

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

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

BY

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DECLARATION

I, **ESTHER WAMBUI MUGO-KAMANJA** do declare that this thesis is my original work and has not been submitted and is not currently being submitted for a degree in any other institution.

Signed.....Date.....

ESTHER WAMBUI MUGO-KAMANJA

This thesis has been submitted for examination with my knowledge and approval as the University Supervisor.

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DEDICATION

This project is dedicated to my beloved husband JAMES MUTHUI KAMANJA who has given me tremendous and immeasurable support throughout this study.

I also dedicated this work to my wonderful and precious children BENJAMIN MUTHUI KAMANJA and IRENE WAIRIMU KAMANJA. I hope and pray that this will be an encouragement to them to dream big and achieve their full potential.

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May God grant you all favour and bless you abundantly.

LIST OF ABBREVIATIONS

AU – African Union

CACG - Commonwealth Association for Corporate Governance

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

CBC - Commonwealth Business Council

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

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

CMA – Capital Markets Authority

CRC - Convention on the Rights of the Child

CSR - Corporate Social Responsibility

EAC – East African Community

EPZs – Export Processing Zones

ERS - Economic Recovery Strategy for Wealth and Employment Creation

FIDH - International Federation of Human Rights

GDP – Gross Domestic Product

HURIA – Human Rights Agenda

JSE - Johannesburg Stock Exchange Limited

ICCPR – International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

ICT – Information and Communication Technology

ILO - International Labour Organisation

ILRF - International Labour Rights Fund

KHRC – Kenya Human Rights Commission

KNCHR – Kenya National Human Rights Commission

OAU - Organisation of African Unity

OECD - Organisation of Economic Cooperation and Development

PSDS - Private Sector Development Strategy

TNCs – Transnational Corporations

SOMO - Centre for Research on Multinational Corporations

UDHR – Universal Declaration of Human Rights

UN – United Nations

LIST OF STATUTES

The Constitution of Kenya, 1963 (as amended in 2008).

The Constitution of Kenya, 2010.

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

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

The Competition Act of 2010.

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

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

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

The Hotels and Restaurants Act, Cap 494 of the Laws of Kenya

The Kenya Anti- Counterfeit Act of 2008.

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

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

The Pharmacy and Poisons Act, Cap 244 of the Laws of Kenya.

The Pharmacy and Poisons Board, the Food Drugs and Chemical Substances Act, Cap 254 of the Laws of Kenya.

Physical Planning Act, Cap 286 of the Laws of Kenya.

The Sale of Goods Act, Cap 31 of the Laws of Kenya.

Standards Act, Cap 496 of the Laws of Kenya.

The Trade Description Act, Cap 505 of the Laws of Kenya.

The Weights and Measures Act, Cap 513 of the Laws of Kenya.

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

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

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

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CHAPTER ONE

INTRODUCTION

1.1 An Overview of the Private Sector in Kenya

The private sector plays a major role in society. Private enterprise has been described as the *epitome of development*.¹ In most economies, private sector expenditure contributes a significant part of gross domestic product (GDP). In addition, private sector entities are substantial employers and major capital market participants. They generate wealth through their businesses by supplying goods and services, creating employment opportunities, human resource development and contributing to public revenue through tax payments. The private sector comprises of entities in the economy which are privately owned and are not part of the government as opposed to public sector entities which are owned and/or controlled by the government.² These include private sector corporations which are privately owned enterprises incorporated under law and geared towards making a profit.³ A corporation in Kenya consists of a body of persons who collectively form one entity (also known as a company) but are a separate legal entity from that of the corporation. This study will use the terms private corporations, private companies and privately owned enterprises interchangeably to refer to private sector corporations.

¹ Government of Kenya, Private Sector Development Strategy (2006-2010) available at www.trade.go.ke › [Programmes](#) (accessed 28 April 2014)

² Ian Lienert, *Where does the Public Sector End and the Private Sector Begins*, (International Monetary Fund Working Paper 09/122, 2009).

³ *ibid.*

In Kenya, the private sector contributes approximately 80% of the country's GDP and provides more than half of the wage employment.⁴ For example, in the agriculture, forestry and fishing sector of the country's economy, the private sector contributes 97% of the sector's contribution to GDP.⁵ Being cognisant of this important role played by the private sector, the Government of Kenya has taken measures to enhance private sector growth and competitiveness through the formulation of the Private Sector Development Strategy (PSDS) which recognises all commercial productive activities both formal and informal as well as on farm and off farm activities as part of the private sector.⁶ This is in recognition of the significant role that will be played by the private sector in achieving the country's medium term objectives outlined in the Economic Recovery Strategy for Wealth and Employment Creation (ERS).⁷ Moreover, the important role of business has been recognised by the Government through its development blueprint, Kenya Vision 2030, which commits to create "*a more enabling business environment for all trading activity*" as well as developing infrastructure that will support the growth of small and medium enterprises.⁸

Traditionally, private sector corporations were viewed as property institutions whose main mandate was to make profits and maximize shareholder value.⁹ Corporations were largely incorporated in order to make it easier for entrepreneurs to conduct business. The separate legal personality of corporations meant that corporations could engage in business

⁴ Government of Kenya (n.1) 2.

⁵ African Development Bank Group, *The State of Kenya's Private Sector: Recommendations for Government, Development Partners and the Private Sector* (2013).

⁶ Government of Kenya (n.1).

⁷ *ibid.*

⁸ Government of Kenya, *The Vision 2030* (2007) at <http://www.vision2030.go.ke> (accessed 30 January 2014).

⁹ Paul L. Davies and D.D Prentice, *Gower's Principles of Modern Company Law* (6th edn, Sweet & Maxwell: London 1997) 8.

transactions and bear the potential risk of liability separately from its members or founders.¹⁰ In addition, corporations also provided a platform where many members could be able to invest capital in the corporation and in return obtain a share in the corporation as well as partake of the profit made by the corporation through payment of dividends. Consequently, these corporations perceived their social responsibility as simply maximising profits within the law. As Milton Friedman put it, the only responsibility of business towards society is the maximization of profits.¹¹ As a result, the management and governance structures of corporations were organized with the aim of providing direct accountability only to shareholders.¹² Little or no attention was paid to human rights as a corporate responsibility.

However, due to the dynamic character of the corporate enterprise, the activities of private corporations have been brought into public focus. For example, there has been an increasing involvement of private corporations in the provision of services which had been previously perceived as the preserve of the government such as water, electricity, healthcare and education.¹³ This has resulted in a greater interaction between private corporations and the public and hence private corporations are increasingly having a direct impact upon the enjoyment of human rights by individuals. Moreover, corporate policies, procedures and actions that relate to employment terms and conditions, standards of products and services, environmental protection amongst others have a human rights

¹⁰ See the concept of separate legal personality espoused in the case of *Salomon v Salomon & Co Ltd* [1897] AC at 52.

¹¹ Milton Friedman, 'The social responsibility of business is to make profits' in Steiner and Steiner (eds), *Issues in business and society* (New York: Random House, 1977).

¹² Cynthia A. Williams and John M. Conley, "Is there an Emerging Fiduciary Duty to Consider Human Rights?" (2005) 74 *University of Cincinnati Law Review*, 75.

¹³ Michael K. Addo, *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International: The Hague, 1999) 83.

impact on individuals. Consequently, the impact of private corporations is not restricted to the shareholders of the corporation but is also felt by stakeholders such as employees, consumers and the wider society at large. In other words, private sector corporations have the potential to promote or violate human rights and consequently, the protection and respect of human rights forms an essential element of corporate governance within private sector corporations. The enforcement of human rights protection within the private sector becomes critical in enhancing good corporate governance in Kenya which ultimately contributes towards the growth of the country's economy.

1.2 Background to the Problem

Traditionally human rights principles were intended to limit state action towards individuals or groups. Consequently, the State was perceived as the primary duty bearer in the promotion and protection of human rights.¹⁴ Thus, as a general principle of enforcing human rights standards, the government and its agencies are required to respect, protect and fulfil human rights standards. The international human rights framework sought to regulate actions and omissions of governments in order to avoid human rights violations and hold governments accountable for human rights abuses.¹⁵ For example, international covenants which impose binding obligations in respect to the promotion and protection of human rights in line with the Universal Declaration for Human Rights (UDHR) address States as parties and therefore bind the States as the primary duty bearers of the obligations

¹⁴ Larissa van den Herik and Jernej Letnar Cernic, "Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again", (2010) 8 *Journal of International Criminal Justice* (JICJ) 725-743 at 727.

¹⁵ Jonathan Cooper, "Horizontality: The Application of Human Rights Standards in Private Disputes" in Rosalind English and Phillip Havers (eds), *An Introduction to Human Right and the Common Law* (Oxford – Portland Oregon: Hart Publishing, 2000) 52, 54-55.

therein.¹⁶ Other non-state actors such as corporations had thus been placed at the periphery of this legal regime as far as human rights protection was concerned. As a result, not much focus was placed on how corporate action promoted or undermined human rights and thus human rights did not feature as an agenda of corporate governance.

Corporate governance has been defined as the system by which corporations are directed and controlled.¹⁷ It deals with the relationships between the different participants of the corporation including the board of directors, managers, shareholders and other stakeholders of the corporation.¹⁸ In other words, it consists of structures within a corporation that guides decision making in the organisation.¹⁹ Corporate governance is a topic which is as old as the modern company.²⁰ The corporate governance debate started with the separation of senior management from shareholders and hence the separation of ownership and control within a company. This was instigated, in large companies, mainly by the need to facilitate speedy decision making processes and to ensure that the decision makers had the necessary skills, expertise and commitment to run the corporation.²¹ As early as the 1930s, Adolf Berle and Gardiner Means contended that ownership and control of large companies in the United States had separated resulting in conflicts arising within the corporations.²² These conflicts referred to as ‘agency problems’ were among corporate participants and

¹⁶ Examples include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women.

¹⁷ Report of the Committee on the Financial Aspects of Corporate Governance (Gee, 1992) commonly known as the ‘Cadbury Committee’ Report of 1992.

¹⁸ Stijn Claessens, “Corporate Governance and Development” (2006) 21(1) *The World Bank Research Observer* 91-122.

¹⁹ Stephen Bainbridge, *Corporate Governance after the Financial Crisis* (Oxford University Press: Oxford, 2012) 2.

²⁰ Paul L. Davies, *Gower and Davies Principles of Modern Company Law* (8th edn, Sweet & Maxwell: London 2008) 359.

²¹ *ibid.*

²² Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (New York: MacMilan, 1932).

included conflicts between managers and shareholders, conflicts among shareholders themselves and conflicts between managers and the corporation's other constituencies including creditors and employees.²³ The separation of the control of the corporation from the ownership of the corporation was seen as one way of reducing these agency problems.²⁴ The aim was to create a corporate structure that would ensure that the decisions relating to initiation and implementation of the corporation's affairs are effectively monitored in order to meet the objectives of the corporation. Hence, from a historical perspective, the main issue of the corporate governance debate was how the shareholders or investors could hold the senior management of the corporation accountable for their actions and decisions.²⁵ However, the debate has moved from the issue of accountability of senior management of a corporation to shareholders and now includes accountability towards other groups who have a long-term interest in the company commonly referred to as stakeholders.²⁶ Hence, in addition to dealing with corporate issues such as managerial accountability, board structures and shareholder involvement, corporate governance also encompasses stakeholder management.²⁷

Corporate governance as a subject came into prominent focus in the 1990s. In the United States, the American Law Institute, a private organisation made up of lawyers, judges and academics, had undertaken a project on corporate governance in 1978 which resulted in the publication of the "*Principles of Corporate Governance: Analysis and Recommendations*"

²³ John Armour, Henry Hansmann and Reinier Kraakman, "The Essentials Elements of Corporate Law" (ECGI Law Working Paper No. 134/2009, November 2009) 4.

²⁴ *ibid.*

²⁵ Addo (n.13) 96.

²⁶ Paul L. Davies (n. 20) 360.

²⁷ Brian R. Cheffins, "The History of Corporate Governance" (ECGI Working Paper No. 184/2012) 19 available at <http://ssrn.com/abstract=1975404> accessed 6 June 2013.

in 1994.²⁸ The work of the Institute had been prompted by, among other things, the concerns that the executives of corporation were not acting to the best interests of the company or the shareholders and lack of oversight of the executives of corporations resulting in ‘corporate autocracy’.²⁹ In the United Kingdom, a Committee on the Financial Aspects of Corporate Governance headed by Sir Adrian Cadbury (the “Cadbury Committee”) was established in 1991 by the Financial Reporting Council (FRC)³⁰, the London Stock Exchange and the accountancy profession to scrutinize report and make recommendations on good practice regarding issues relating to financial reporting and accountability.³¹ This was as a result of the increasing lack of confidence in the corporate financial reporting regime as well as the concern that auditor shortcomings were undermining the effectiveness of companies’ internal control systems. The committee’s work was given further impetus following the emergence of corporate failures of major companies in the United Kingdom.³² In 1992, the Cadbury Committee published its report which was accompanied by a Code of Best Practice which focussed on the role of the board of directors in supervising executive decision making as well as making recommendations on how the professional objectivity of auditors could be preserved in order to increase their effectiveness and value. The recommendations of the Cadbury Committee were adopted by the London Stock Exchange which imposed an obligation on listed companies to publish a statement of compliance with the accompanying Code of

²⁸ Paul L. Davies (n.20).

²⁹ Brian R. Cheffins, “Current Trends in Corporate Governance: Going from London to Milan via Toronto” (1999) 10 *Duke J. Comp. & Int’l L.* 5.

³⁰ Established by the Government as an independent regulator responsible for promoting confidence in corporate reporting and governance for British companies.

³¹ John Mellor, *The UK Combined Code on Corporate Governance and its Application to Smaller Quoted Companies* (2007).

³² Cadbury Committee Report (n.17).

Best Practice.³³ The Cadbury Code of Best Practice, which was based on the principles of openness, integrity and accountability, became recognised internationally and served as a model for the development of governance codes in various countries around the world.³⁴

Recognising that good corporate governance makes a contribution to financial market stability and economic growth, the Organisation for Economic Co-operation and Development (OECD), an international body established to promote sustainable economic growth and financial stability of member issued corporate governance principles in 1999.³⁵ These principles have “*become an international benchmark for policy makers, investors, corporations and other stakeholders worldwide*”.³⁶ Indeed the principles, though non-binding in nature, have been used as guidelines for legislative as well as regulatory corporate governance frameworks in both OECD member and non-member countries. The principles recognise the role played by the corporations’ stakeholders in the long-term success of the corporations and thereby advocates for the corporate governance frameworks to take into account the interests of stakeholders of corporations. In the Commonwealth countries, principles for corporate governance have been set out by the Commonwealth Association for Corporate Governance (CACG) and are a well-recognized benchmark within the Commonwealth.³⁷ The CACG guidelines have been designed with particular focus on the emerging and transitional economies which make up a large part of the Commonwealth.

³³ Brian R. Cheffins, “Current Trends in Corporate Governance: Going from London to Milan via Toronto” (1999) 10 *Duke J. Comp. & Int’l L.* 5.

³⁴ Brian R. Cheffins, *The History of Corporate Governance* (ECGI Working Paper No. 184/2012).

³⁵ Organisation for Economic Co-operation and Development, *The OECD Principles of Corporate Governance* (2004).

³⁶ *ibid* 3.

³⁷ The CACG guidelines were agreed by the Commonwealth Business Council (CBC) in 1999 and presented to Commonwealth Heads of Government at their 1999 Summit, which endorsed them.

In Africa and particularly in East Africa, the corporate governance agenda has been endorsed through the recognition of the important role the private sector plays in the economy of the countries. One of the objectives of the East African Community Treaty is the strengthening of the private sector with the aim of achieving socio-economic development of the member states.³⁸ Additionally, the draft East African Community Protocol on Good Governance reiterates this recognition by seeking to promote private sector development and corporate governance by providing appropriate and enabling regulatory frameworks.³⁹ In Kenya, the corporate governance debate came into prominence following major corporate scandals leading to the collapse of big corporations most of which were state owned corporations in the 1990s.⁴⁰ Towards the end of 1998 a workshop on the role of non-executive directors was held bringing together participants from the Nairobi Stock Exchange, Capital Markets Authority, and Institute of Certified Public Accountants amongst others.⁴¹ Following this initiative, the Private Sector Corporate Governance Trust was formed in 1999 by the private sector to address the issues concerning corporate governance in Kenya. It then proceeded to release a Code of Best Practice for Corporate Governance to act as a guide for corporate governance practices in Kenya.⁴² These efforts to institutionalise the principles of corporate governance in Kenya

³⁸ Article 5(3)(g) of the East African Community Treaty.

³⁹ Article 2 (1) (n) and Article 12 (1) of the East African Community Protocol.

⁴⁰ Examples of parastatals that collapsed include Kenya Co-operative Creameries, Kenya Meat Commission, Kenya National Assurance Company amongst others.

⁴¹ Private Sector Corporate Governance Trust, *Principles for Corporate Governance in Kenya and a Sample Code of Best Practice for Corporate Governance* (Nairobi, 1999).

⁴² *ibid.*

led to the promulgation of the Guidelines on Principles of Corporate Governance for Public Listed Companies in 2002.⁴³

It is noteworthy that the East African Community Protocol on Good Governance seeks to also promote the respect and protection of human rights with a view of entrenching the culture of observance of human rights amongst member states.⁴⁴ This is recognition that corporations do have a role to play in the protection of human rights. At the international level, efforts to create corporate human rights accountability mechanisms began in 1999 when the United Nations Global Compact (the “Compact”) was launched to encourage corporations to adhere to certain principles in their activities.⁴⁵ The Compact contains ten principles which are largely inspired by the existing international instruments for the protection of human rights. The Compact provides that corporations should support and respect the protection of international human rights within their spheres of influence and ensure that they are not complicit in human rights abuses.⁴⁶ However, due to the voluntary and non-binding nature of the Compact, corporations have not been effectively held to account for non-compliance with the principles therein. This is one of the major challenges facing voluntary mechanisms seeking to regulate the conduct of corporations with respect to human rights,⁴⁷ leading to calls for binding legal rules with enforcement mechanisms to ensure compliance.⁴⁸

⁴³ Jacob K. Gakeri, “Enhancing Kenya’s Securities Markets through Corporate Governance: Challenges and Opportunities” (2013)3(9) *International Journal of Human and Social Sciences* 94-117.

⁴⁴ See the Preamble, Article 2(1)(a) and Article 3(b) of the East African Community Protocol.

⁴⁵ United Nations Global Compact, at www.unglobalcompact.org (accessed 6 February 2014).

⁴⁶ See principles 1 and 2 of the UN Global Compact.

⁴⁷ Kiarie Mwaura, “Horizontality and the Bill of Rights: Defining Parameters of Corporate Complicity in Human Rights Violations” (2011) 7(1) *LSKJ* 1-21.

⁴⁸ Henry J. Steiner, Phillip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd Edition, Oxford, New York: Oxford University Press, 2007) 1398.

A step towards a binding international legal regime for the protection of human rights was the drafting of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights (the “Norms”).⁴⁹ The Norms sought to create obligations for transnational corporations and other business enterprises to ensure the respect and protection of human rights within their spheres of activities and influence.⁵⁰ This obligation meant that transnational corporations and other business enterprises would have the responsibility to use due diligence in ensuring that their activities did not in any way, directly or indirectly, violate human rights standards.⁵¹ Although the Norms were commended by a number of international non-governmental organisations,⁵² they were also criticised for an apparent lack of certainty or clarity as far as corporate human rights obligations were concerned.⁵³

The United Nations Commission on Human Rights, in 2004, while noting that the Norms contained useful elements and ideas, concluded that the same had no legal standing and proceeded not to adopt them. Instead, in 2005, the Commission appointed an independent expert, John Ruggie, as a Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises with the mandate to, inter alia, identify and clarify standards of corporate responsibility and accountability.⁵⁴ His work culminated in the ‘Respect, Protect and Remedy’ framework for

⁴⁹ See UN Doc.E/CN.4/Sub.2/2003/38/Rev.2 (2003).

⁵⁰ *ibid.*

⁵¹ See The Commentary to the UN Norms.

⁵² D. Kinley and R. Chambers, “The UN Human Rights Norms for Corporations: The Private Implications of Public International Law” 6 Hum.Rts.L.Rev.447 (2006) as quoted in Steiner, Alston and Goodman (n.48) 1404.

⁵³ Larissa van den Herik and Jernej Letnar Cernic (n. 14) 734.

⁵⁴ *ibid.*

corporate accountability for human rights.⁵⁵ This framework was operationalised by the guiding principles set out in Ruggie’s March 2011 report⁵⁶ and were endorsed by the United Nations Human Rights Council.⁵⁷

Under the international human rights framework, therefore, the United Nations Respect, Protect and Remedy framework together with the United Nations Guiding Principles on Business and Human Rights form the basis on which corporations are to uphold human rights standards in their activities. The principles provide that to respect human rights requires that corporations would desist from committing any act directly or indirectly that would interfere with the enjoyment of human rights or in other words ‘do no harm’. In addition, according to the guiding principles, the responsibility to respect human rights means that a corporation should act with due diligence to avoid interfering with the rights of others and to address any adverse impacts that may be a result of their activities.⁵⁸

In the domestic arena, human rights protection in Kenya has been anchored on the provisions of the Constitution. The independence Constitution provided a framework for the protection of fundamental rights and freedoms of the individual.⁵⁹ It provided for protections of individual rights such as the right to life, liberty and security of the person, freedom of movement, conscience, assembly, association and expression, protection from

⁵⁵ John Ruggie, “Protect, Respect and Remedy: A Framework for Business and Human Rights” *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc.A/HRC/8/5 (7 April 2008).

⁵⁶ John Ruggie, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc. A/HRC/17/31 (21 March 2011).

⁵⁷ Robert C. Blitt, “Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance” 48 (1) *Texas International Law Journal*, 33.

⁵⁸ *ibid.*

⁵⁹ Chapter Five of the Constitution of Kenya, 1963.

slavery and forced labour, protection from inhumane treatment, protection from any form of discrimination and deprivation of property.⁶⁰ These rights were protected subject to limitations provided for in the Constitution which were designed to ensure that the enjoyment of individual rights and freedoms did not prejudice the enjoyment of rights and freedoms of others or public interest.⁶¹ Under the independence Constitution the violation of rights and freedoms was largely deemed to be by the State as against the individual and hence vertical application of human rights protection.⁶² However, such rights and freedoms as freedom of assembly, association and expression, protection from forced labour, inhumane treatment, discrimination as well as deprivation of property were also violated by other entities such as corporations which engaged in discriminatory practices, forced labour and environmental poor working conditions.

Although, there was no direct application of human rights protection to corporations under the independence Constitution, there have been legislative measures taken to provide for protection of such groups as employees, workers and consumers who are affected most by corporate activities. These include Acts of Parliament which offer protection for workers and employees such as the Employment Act⁶³, the Labour Relations Act⁶⁴, the Labour Institutions Act⁶⁵, the Work Injury Benefits Act⁶⁶, the Occupational Safety and Health

⁶⁰ See Sections 70-82 of the Constitution of Kenya, 1963.

⁶¹ Section 70 of the Constitution of Kenya, 1963.

⁶² An example is the case of *Richard Nduati Kariuki v Leonard Nduati Kariuki [2006]* eKLR <http://www.kenyalaw.org> (accessed 27 January 2014) where the court held that the constitution could not be applied horizontally.

⁶³ Cap 226 of the Laws of Kenya.

⁶⁴ Cap 233 of the Laws of Kenya.

⁶⁵ Cap 234 of the Laws of Kenya

⁶⁶ Cap 236 of the Laws of Kenya.

Act⁶⁷ and the Public Health Act⁶⁸. For instance, the Employment Act prohibits forced labour and discrimination practices in the workplace.⁶⁹ The Occupational Safety and Health Act, also provides protection against discrimination practices in the workplace.⁷⁰ However, despite having the legal framework for protection against human rights abuses by corporations as well as other institutions, corporate human rights violations continue to be witnessed in the country.

In a bid to enhance human rights protection in the country, the Constitution of Kenya, 2010, recognises international law as one of the sources of law in the country by providing that the general rules of international law shall form part of the law of Kenya.⁷¹ In addition, any treaty or convention ratified by Kenya shall also form part of the law of Kenya.⁷² In essence, the international human rights framework has significant influence for the protection of human rights framework in Kenya. Kenya has ratified a number of international human rights instruments such as the ICCPR, ICESCR, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of all Forms of Discrimination against Women, the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment and the Convention on the Rights of the Child.⁷³ In addition, Kenya has also ratified International Labour Organisation (ILO) Conventions that deal with workers' rights such as the right of association, right to organise and collective bargaining, abolition

⁶⁷ Cap 514 of the Laws of Kenya.

⁶⁸ Cap 242 of the Laws of Kenya.

⁶⁹ See Sections 4 and 5 of Cap 226.

⁷⁰ See Section 8 of Cap 514.

⁷¹ Article 2(5) of the Constitution.

⁷² Article 2(6) of the Constitution.

⁷³ See Kenya's status of ratification of international human rights instruments <http://www.ohchr.org/> (accessed 27 February 2014)

of forced and child labour, equal remuneration, non-discrimination and equality of treatment at the workplace, Workmen's compensation.⁷⁴ Consequently, these treaties which provide for human rights obligations form part of the laws of Kenya.

More significantly, the Constitution has brought corporations directly under the ambit of the Bill of Rights provided for under Chapter Four.⁷⁵ The Constitution recognizes the Bill of Rights as an integral part of the Kenyan democratic state and a framework for social, economic and cultural policies.⁷⁶ Further, it recognises the role of the protection of human rights in the preservation of the human dignity and promotion of social justice.⁷⁷ The Bill of Rights provides for the fundamental rights and freedoms of the individual as well as groups or communities such as the right to life, equality and freedom from discrimination, respect and protection of the human dignity, freedom from slavery, servitude and forced labour, right to privacy, freedom of association, freedom of assembly, demonstration, picketing and association, freedom of movement and residence, right to property. The Constitution has also provided for other rights which were not included in the independence Constitution and which directly relate to the protection against corporate human rights abuses such as rights relating to labour relations, right to a clean and healthy environment, right to the highest attainable standard of health, housing, food, clean and safe water, social security and education and consumer rights. More importantly, the Constitution provides that the Bill of Rights binds not only the State and its organs, as was the case in with the independence Constitution, but also all persons which include

⁷⁴ See Kenya's status of ratification of ILO conventions at <http://www.ilo.org/> (assessed 27 February 2014).

⁷⁵ Constitution of Kenya, 2010.

⁷⁶ Article 19 (1) of the Constitution.

⁷⁷ Article 19 (2) of the Constitution.

companies, associations or other body of persons whether incorporated or not.⁷⁸ This means that corporations have a duty under the Constitution to uphold human rights standards and ensure that their actions or activities do not violate human rights. By extending the application of the Bill of Rights to corporations, the Constitution has provided a binding constitutional and legal framework for holding corporations directly accountable for human rights violations in Kenya.

1.3 Statement of the Problem

The increased power and influence of corporations in the global as well as the national economy has given rise to the increasing social consciousness of the arena within which businesses operate and their impact on the society. This is particularly pertinent to the increased potential of corporations as business related human rights violators.⁷⁹ Whilst corporations do contribute directly or indirectly towards improving human rights standards through investments that they make in any given society, they also do have potential of having a negative impact on human rights in the society.⁸⁰

Kenya through constitutional and legislative framework has provided for a legal framework for human rights protection. Article 20 of the Constitution provides that the Bill of Rights applies and binds all state organs and all persons. The Constitution proceeds to define a person to include “*a company, association or other body of persons whether incorporated or unincorporated.*”⁸¹ This is a clear departure from the traditional perspective that only States have obligations in respect to human rights and is consistent

⁷⁸ Article 260 of the Constitution.

⁷⁹ Blitt (n.57) 35.

⁸⁰ Larissa van den Herik and Jernej Letnar Cernic (n. 14) 726.

⁸¹ Article 260 of the Constitution.

with the emerging global human rights norms which recognise that corporations have an obligation to respect human rights. In addition, various Acts of Parliament which offer protection for workers and employees such as the Employment Act, the Labour Relations Act, the Labour Institutions Act, the Work Injury Benefits Act and the Occupational Safety and Health Act provide legal protection against human rights abuses of workers and employees by corporations.

Thus, a corporation is bound by the provisions of the Constitution and other legislative instruments to ensure that it does not violate human rights in its activities and conduct. The promotion and protection of human rights should therefore be a key component of the corporate governance mechanisms of corporations in Kenya. However, despite the aforementioned constitutional and legal framework for human rights protection, corporate human rights abuses continue to be witnessed in the country. Investigations of corporate conduct continue to show violations of human rights through unethical activities of private sector corporations. These violations include, among others, flouting and disregard of labour laws, sexual harassment, environmental degradation, discriminatory practices, use of forced and child labour, poor safety and health measures at the workplace, poor working conditions for employees and violation of employees' right to privacy.⁸²

The respect for human rights within private sector corporations should form part and parcel of their corporate governance practices. The continued disregard and violation of human rights by private sector corporations undermines corporate governance in Kenya and

⁸² See The Standard Digital, "Firm Defended against Pollution Claims" (December 13 2013) available at <http://www.standardmedia.co.ke/> (accessed 4 March 2014).

results in poor corporate governance practices. In view of this, there is need to investigate adverse corporate conduct relating to human rights by private sector corporations in Kenya and the role of human rights protection in enhancing corporate governance in private sector corporations in Kenya.

1.4 Objectives of the Research

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

1.4.2 To assess the adequacy of the regulatory framework governing the respect for human rights by private sector corporations in Kenya.

1.4.3 To examine the relationship between respect for human rights and good corporate governance by private sector corporations in Kenya.

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

1.5 Research Questions

1.5.1 What are the human rights violations committed by private sector corporations in Kenya?

1.5.2 What is the regulatory framework that protects against human rights violations committed by private sector corporations in Kenya?

1.5.3 What is the relationship between good corporate governance and respect for human rights by private sector corporations Kenya?

1.5.4 What regulatory reforms can be made for effective enforcement of human rights protection in private sector companies in Kenya?

1.6 Hypothesis

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

1.7 Justification for the Study

Being important economic players, private sector corporations wield significant power and influence in a country and hence have the potential to influence and affect the society either positively or negatively. The increased involvement of corporations in the areas previously perceived as falling under the public domain has led to increased interaction between private business enterprises and the public.⁸³ However, this has not always benefited the societies within which these companies operate. On the converse, investigations into corporate activities and conduct have shown that corporations have the potential to negatively affect the society through human rights violations as well as environmental degradation.

Corporations are obligated under the Constitution to respect human rights as provided for under the Bill of Rights. It is therefore imperative that private corporations have effective policies and processes in place within their corporate governance mechanisms which are geared towards ensuring that all activities of the corporations are compliant with human rights standards. Although there is an existing constitutional as well as legislative framework for human rights protection in Kenya, human rights violations by corporations continue to be reported. This study is expected to evaluate the adequacy of the regulatory framework governing the respect of human rights and its incorporation in corporate

⁸³ Addo (n.13).

governance practices of private sector corporations in Kenya and provide recommendations towards improvement.

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

1.8 Scope of the Study

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

1.9 Theoretical Framework

This study is premised on the stakeholder theory of corporate governance. The stakeholder theory is based on the view that the corporation should be run not only in the interests of the shareholders but also the interest of other constituents of the corporation known as stakeholders. According to the theory, shareholders are just but one of the competing and diverse groups that contribute to a corporation and are affected by the actions of a corporation.⁸⁴ Consequently, rather than the corporation working towards creating value for the shareholders only, the stakeholder theory holds that the corporation should create value for all stakeholders. According to Merrick Dodd, a renowned professor at Harvard Law School and proponent of the stakeholder theory, the corporation was a social as well as an economic institution and therefore it had a social service in addition to its profit making function.⁸⁵ Hence, the proper purpose for a corporation was not restricted to increasing shareholder value but also included considering the welfare of the employees, ensuring good quality products for consumers and making positive contribution to the welfare of the community as a whole.⁸⁶ R. Edward Freeman, a proponent of the stakeholder theory defines stakeholders as “*any group or individual who can affect, or is affected by, the achievement of a corporation’s purpose*”.⁸⁷ These include employees, suppliers, consumers, government, creditors and the society at large in which the corporation operates. The interests of these stakeholders should be taken into account in the decision making process of a corporation. Accordingly, business should be managed

⁸⁴ Andrew Keay, “Stakeholder Theory in Corporate Law: Has It Got What It Takes?” (January 4, 2010) available at SSRN: <http://ssrn.com/abstract=1531065> or <http://dx.doi.org/10.2139/ssrn.1531065>.

⁸⁵ E. Merrick Dodd, “For Whom Are Corporate Managers Trustees?” (1932) 45 Harv. L. Rev. 1145, 1148.

⁸⁶ Lynn A. Stout, “Bad and Not So Bad Arguments for Shareholder Primacy”, (2002) 75 Southern California Law Review 1189.

⁸⁷ R. E. Freeman, *Strategic Management: A Stakeholder Approach* (Boston: Pitman Publishing, 1984) 49.

for the benefit of all stakeholders.⁸⁸ Incorporating the interests of stakeholders in the decision making process of a corporation ultimately is to the benefit of the corporation as it results in the reduction of transaction costs which ultimately contributes to profit.⁸⁹ Additionally, treating employees, suppliers, consumers and the society well amounts to respect for individuals, which is “*a greater good that business cannot ignore.*”⁹⁰ Consequently, the respect for human rights is an issue that business has to contend with and is a matter which is relevant and important for corporate governance.

This study is also premised on the integrative social contracts theory propounded by Thomas Donaldson and Thomas Dunfee.⁹¹ This theory, which is largely influenced by the social contract theories of John Locke and John Rawls, is premised on the notion that there exists a social contract between business and society and consequently there are some obligations of business towards society.⁹² Corporations operate within the society and their existence is sanctioned by the society or, in other words, society has given them a “licence to operate”.⁹³ The integrative social contracts theory proposes two levels of social contracting namely macro-social contract which relates to all rational contractors and micro-social contract which are explicit or implicit agreements by members of a given

⁸⁸ Donald Nordberg, “The Ethics of Corporate Governance” (July 2007) available at Social Science Research Network: <http://ssrn.com/abstract=1004038>, 10.

⁸⁹ *ibid.*

⁹⁰ *ibid.*

⁹¹ Thomas Donaldson and Thomas Dunfee, ‘Towards a Unified Conception of Business Ethics: Integrative Social Contracts Theory’, (1994) 19 *Academy of Management Review*, 252–284 and *Ties That Bind: A Social Contracts Approach to Business Ethics* (Harvard Business School Press: Boston, 1999).

⁹² Elisabet Garriga and Domènec Mele, “Corporate Social Responsibility Theories: Mapping the Territory” (2004) 53 *Journal of Business Ethics* 51-71.

⁹³ K.V. Bhanu Murthy, *Business Ethics and Corporate Responsibility – A New Perspective* (Paper presented at Workshop on ISO 26000 Guidance on Social Responsibility and the implications for Developing Countries, New Delhi, 2007).

community.⁹⁴ The theory posits that under the macro-social contract there are some basic moral principles (hyper-norms) which are so fundamental that all rational people would agree upon them as the basis for any social contracting.⁹⁵ These hyper-norms are deemed to be universal in nature and are therefore superior to the micro-social contracts which are essentially binding agreements or contracts between interested parties in a community. The hyper-norms would include social responsibilities such as not causing gratuitous harm to others, honouring contracts, treating people and organisations fairly and respecting human rights.⁹⁶ Cognisant of the fact that corporations are social actors in the society and that their policies and activities have major implications for those directly and indirectly involved in the business, this theory provides a framework within which decision making within corporations can be made with respect to their impact on relevant communities, ethical norms and universal moral standards including universally accepted human rights. Since corporations derive their workforce, profit and other resources from the society, they must be socially responsible in general and more specifically to the affected constituents of the society and consequently, respect for human rights is one of the responsibilities that corporations must discharge.

Human rights are rights which emanate from the inherent dignity of every human being.⁹⁷ The formulation of natural rights, which underlie the basic understanding of human rights, derives from the natural law theory. The natural rights theory was articulated by John Locke (1632-1704) who advanced the theory that there are natural and individual rights

⁹⁴ Lothar Auchter and Martin Dziwka, "Managing Business Values in a Globalised Economy by ISCT (Integrated Social Contract Theory) – A Comparative Study" (2013) 3 (2) *The Business & Management Review* 208-220.

⁹⁵ Garriga and Mele (n.92).

⁹⁶ Stuart Wall and Bronwen Rees, *International Business* (2nd edn, Pearson Education Limited, 2004).

⁹⁷ The preamble of the UDHR recognises the inherent dignity and equal and inalienable rights of all human being.

which the ruler of any society must guarantee.⁹⁸ Individuals are born with inherent basic rights which are given by God or nature and therefore cannot be taken away. According to Locke, man by contract, surrendered part of his liberty to the sovereign (being the state or the government) for the main purpose of protection of human entitlements.⁹⁹ Hence, man gave up the power to enforce his rights or entitlement to the government but not the rights themselves. Hence the social contract between the governor and the governed, with the protection of rights as the basis for that contract. Locke considered the content of natural life to be life, health, liberty and property.¹⁰⁰ These can be said to be the basis of the contemporary idea of human rights articulated in the various international instruments today such as the UDHR which recognises these rights as fundamental rights and freedoms for all peoples. However, the principles underlying human rights go beyond the relationship between the government and the individual and extend to non-state actors or private entities such as corporations.¹⁰¹ “Human rights are an expression of human dignity and the right to be protected in that dignity.”¹⁰² Corporations should in their decision making structures and processes take into account and consider human rights as exemplified both in the international law of human rights and domestic law of the country of operation.¹⁰³ This would form part of the practice in corporate governance of

⁹⁸ M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (7th edn, London: Sweet & Maxwell, 2001) 112.

⁹⁹ *ibid.*

¹⁰⁰ *ibid* 115.

¹⁰¹ Wesley Cragg, “Human Rights and Business Ethics: Fashioning a New Social Contract” (2000) 27 *Journal of Business Ethics* 205, 213.

¹⁰² Robert McCorquodale, “Corporate Social Responsibility and International Human Rights Law” (2009) 87 *Journal of Business Ethics, Supplement 2: Spheres of Influence/Spheres of Responsibility: Multinational Corporations and Human Rights* 391.

¹⁰³ Williams and Conley (n. 12).

considering wide stakeholders interests which would ensure long-term value and success for the corporation.¹⁰⁴

1.10 Literature Review

Corporate governance has in the recent past received increased attention and focus around the world. The corporation plays a key role in wealth creation, economic as well as social development. Good corporate governance is critical in ensuring that the management of corporations is done in such a manner as to lead to the growth of these corporations and thus contributing towards the improvement of the country's economy. Good corporate governance practices enhance the country's ability to attract both short term as well as long term local and foreign investments hence enabling the country to achieve its long-term development agenda.¹⁰⁵ In other words, corporate governance contributes towards the growth and development of a country's economy which ultimately affects the standards of living of the society as a whole. On the other hand, corporations can and do cause harm to the society if not properly governed or managed. The increasing role of corporations in the society means that if they do not perform well or collapse, it is not only the shareholders that would be adversely affected but also the employees, creditors and other stakeholders as well as the society in general. In addition, due to the increasing interaction of corporations with the society, corporations have the can positively or negatively affect the enjoyment of human rights by the individuals in which they operate.

¹⁰⁴ *ibid.*

¹⁰⁵ Ozden Deniz, "The Importance of Corporate Governance for a Well Functioning Financial System: Reforming Corporate Governance in Developing Countries" (2011-2012) 14 *Duq. Bus. L.J.* 219.

Claessens¹⁰⁶ in examining the relationship between corporate governance and development observes that corporate governance, until recently, only featured in discussions by a handful of scholars and shareholders. He states that it has now “*become a mainstream concern – a staple of discussion in corporate boardrooms, academic meetings, and policy circles around the globe.*” He notes that the increased interest in corporate governance has been a result of the negative impact of corporate behaviour on countries around the world occasioned by deficiencies in corporate governance practices which has endangered the stability of the global economy. He observes that the objective of good corporate governance in any economy is to maximise the contribution of corporations to the overall economy of a country and with due regard to all stakeholders of the corporation who include the corporation’s shareholders, employees, consumers, creditors, regulators (government) and the society at large. He argues that corporations have no alternative but to behave “*responsibly*” towards stakeholders since corporations cannot operate without them and this will ultimately be of benefit to the corporation. While agreeing with Claessens that socially responsible behaviour by corporations such as respecting the environment has a positive on the relationship between the corporations and their stakeholders, I disagree with his opinion that this has “*little direct business justification*”. To the contrary, when the relationship between a corporation and its stakeholder is thriving, then the likelihood for the corporation to succeed in meeting its objectives is more and this is a direct business justification for consideration of social issues such as human rights. In addition, although Claessens has noted that labour rights form part of stakeholder

¹⁰⁶ Claessens (n.18) 91.

issues that corporations need to deal with, he has not addressed the issue of human rights directly and how they affect corporate governance.

Corporations have traditionally been viewed as private institutions whose primary role is to generate profits for the shareholders. **Murthy**¹⁰⁷ acknowledges this when he states that, “*the domain of business as an entity was distinct and independent from that of the rest of the society.*” Consequently, businesses could be formed and operate without taking into account anything that was a concern to the society beyond what is produced and conveyed through the market. In other words, the corporation did not owe the society any obligation since it was viewed as having acted in the interest of the society through the production of goods and services demanded by the society and therefore, in this sense, the corporation was regarded as having adequately compensated society. Therefore, any obligation the corporation had towards society was fully discharged through market mechanisms. He, however, contends that this traditional view is no longer viable and that the nature of business has been transformed due to a number of reasons. Firstly, business is no longer just a property for the shareholders. The society has a stake in it since there are many dimensions of society that are reflected in the business. Therefore, corporations are not just private economic institutions but are also social institutions with the responsibility of being involved and assisting in solving the challenges facing the society.

In **Addo's**¹⁰⁸ view, the changing character of the private corporate enterprise and its growing involvement in sectors which were traditionally regarded as the public sphere means that policies and activities of private corporations are increasingly affecting the

¹⁰⁷ Murthy (n. 93).

¹⁰⁸ Addo (n.13).

public directly. Consequently, good and sound corporate governance requires focus to be placed on how corporate values and activities are aligned with those of the surrounding society. It therefore is a key corporate concern and interest that the society's "licence to operate" is gained and retained as this will ensure that the corporations' businesses are successfully carried out. It is not sufficient to merely consider the interests of corporate shareholders without taking into account the stakeholders of the corporation. This is because shareholder value is increasingly dependent on the creation of stakeholder value. To be able to meet the values of the society, corporations must adhere to and respect human rights standards as set out both in domestic as well as international law.

Cragg¹⁰⁹ contends that the traditional view that protection of human rights is a government as opposed to the private sector responsibility is no longer tenable in the current global economy. The protection of human rights is also a private sector responsibility. The business community must recognise that they have an obligation to incorporate respect for human rights in all aspects of their operations. They must therefore not restrict their responsibility to generating wealth and profit maximisation but must embrace the social responsibility of ensuring respect and promotion of human rights. Accordingly, business and government partnerships should be encouraged to ensure promotion of human rights. He also contends that the role of the civil society in monitoring compliance of corporations to human rights standards is essential in promotion of human rights. Although recognising the need to move away from the traditional arrangement where only governments were viewed as having the responsibility to promote and protect human rights and hence the need to have "*a new social contract*", Cragg has not dealt with how this new social

¹⁰⁹ Cragg (n.101).

contract can be actualised within the existing national and international human rights as well as corporate governance frameworks. This is important in order to realise the respect for human rights by private sector corporations.

Nordberg¹¹⁰ argues that businesses should have larger aims than maximisation of profits. Businesses should take into account the interests not only of their shareholders but also of their stakeholders. The society or the community within which a business operates forms part of the stakeholders of such a company. Corporations use the society's resources and hence need to be accountable to the society. In supporting the notion that businesses should be accountable to society, he rightly argues that businesses should take into account that it is the society that grants them the licence to operate and therefore they should be accountable for their use of such licence. Additionally, he goes on to assert that in the decision making processes of a corporation, it is important to take into account the interests of all the stake holders of the corporation. These include employees, suppliers as well as the customers. He notes that "*respect for individuals is a greater good that businesses cannot ignore.*" This he observes is of a long term and strategic value to the corporation. Hence, the respect for human rights by corporations is of a long term value to the corporation.

Kibwana¹¹¹ observes that human rights defined by both domestic and international law should be fully observed and respected. He notes that it is not only governments which violate human rights. Private individuals as well as corporations also violate human rights and should be held accountable. He contends that for human rights to be fully enjoyed by

¹¹⁰ Nordberg (n.88).

¹¹¹ Kivutha Kibwana, *Fundamental Rights and Freedoms in Kenya* (OUP: Nairobi, 1990) 83.

individuals, they should be effectively and fully enforced. Thus, enforcement of human rights becomes critical in ensuring that there is effective corporate accountability for human rights protection.

In the opinion of **Mwaura**,¹¹² corporations have taken advantage of the opportunities for trade presented by globalisation to increase shareholder for the benefit of their shareholders. In their quest to maximise their profits, corporations have engaged in practices which violate the human rights of individuals and societies such as forced and child labour, discrimination, providing deprived working conditions to employees and environmental degradation among others. The recognition that corporate activity has had detrimental impact on human welfare has led to the need to hold corporations accountable for human rights violations. He further argues that as a result of unethical activities carried out by corporations, they should have responsibilities for protecting human rights. While lauding the application of the Kenyan bill of rights to all persons, including corporations, he observes that this will change the way business is carried out in the country as corporations will have to take into account human rights concerns as part of their business risks. He, however, contends that there still lacks clear identification of the parameters of indirect corporate liability for human rights violations which is necessary for the effective enforcement of human rights protection.

In addressing this issue, **Ratner**¹¹³ asserts that corporate responsibility should be established and enforced by imposition of human rights obligations on corporations to be

¹¹² Mwaura (n. 47) 1.

¹¹³ Steven R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility." (2001) 111 The Yale Law Journal 443,533.

determined in view of the specific corporate activity. Ratner proposes that in seeking to determine how corporations can be held responsible for human rights it is important to take into consideration the “*corporations’ diverse structures and modes of operation within a particular country.*” He asserts that development of corporate duties relating to protection of human rights should be cognisant of four issues namely, “*the corporation’s relationship with the government, its nexus to affected populations, the particular human right in issue, and the place of individuals violating human rights within the corporate structure.*” Ratner proceeds to argue that corporations with close ties with the government or performing functions ordinarily performed by the government should bear more human rights responsibilities. His argument is hinged on the notions of control and complicity. Where private corporations carry out quasi-state authority, they should be held responsible for the protection of the human rights of those under their control. Likewise, where corporations have contributed to the violation of human rights by the state, it should also be directly held responsible as having been complicit. Ratner also observes that the duties to be attributed to corporations with regard to human rights protection should be determined by the corporation’s sphere of influence. However, he also rightly notes that there are certain rights where the sphere of influence factor may be irrelevant and therefore a corporation will be deemed to owe a duty to all. While acknowledging that the goals and interests of business enterprises largely rest on the need for profit maximisation and increased shareholder value, Ratner argues that there is a need to balance between the interests of those individuals and the interests of business. Although this is a valid argument considering that human rights do not exist in a vacuum, it is also possible that if corporations are left to determine what their interests are and how far they extend vis-à-vis

individual human rights, it may be detrimental to the individuals whose rights are sought to be protected.

Ruggie¹¹⁴ in seeking to provide clarity on the issue of human rights and business proposed the “Protect, Respect and Remedy” framework. While acknowledging that the State has the primary duty to protect against human rights abuses, he observed that corporations also have a responsibility to respect human rights. He contends that the corporate responsibility with regard to human rights comprises doing no harm which means corporations should avoid violating human rights and in addition should take positive actions to address adverse human rights impacts which they have contributed to. Consequently, Ruggie points out that effective discharge of the corporate responsibility to respect human rights requires due diligence to be carried out by corporations. By due diligence is meant the “*steps a company must take to become aware of, prevent and address adverse human rights impacts.*”¹¹⁵ Hence, in Ruggie’s opinion, the extent of corporate responsibility to respect human rights should be determined by the sphere of influence and complicity of the corporation. Thus, the extent of the human rights responsibilities of corporations depends on the activities of a corporation in a specific context. **McCorquodale**¹¹⁶ questions the distinction made by Ruggie between the ‘duty’ of the state implying a legal obligation and a corporate ‘responsibility’ implying a moral obligation. In his view, the concept of corporate responsibility should be based on the expectation that corporations would have legal, social as well as moral obligations towards the society in which they operate. This

¹¹⁴ Ruggie (n.55).

¹¹⁵ Ruggie (n.55) paragraph 56.

¹¹⁶ Robert McCorquodale, “Corporate Social Responsibility and International Human Rights Law” (2009) 87 *Journal of Business Ethics, Supplement 2: Spheres of Influence/Spheres of Responsibility: Multinational Corporations and Human Rights* 391.

criticism is supported by **Deva**¹¹⁷ who argues that the use of the term ‘responsibility’ as opposed to ‘obligation’ is misleading since it suggests that corporate human right responsibilities are without legal consequences.

Williams and Conley¹¹⁸ examine the respect of human rights by corporations as an issue that directors of corporations must consider when considering the other constituents or stakeholders of the corporation. They contend that respect for human rights forms part of the corporations’ board of directors’ fiduciary duties to their shareholders. This, they argue, is an emerging trend brought about by, among others, the changing institutional investor behaviour as well as the growth of new governance regimes including government regulation and corporate governance standards and codes which is increasingly requiring disclosures by corporations relating to human rights issues. They contend that board of director of corporations are required to consider rights and interests exemplified in the international law of human rights. Although this requirement may not always be legally enforceable i.e. be a requirement of the law, it can be enforced through non-legal mechanisms such as market and norm based mechanisms. Despite acknowledging that stakeholder leverage in the enforcement of human rights issues is largely dependent on non-legal enforcement mechanisms, William and Conley do not propose ways in which the legal enforcement of human rights protection within corporations can be enhanced.

By providing that the Bill of Rights is binding on all persons including corporations, the Constitution has made it clear that respect for human rights in Kenya is no longer a mere

¹¹⁷ Surya Deva, “Guiding Principles on Business and Human Rights: Implications for Companies” (2012) 9(2) European Company Law 101,103.

¹¹⁸ Williams and Conley (n. 12)

responsibility without legal consequences but a legal obligation. Consequently, it is important that corporate decision makers in Kenya seek to “*understand how human rights relate to their management function*”¹¹⁹ and more essentially ensure that human rights requirements and considerations are incorporated in their corporate governance structures. Hence, a significant shift is required in the ways in which corporations and business enterprises understand and respond to human rights issues.¹²⁰ **Muriuki**¹²¹ observes that corporations have the responsibility to uphold the rights of others. Thus it is important for corporations to incorporate respect human rights for human rights in their business practices. This, he notes, is not only beneficial to the society and the individuals affected by the corporation, but is also beneficial to the corporation’s corporate image.

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

¹¹⁹ Ruggie (n.55) paragraph 52.

¹²⁰ Rae Lindsay, Robert McCorquodale, Lara Blecher, Jonathan Bonnitcha, Antony Crockett and Audley Sheppard, “Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles” (2013) 6 (1) *Journal of World Energy Law and Business* 2, 16.

¹²¹ Stephen Wandeto Muriuki, “Business and Human Rights in Kenya: Embracing Corporate Constitutional Compliance” (2013) 9(2) *LSKJ* 102.

human rights. This is what this research proposes to study and thereby fill the existing knowledge gap.

1.11 Research Methodology

This study will largely be conducted through the historical or documentary research design. The documentary research design consists of the discovery and analysis of data that is already available.¹²² This research design involves exploring and understanding data that is already available for the purpose of arriving at conclusions about causes and trends which can explain or predict the future.¹²³

This research design has been chosen for the reason that the proposed research will entail documentary analysis of the human rights violations committed by private companies in Kenya and the legal and regulatory framework governing respect for human rights by companies. The study will examine Constitution, the relevant Acts of Parliament, regulations as well as under international human rights treaties and instruments. It will then seek to explore the human rights impact of corporate activities on corporate governance practices in Kenya. The study will therefore mainly entail the theoretical and doctrinal analysis of the law relating to the application of human rights duties on corporations in Kenya and how the enforcement of human rights protection will affect the corporate governance practices in the country.

¹²² Olive M. Mugenda and Abel G. Mugenda, *Research Methods: Quantitative and Qualitative Approaches* (Nairobi: Acts Press, 1999) 167.

¹²³ Willis Yuko Oso and David Onen, *A General Guide to Writing Research Proposal and Report: A Handbook for Beginning Researchers* (Revised Edition, The Jomo Kenyatta Foundation, 2009) 85.

One way of conducting historical or documentary research is “*by looking at books or articles published in a certain area and study the trend or the relationship of articles presented.*”¹²⁴ The study will, thus, rely on library research and will require the critical examination of the Constitution of Kenya, the international human rights treaties, the relevant Acts of Parliament and other statutes which provide the human rights obligations of corporations in Kenya. Published reports by government agencies as well as civil society organisations will also be examined.

The study will also use the comparative research design which is a research method used to make comparisons between two or more phenomena. The study will examine the integration of human rights in the corporate governance system in South Africa with a view to identify practices that can be adopted to improve the integration of human rights in the corporate governance system in Kenya.

The source of data proposed to be relied on will be both primary and secondary sources. For the primary sources of data, it is proposed that an in-depth study of the relevant international human rights instruments, the Constitution and relevant legislation will be conducted. With respect to secondary source of data, books, journals, articles and reports both in hard copy and soft copy through the internet on the subject of research will be reviewed and consulted.

¹²⁴ Mugenda and Mugenda (n. 122) 168.

CHAPTER TWO

CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IN KENYA

2.1 Introduction

Business is a major contributor towards the growth of the economy of the society.¹²⁵ Companies contribute towards the development of society through creation of investments and employment opportunities, supplying of goods and services and contribution towards public revenue through tax payments. The success and development of corporations also means the development of the society's economy and ultimately the improvement of the society's standard of living.

However, the role of the corporation in society can also be a double edged sword since the activities and actions of corporations also have the potential to negatively affect society. Corporations can impede the realisation of human rights directly or indirectly by negatively affecting individuals, communities as well as the environment within which they operate.¹²⁶ Thus, there is need for mechanisms which are geared towards ensuring that the activities of corporations are consistent with established human rights standards and they are held to account for any human rights violations.¹²⁷ This chapter will examine the regulatory framework for corporate accountability for human rights in Kenya. It will begin by examining the nature of the corporation and the competing interests at play. It will then

¹²⁵ Navanethem Pillay, *The Corporate Responsibility to Respect: A Human Rights Milestone* (United Nations High Commissioner for Human Rights Contribution during the 2009 Annual Labour and Social Policy Review) available at <http://www.ohchr.org> (accessed 9 June 2014).

¹²⁶ Kenya National Commission on Human Rights (KNCHR), *Making the Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations* (Occasional Report 103, 2011).

¹²⁷ Steiner Alston and Goodman (n.48) 1385.

proceed to give an overview of the international and regional frameworks for corporate accountability for human rights violations before examining the domestic framework. The chapter will also seek to identify the challenges or limitation of the said framework.

2.2 The Corporation and Human Rights Norms

2.2.1 The Nature of the Corporation

A corporation can be defined as an organisation of individuals who come together for a common objective.¹²⁸ Since the early years of the 19th Century, the corporation has been viewed as an entity which exists separately from its shareholders. It has been considered as a legal entity which is distinct from its members and is capable of enjoying rights which are enjoyed by natural persons. Consequently, once incorporated, a corporation becomes an ‘artificial person’ with a separate and distinct legal personality.¹²⁹ Viewed as an artificial person, it can be argued that the corporation owes its existence to the incorporation law of the State rather than to the initiative of the private members who incorporate it.¹³⁰ Consequently, being the creature of the State and depending on State action for its corporate status, the corporation has been conferred the privileges of incorporation not just for the benefit of its shareholders or members but also for the general good of the society.¹³¹ This is particularly significant in light of the fact that the corporation is an important vehicle for economic growth.

¹²⁸ Davies (n.9) 48.

¹²⁹ See the case of *Salomon v Salomon* (1897) AC 22 where the House of Lords held that the limited company was a legal entity which was separate from its shareholder.

¹³⁰ David Millon, “Theories of the Corporation” (1990) *Duke Law Journal* 201-262, 206.

¹³¹ *ibid* 207.

However, the corporation can also be viewed as a creation of private initiative and not just an artificial product of State action.¹³² This is evidenced by the fact that the growth in size of corporations is not necessarily a result of state action but a combination of entrepreneurial initiative and market forces. Hence, a corporation can be considered as a natural entity constituted by private individuals and regulated by market forces.¹³³ In addition, the corporation as a natural entity is considered distinct from its shareholders or members and hence as an entity exists separately from its ownership. Under this view, the role of the State is not to regulate corporations but rather to facilitate the growth of corporations. Thus, corporate activity is fundamentally treated as private in nature and free from legal regulations designed to protect public welfare”.¹³⁴

A corporation has also been described as a legal fiction.¹³⁵ The artificial creation of the law has been argued to be for purpose of convenience and not the reality.¹³⁶ A corporation under this argument only serves as nexus for a set of contracting relationships among individuals. These contracts may be written or unwritten and are between the corporation, the owners of the factors of production and the consumers of the products or services.¹³⁷ In other words, the corporation is a product of individual actors who enter willingly and freely into contractual relationships and the freedom of contract applies. Consequently, under this argument, issues such as the social responsibility of a corporation do not arise because a

¹³² *Supra* (n. 130) 213.

¹³³ *ibid.*

¹³⁴ *ibid.*

¹³⁵ Michael Jensen and William Meckling, “Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure” (1976) 3 *Journal of Financial Economics*, 305.

¹³⁶ Frank H. Easterbrook and Daniel R. Fische, “The Corporate Contract” (1989) 89 *Columbia Law Review* 1416.

¹³⁷ Eugene Fama and Michael Jensen, “Separation of Ownership and Control” (1983) XXVI *Journal of Law and Economics*.

corporation cannot be equated to an individual or a person and personalisation of the firm is considered deceptive.¹³⁸

According to Professor Adolph Berle the corporation should serve solely the interest of the shareholders.¹³⁹ The corporation as the property of the shareholders should be engaged in activities that ensured maximum creation of wealth for the shareholders. With the separation of ownership and control, Berle argued that there was need to ensure that managers of the corporation acted in a manner to maximize the shareholders' financial interests. Accordingly, the management of a corporation acted as trustees for the shareholders. While disagreeing with Berle's view that the corporation should only seek to serve the interests of the shareholders, E. Merrick Dodd argued that the corporations should also serve the interests of the society as they had citizenship responsibilities.¹⁴⁰ Dodd argued that the corporation as a good citizen should not be limited to activities that promote wealth maximization but should also have policies in place that benefit the other constituents of the corporation.¹⁴¹ Following this line of argument, it can be deduced that corporations should consider not only the interests of their shareholders but also the interests as well as rights of their stakeholders who include employees, consumers, suppliers and the society at large. In other words, the corporation should respect the rights of its constituents and therefore uphold and respect human rights. In so doing they act in the long term interest of the corporation.

¹³⁸ *ibid.*

¹³⁹ Adolf Berle, "Corporate Powers as Powers in Trust", (1931) 44 Harvard Law Review 1049.

¹⁴⁰ E. Merrick Dodd, "For Whom Are Corporate Managers Trustees?" (1932)45 Harvard Law Review. 1145.

¹⁴¹ Millon (n.130) 217.

2.2.2 Corporations in the Human Rights Context

Human rights are rights which inherent in the nature of human beings and thus accrue to individuals by virtue of being human.¹⁴² They are guaranteed as basic rights for all members of the human race regardless of their nationality, origin, sex, religion, race, colour, age, gender, language or any other status.¹⁴³ They are aimed at securing dignity and equality for all.¹⁴⁴

The concept of human rights can be traced back to the idea of ‘natural law’ and ‘natural rights’ propagated by Greek philosophers such as Aristotle and Cicero who considered natural law as the standard for making and interpreting law.¹⁴⁵ The natural law approach argues that there exists a ‘higher law’ which does not change over time, is the same in all societies and that every person has access to the standards of this higher law by use of reason.¹⁴⁶ These standards are inherent in the nature of things or human nature. From the concept of natural law came the idea of natural rights which was developed by John Locke in the 17th century.¹⁴⁷ According to Locke, people derive these ‘natural rights’ from divine or natural law and not from man-made law. Therefore natural rights precede the state, government and man-made laws and people hold them in the ‘state of nature’. When humankind entered into ‘civil society’ i.e. political and social organization with governing structures they surrendered to the state only the power to enforce those rights, and not the

¹⁴² See the Office of the High Commissioner on Human Rights (OHCHR) definition of human rights available at <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx> (accessed 12 July 2014).

¹⁴³ United Nations, *Universal Declaration of Human Rights* (UDHR) (1948) < <http://untreaty.un.org> > accessed 27 June 2013, Article 2.

¹⁴⁴ United Nations, *Human Rights Translated: A Business Reference Guide* (OHCHR, 2008) viii available at http://human-rights.unglobalcompact.org/doc/human_rights_translated.pdf (accessed 9 June 2014) .

¹⁴⁵ Freemann (n.98) 103.

¹⁴⁶ *ibid.*

¹⁴⁷ Freeman (n. 98) 112.

rights themselves. This arrangement established a ‘social contract’ between the governed and the governor, with the protection of rights as the basis for that contract. The primary obligation of governments was therefore to guarantee the protection of the citizen’s entitlements or natural rights.¹⁴⁸ The UDHR which is considered to be the internationally accepted standard and framework of human rights incorporates the spirit of natural law by providing for “*recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.*”¹⁴⁹ This recognizes the idea that individuals draw rights simply from the fact that they are human beings. The UDHR also upholds every individual and every organ of society to promote and protect human rights.

The UDHR is also considered “*as a common standard of achievement for all peoples and all nations.*”¹⁵⁰ This implies that the rights and freedoms contained in the UDHR are of universal application and are therefore applicable to all persons across all nations. However, the notion of the universality of human rights has not been without controversy. Those in support of the universality of human rights argue that human rights should be universal because they inhere in every human being by virtue of simply being humans and should therefore not be contingent on particularities such as social, economic or cultural context.¹⁵¹ On the other hand, those who argue against the universalism of human argue that notion of human rights is a western concept having had its origin and formulation

¹⁴⁸ *ibid.*

¹⁴⁹ See the Preamble of the UDHR.

¹⁵⁰ See the Preamble of the UDHR at paragraph 8.

¹⁵¹ Celestine Nyamu-Musembi, *Towards an Actor-Oriented Perspective on Human Rights* (Institute of Development Studies, Working Paper 169, 2002) 3.

within the western culture.¹⁵² As argued by An-naim for human rights to be truly universal, they must be applied while taking into account and incorporating the different cultures and traditions of the world. In his view “*current and foreseeable new human rights cannot be seen as truly universal unless they are conceived and articulated within the widest possible range of cultural tradition.*”¹⁵³ It is important to note that African societies, for example, did not participate in the process of formulation of international standards for human rights.¹⁵⁴ Consequently there was no African input in the formulation of international human rights norms resulting in a largely a western-based human rights framework. This framework was then imposed on African countries largely through their independence constitutions upon attaining independence from colonialism.¹⁵⁵ Hence, African values such as community as opposed to individualism as well as the protection of the rights of the minority and indigenous peoples were not clearly reflected in the initial formulation of human rights which emphasized individual rights’ against the state and individual property ownership rights.¹⁵⁶ However, the African human rights framework, which shall be discussed later in this chapter, has made an attempt to incorporate some of the African values by not only recognizing individual human rights but also people’s rights hence incorporating the values of community and protection of indigenous peoples.

¹⁵² See for example, American Anthropological Association, “Statement on Human Rights” (1947) 49 *American Anthropologist* 539-543 where in a reaction to the draft UDHR in 1947, the American Anthropological Association challenged the perspective that UDHR was universal by stating “*How can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?*”

¹⁵³ Abdullahi Ahmed An-Naim, *Human Rights in Cross-Cultural Perspectives: Quest for Consensus* (University of Pennsylvania Press: Philadelphia, 1992) 2.

¹⁵⁴ At the time of the drafting and adoption of the UDHR in 1946-48, there were only four African members of the United Nations (Egypt, Ethiopia, Liberia and apartheid South Africa).

¹⁵⁵ Abdullahi Ahmed An-Naim, “Introduction: Expanding Legal Protection of Human Rights in African Contexts” in Abdullahi Ahmed An-naim (eds) *Human Rights Under African Constitutions: Realising the Promise for Ourselves* (University of Pennsylvania Press: Philadelphia, 2003) 9.

¹⁵⁶ John C. Mubangizi, *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (Juta and Company Ltd: Lansdowne, 2005).9.

When viewed merely as a legal creation, the corporation has been regarded as having its main objective and goal as creation of wealth and generating profits for its stockholders.¹⁵⁷ Accordingly, the corporation is viewed as private property belonging to the owners who are perceived to be the shareholders or members of the corporation and has no obligation towards society except to conduct its business in a lawful manner with a view of ensuring maximum returns for the shareholders.¹⁵⁸ However this view cannot be sustained because the corporation as an organ of society is no exception as far as the protection and promotion of human rights is concerned. With the growth of corporate power both in the international and national spheres, it has been recognised that corporations can have a considerable impact on the enjoyment of human rights and there is need to ensure that the activities of corporations are consistent with human rights standards and that corporations are held accountable for any violations of these standards.¹⁵⁹

The impact of business on the enjoyment of human rights by individuals, communities and the society as a whole has increasingly become of concern globally. This is largely as a result of the impact of the activities of multinational corporations in developing nations including African countries. Research conducted by Amnesty International reveals the negative impact companies can have on the human rights of the individuals and communities affected by their operations. This can be harm directly caused by companies through abuse of human rights or indirectly through collusion of companies with others

¹⁵⁷ William Bradford, "Beyond Good and Evil: Toward a Solution of the Conflict Between Corporate Profits and Human Rights" available at <http://ssrn.com/abstract=991241> (accessed 14 July 2014).

¹⁵⁸ Bradford (n. 161).

¹⁵⁹ Steiner, Alston and Goodman (n.48) 1388-1389.

violating human rights.¹⁶⁰ This is exemplified in the case of *Wiwa v Royal Dutch Petroleum and Shell Petroleum Development Company*.¹⁶¹ In 1996 charges were brought under the Alien Tort Claims Act in the United States of America against the Royal Dutch Petroleum Company and Shell Transport and Trading Company (Shell), the head of its Nigerian operation, Brian Anderson; and the Nigerian subsidiary itself, Shell Petroleum Development Company for complicity in human rights abuses against the Ogoni people in Nigeria. Shell was accused of human rights violations which included crimes against humanity, summary execution, torture, inhumane treatment, arbitrary arrest, wrongful death, assault and battery, and infliction of emotional distress on the Ogoni people. Shell, which was involved in the exploitation of oil and gas resources in the Niger Delta of Nigeria, had over a long period of time caused human rights abuses to the Ogoni people such as forced acquisition of land and without adequate compensation to the owners, oil related contamination of water sources and the agricultural land upon which the Ogoni's people economy was based as well as environmental degradation. These human rights abuses resulted in demonstrations and protests conducted to oppose the activities of the Shell due to their negative impact in the community. As a way to suppress the protests by the people, Shell used Nigerian military regime and police to provide security for their operations. It financed and armed the security forces and was involved in mapping out strategies with the police on how to stop the opposition to its activities. This led to the torture and killings of civilians accused of protesting against the government including Ken Saro-Wiwa a leading human rights activist and a campaigner against the activities of Shell

¹⁶⁰ Amnesty International at <http://www.amnesty.org/en/business-and-human-rights> (accessed 6 February 2014).

¹⁶¹ See <http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum> (accessed 6 February 2014).

and its collaboration with the Nigerian military regime.¹⁶² The case, however, did not proceed to full trial as the parties reached an out of court settlement on 8th June 2009 with Shell agreeing to pay the sum of 15.5 million dollars as part of the settlement which monies was used to set up a trust fund for the purposes of the education, community development and other benefits geared towards improving the welfare of the Ogoni people.¹⁶³ Interestingly, one of the reasons for entering into the settlement is stated as “*to eliminate the uncertainties, burdens and expense of further protracted litigation.*”¹⁶⁴ Although this could have been true for both parties, it was especially relevant to the defendants’ corporations whose continued and highly publicised legal battle was not good for its image and brand and due to the gravity of the charges brought against them, they could not risk the case going to full trial. The case went on to show the extent and impact of corporate activities and conduct on human rights especially in cases where corporations collaborate with oppressing regimes to perpetrate human rights violations and further that corporations can indeed be held accountable for human rights abuses.¹⁶⁵

¹⁶² Ken Saro-Wiwa was the leader of the Movement for the Survival of the Ogoni People (MOSOP), a human rights group founded with the aim of stopping exploitation of the Ogoni people by Shell and the Nigerian government. Together with John Kpnuinen, the deputy president of the MOSOP’s youth wing, and others, they were falsely accused of murdering four Ogoni chiefs, tried before a military appointed special tribunal and hanged on 10 November 1995. See <http://wiwavshell.org/> (accessed 15 July 2014).

¹⁶³ See the Settlement Agreement and Mutual Release filed in the United States District Court , Southern District of New York available at http://wiwavshell.org/documents/Wiwa_v_Shell_agreements_and_orders.pdf (accessed 15 July 2014).

¹⁶⁴ *ibid* at page 3.

¹⁶⁵ Ed Pilkington, ‘Shell Pays Out \$15.5m Over Saro-Wiwa Killing’ (The Guardian, 9 June 2009) available at <http://www.theguardian.com/world/2009/jun/08/nigeria-usa> (accessed 15 July 2014).

2.3 The International Human Rights Regulation of Business Corporations

2.3.1 An Overview of the International Human Rights Framework

The process of setting the modern standards of human rights began with the establishment of the United Nations (UN) in 1945 following the end of the Second World War.¹⁶⁶ The establishment of the UN was as a result of the recognition by world leaders that a commitment to the protection of human rights was essential to world peace.¹⁶⁷

One of the objectives of the UN is to promote and encourage respect for human rights and fundamental freedoms for all without discrimination on any basis including sex, race, language or religion.¹⁶⁸ This objective is given further impetus by Article 55 of the UN Charter which provides that the UN shall promote “*universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.*” In order to give substance to the human rights and fundamental freedoms envisaged in the UN Charter, the UDHR was adopted by the UN in 1948.¹⁶⁹ The UDHR outlines the key human rights and their constituent elements. The UDHR has been described as the “*cornerstone of modern human rights law*”.¹⁷⁰

As a way of elaborating on the human rights and fundamental freedoms contained in the UDHR, the UN General Assembly in 1966 adopted two binding treaties namely, the International Covenant on Civil and Political Rights (ICCPR) and the International

¹⁶⁶ Established by the Charter of the United Nations signed on 26 June 1945 and came into force on 24 October 1945.

¹⁶⁷ Mubangizi (n.156) 13.

¹⁶⁸ Article 1 of the Charter of the United Nations available at <http://www.un.org/en/documents/charter/chapter1.shtml> (accessed 10 June 2014).

¹⁶⁹ Adopted by the UN General Assembly on 10 December 1948.

¹⁷⁰ UDHR (n.144) viii.

Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁷¹ Although contained in two separate covenants, the rights in the two covenants have been recognised as universal, indivisible, interdependent and equally important.¹⁷² Collectively, the UDHR, ICCPR and ICESCR form what has been described as the ‘International Bill of Human Rights’. In addition to these general human rights instruments, a number of declarations and conventions dealing with specific human rights issues have been adopted by the UN. These include the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CRC).¹⁷³

2.3.2 The Development of International Corporate Human Rights Accountability Mechanisms

One of the defining features of the international human rights framework is the centrality of the state. As a result, the human rights system seeks to bind states through a network of treaty obligations to which, in a majority of cases, only States can become parties.¹⁷⁴ Under the international human rights framework, States are considered to be the primary duty holders in respect to human rights obligations.¹⁷⁵ Under the structure of the international human rights legal system, States bear the legal obligation or duty to protect against human rights abuses. This obligation arises out of the ratification by States of the international

¹⁷¹ Came into force on 16 December 1976 following the requisite number of member state ratifications.

¹⁷² United Nations, (n.21) ix.

¹⁷³ Steiner, Alston and Goodman (n.48) 1388.

¹⁷⁴ *ibid.*

¹⁷⁵ Karin Lucke, “States’ and Private Actors Obligations under International Human Rights Law and the Draft UN Norms” in Thomas Cottier, Joost Pauwelyn and Elisabeth Burgi Bonanom (eds), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005) 151.

human rights instruments.¹⁷⁶ Consequently, under the said framework, corporations are not perceived as having direct legal obligations to protect against human rights violations.¹⁷⁷ Moreover, as a general principle of enforcing human rights standards, it is the government, its agencies or agencies acting on its behalf that are the entities, in the first instance, required to respect, protect and fulfil human rights standards. The international human rights framework seeks to regulate actions and omissions of governments in order to avoid human rights violations and hold governments accountable for human rights abuses.¹⁷⁸ This is generally termed as vertical application of human rights whereby human rights are restricted to governing the relations between the state, public bodies and the individual.¹⁷⁹

Be that as it may, corporations as non-state actors do bear human rights responsibilities under some international human rights instruments.¹⁸⁰ For example, the UDHR provides that every individual and every organ of society shall strive to promote and respect the rights and freedoms provided therein. The reference to every organ of society implies that corporations and business enterprises are not exonerated from that responsibility. Additionally, under some international conventions, non-state actors bear obligations. A good example is the CEDAW where state parties are required to take all appropriate measures “*to eliminate discrimination against women by ‘any person, organisation or*

¹⁷⁶ Robert McCorquodale, “Corporate Social Responsibility and International Human Rights Law” (2009) 87 *Journal of Business Ethics*, Supplement 2: *Spheres of Influence/Spheres of Responsibility: Multinational Corporations and Human Rights* 385, 386.

¹⁷⁷ *ibid.*

¹⁷⁸ Jonathan Cooper, “Horizontality: The Application of Human Rights Standards in Private Disputes” in Rosalind English and Phillip Havers (eds), *An Introduction to Human Right and the Common Law* (Oxford – Portland Oregon : Hart Publishing, 2000) 52,54-55.

¹⁷⁹ *ibid.*

¹⁸⁰ Lucke (n.49) 154.

enterprise".¹⁸¹ Thus, the principles underlying human rights go beyond the relationship between the government and the individual and extend to non-state actors or private entities.¹⁸²

With the growth of corporations, came concerns about the impact of these powerful commercial entities on the lives of people and the environment. The 1970s witnessed increasing report of unethical and illegal activities of multinational corporations which led to calls for international regulation of corporations.¹⁸³ In response to the growing concern of the need to hold corporations accountable for their actions, the United Nations Commission on Transnational Corporations was formed in 1973.¹⁸⁴ The Commission, whose mandate was to investigate the impact of transnational corporations, drafted the UN Code of Conduct on TNCs, an attempt to provide social and environmental guidelines for transnational corporations. However, these guidelines received resistance from a large number of countries where transnational corporations were headquartered and consequently, were not adopted.¹⁸⁵

In 1975, the Organisation of Economic Cooperation and Development (OECD) formed the Committee for International Investments and Multinational Enterprises with a view to evaluating the possibility of introducing codes of conducts for multinational corporations

¹⁸¹ Article 2 (e) of CEDAW. Although the Convention does not define the words 'person, organisation or enterprise', the Committee on the Elimination of Discrimination Against Women under General Recommendation No. 19 at its 11th Session in 1992, noted that discrimination under the Convention is not restricted to State or government action and hence the inclusion of non-state actors such as persons, organisations or enterprises.

¹⁸² Wesley Cragg, "Human Rights and Business Ethics: Fashioning a New Social Contract" (2000) 27 *Journal of Business Ethics* 205, 213.

¹⁸³ Thomas Cottier, Joost Pauwelyn and Elisabeth Burgi Bonanom (eds), *Human Rights and International Trade* (OUP: Oxford, 2005) 119-120

¹⁸⁴ Patricia Feeney, "Business and Human Rights: The Struggle for Accountability in the UN and the Future Direction of the Advocacy Agenda" (2009) 6 (11) *SUR- International Journal on Human Rights* 161-175.

¹⁸⁵ *ibid.*

as well as ensuring protection of international investors from discriminatory and detrimental practices by their host countries.¹⁸⁶ The result of this effort was the drafting of the OECD Guidelines for Multinational Enterprises in 1976 which although incorporating some labour rights, did not explicitly mention other human rights and thus were largely considered as a token concession for the concerns raised regarding the effects of multinational companies on human rights.¹⁸⁷ In 1977, the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy was adopted by the International Labour Organisation (ILO) calling on corporations to respect the UDHR and other international human rights instruments. However, the declaration was not legally binding and largely focussed on workers' rights.

The 1980s and 1990s saw increasing agitation for corporations to be held accountable for human rights abuses. The increased discontent with the way multinational corporations conducted their business and their impact on human rights brought about initiatives to address these concerns namely, the UN Global Compact, the OECD Guidelines for Multinational Enterprises and the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms).¹⁸⁸ The Norms sought to create obligations for transnational corporations and other business enterprises to ensure the respect and protection of human rights within their spheres of activities and influence.¹⁸⁹ This obligation meant that transnational corporations and other business enterprises would have the responsibility to use due diligence in

¹⁸⁶ *ibid.*

¹⁸⁷ *ibid.*

¹⁸⁸ Steiner, Alston and Goodman (n.48) 1396-1409.

¹⁸⁹ *ibid.*

ensuring that their activities do not in any way, directly or indirectly, violate human rights standards. However, due to the opposition largely relating to creation of binding legal human rights obligations for corporations, the Norms were not supported and hence not adopted.

The efforts of putting in place mechanisms to hold corporations accountable for human rights were given a boost in 2008 when the UN Human Rights Council adopted a resolution that “*transnational corporations and other business enterprises have a responsibility to respect human rights*”¹⁹⁰ This was in recognition that corporations like individuals and other organs of society often act in ways that would affect the rights of others. These efforts culminated in the adoption of the United Nations Guiding Principles on Human Rights in 2011. However, these principles are not legally binding in nature and therefore their adoption largely depends on the good will of corporations.

2.3.3 The International Framework for Corporate Accountability for Human Rights.

In its preamble, the UDHR proclaims “*every individual and every organ of society...shall strive ...to promote respect for these rights and freedoms...and secure their universal and effective recognition and observance*”.¹⁹¹ Consequently, all organs of society including corporations are bound to uphold human rights and fundamental freedoms. In addition, the UDHR provides for labour related rights as well as protection against discrimination.¹⁹² These rights are pertinent to corporations since most corporations are employers and are therefore expected to ensure that rights of their workers are protected. These include the

¹⁹⁰ Human Rights Council Resolution 8/7, 18 June 2008 available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf (accessed 9 June 2014).

¹⁹¹ UDHR (n.144).

¹⁹² Articles 2, 23 and 24 of the UDHR.

right to favourable working conditions, equal pay for equal work, just and favourable remuneration and the right to join trade union.¹⁹³ However, it is important to note that the UDHR being a declaration and not a treaty is not legally binding in nature. However, it has been argued that because of its widespread acceptance and adoption across the world, it has acquired the status of international customary law.

The ICESCR, which is a legally binding treaty, also provides for labour related rights aimed at giving effect to the provisions of the UDHR.¹⁹⁴ These include the right to just and favourable conditions of work, fair wages and equal remuneration for equal work, safety and healthy working conditions, rest and reasonable working hours, join trade unions. However, as previously mentioned, the international human rights instruments are not seen as providing direct human rights obligations to corporations. This is because it is States that are held responsible for observing and complying with the provisions of these instruments.¹⁹⁵ Consequently, there have been other efforts at the international level to regulate the human rights conduct of corporations.

2.3.3.1 The United Nations Global Compact Principles

In 1999, the Secretary General of the United Nations, Koffie Annan, launched the United Nations Global Compact (the “Compact”) to encourage corporations to adhere to certain principles in their activities.¹⁹⁶ The Compact contains ten principles which are largely inspired by the existing international instruments for the protection of human rights.¹⁹⁷ It

¹⁹³ Article 23 of UDHR.

¹⁹⁴ Articles 7 and 8 of the ICESCR.

¹⁹⁵ Nina Seppals, “Business and the International Human Rights Regime: A Comparison of UN Initiatives” (2009) 87 (2) *Journal of Business Ethics* 401-417,402.

¹⁹⁶ Steiner, Alston and Goodman (n.48) 1396.

¹⁹⁷ United Nations Global Compact, available at www.unglobalcompact.org.(accessed 16 July2014).

provides that corporations should support and respect the protection of international human rights within their spheres of influence and ensure that they are not complicit in human rights abuses.¹⁹⁸ It therefore affirms the norms of the international human rights regime as contained in international human rights instruments. It calls on businesses to respect the freedom of association, recognise the right to collective bargaining eliminate all forms of forced, compulsory labour and child labour and discrimination in respect of employment and occupation.¹⁹⁹ These are core standards which are considered as fundamental labour rights. Regarding the environment, the Compact calls for business to undertake initiatives which are aimed at promoting environmental responsibility and encourage the development and use of environmentally friendly technology all this aimed at preserving and conserving the environment.²⁰⁰ Businesses are also called upon by the Compact to avoid corruption in all its forms including extortion and bribery.²⁰¹

The Compact has provided a forum where corporations, non-governmental organisations as well governments under the aegis of the UN can discuss human rights issues.²⁰² It has provided an opportunity for corporations to commit themselves to adhere to human rights standards in their operations. According to a report by McKinsey & Company, the Compact which has had incremental impact on corporations has contributed towards policy changes in corporations aimed at improving the adherence to human rights standards.²⁰³

¹⁹⁸ See principles 1 and 2 of the UN Global Compact.

¹⁹⁹ Principles 3-6 of the UN Global Compact.

²⁰⁰ Principles 7, 8 and 9 of the UN Global Compact.

²⁰¹ Principle 10 of the UN Global Compact,

²⁰² The Compact has over 5000 business participants and 2000 other stakeholders and has been described as the world largest corporate responsibility initiative. See <http://business.un.org/en/documents/688> (accessed 16 July 2014).

²⁰³ Mckinsey & Company, Assessing the Global Compact's Impact (May 2004) available at http://europeandcis.undp.org/guides/poverty/spd/ras/mckinsey_report_gc.pdf (accessed 16 July 2014).

However, due to the voluntary and non-binding nature of the Compact, corporations cannot effectively be held to account for non-compliance with the principles therein. To a large extent it has become a corporate public relations exercise to boost the image and brand of corporations.²⁰⁴ In addition, it can be argued that it has focussed more on increasing its membership rather than finding mechanisms to ensure that its members honour their commitment to its principles. This is because it has no effective monitoring and accountability mechanisms to ensure compliance with its principles.²⁰⁵

2.3.3.2 The United Nations Protect, Respect and Remedy Framework

In 2005, the Commission on Human Rights appointed an independent expert, John Ruggie as a Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises with the mandate to, inter alia, identify and clarify standards of corporate responsibility and accountability.²⁰⁶ In 2007, based on his assessment of the international human rights instruments, he concluded that the international human rights framework did not impose direct legal responsibilities on corporations.²⁰⁷ In 2008 he proposed a three pillar framework for corporate accountability for human rights described as ‘Respect, Protect and Remedy’ framework.²⁰⁸ This framework provides for the preservation of the state duty to protect against human rights

²⁰⁴ Pete Engardio, “Global Compact Little Impact” (Businessweek Magazine 2004) available at <http://www.businessweek.com/stories/2004-07-11/commentary-global-compact-little-impact> (accessed 16 July 2014)

²⁰⁵ Oliver F Williams, “The UN Global Compact: The Challenge and the Promise” (2004) 14(4) *Business Ethics Quarterly*, 755-774,757.

²⁰⁶ *ibid.*

²⁰⁷ John Ruggie, “Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporates Acts,” *Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/4/35 (9 February 2007).

²⁰⁸ John Ruggie, “Protect, Respect and Remedy: A Framework for Business and Human Rights” *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc.A/HRC/8/5 (7 April 2008).

violations through appropriate policies, regulation and adjudication, the corporate responsibility to respect human rights under a due diligence standard and the enhancement of effective access to remedies by victims of human rights violations.²⁰⁹ Although recognising that there could be situations where corporations would have additional responsibilities in respect to human rights, Ruggie emphasised the corporations' responsibility to respect human rights as the foundational norm for all corporations in all circumstances.²¹⁰

2.3.3.3 The United Nations Guiding Principles on Business and Human Rights

In 2011, Ruggie moved to operationalize the Respect, Protect and Remedy Framework by developing guiding principles as set out in his March 2011 report.²¹¹ The guiding principles were endorsed by the United Nations Human Rights Council and a working group was established whose mandate is to ensure the effective implementation of the guiding principles.²¹² The main purpose of the guiding principles was to provide a clearer differentiation between the roles of states and corporations which had been seen as lacking in the Norms.²¹³

Under the guiding principles, the state is obligated to respect, protect and fulfil human rights and fundamental freedoms while business enterprises which are recognised as a specialised organ of the society with specialised functions have the responsibility to respect

²⁰⁹ *ibid.*

²¹⁰ John Ruggie, "Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework", Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc.A/HRC/11/13 (22 April 2009).

²¹¹ John Ruggie, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc. A/HRC/17/31 (21 March 2011).

²¹² Endorsed in resolution 17/4 of the Human Rights Council of 16 June 2011.

²¹³ Blitt (n.57).

human rights and comply with all applicable laws.²¹⁴ The state is expected to protect against human rights abuses within its territory and jurisdiction by third parties including business enterprises through effective policy, legislative and regulatory measures. The state is also obligated to effectively enforce existing laws that directly or indirectly regulate business respect for human rights such as non-discrimination, labour, property and privacy laws and ensure that these laws are reviewed regularly to keep up with the evolving nature of human rights obligations. Noting that business behaviour is directly shaped by the laws and policies that govern the creation and operation of business enterprises, the guiding principles recommend that corporate and securities laws and policies should provide guidance on how corporations should respect human rights, what their officers are expected to do regarding human rights and this should be done “*with due regard to the role of the existing governance structures such as corporate boards.*”²¹⁵

To respect human rights requires that corporations would desist from committing any act directly or indirectly that would interfere with the enjoyment of human rights or in other words ‘do no harm’.²¹⁶ In addition, according to the guiding principles, the responsibility to respect human rights means that a corporation should act with due diligence to avoid interfering with the rights of others and to address any adverse impacts that may be a result of their activities.²¹⁷ Business enterprises are obligated to respect internationally recognised human rights standards, at a minimum being, those rights expressed in the International Bill of Human Rights and fundamental rights set out in the International Labour

²¹⁴ United Nations, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (New York and Geneva, 2011).

²¹⁵ *ibid* 5.

²¹⁶ Guiding Principle 11.

²¹⁷ Guiding Principle 13.

Organisation's Declaration on Fundamental Principles and Rights at Work.²¹⁸ It is important to note that the guiding principles apply to all business enterprises regardless of size, structure, ownership or location and are therefore not limited to transnational corporations only.²¹⁹ Additionally, the responsibility to respect human rights by business enterprises exists independently of the state's obligations and is over and above compliance with national laws and regulations protecting human rights.²²⁰ As a way of fulfilling human rights obligations, the guiding principles recommend that corporations should put in place appropriate policies and processes including a policy statement acknowledging their responsibility to respect human rights, a human rights due diligence process to identify, prevent and mitigate human rights impacts of their conduct and activities and processes to enable remediation of any adverse human rights impact they cause.²²¹

Although, the guiding principles go a long way in addressing some aspects relating to corporate human rights impunity, they are not binding in nature. As the name suggests, they are principles whose "*normative contribution lies...in elaborating the implications of existing standards and practices for States and businesses...*"²²² In other words, the guiding principles do not constitute binding obligations for corporations and do not impose a direct obligation to corporations to respect human rights. It can therefore be argued that in the international human rights framework, there is still no binding legal framework that would directly hold corporations accountable for human rights violations.

²¹⁸ Guiding Principle 12.

²¹⁹ Guiding Principle 14.

²²⁰ Ruggie (n. 96) 13

²²¹ Guiding Principle 15.

²²² Ruggie (n. 96).

2.3.3.4 International Labour Organisation's (ILO) Declaration on Fundamental Principles and Rights at Work

The ILO Declaration on Fundamental Principles and Rights at Work,²²³ adopted in 1998, is a commitment by governments, employers' and workers' organizations to uphold basic values regardless of their levels of economic development. These values, which are essential to the economic and social development of individuals, are freedom of association and the effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labour, abolition of child labour and elimination of discrimination in respect of employment and occupation.²²⁴

The Declaration recognises that the freedom to associate and the freedom to bargain collectively are fundamental rights which make it possible to promote and realise decent working conditions at the workplace. These rights also develop strong and independent workers' and employers' organisations which work together to reduce the conflicts between workers and employers hence enhancing industrial relations. The Declaration calls on member states to eliminate forced or compulsory labour. This is in recognition that any working relationship should be freely chosen and be on a voluntary basis. The Declaration also obliges member states to abolish child labour thereby recognising children should be protected from economic exploitation as well as work that has adverse effects on them and impedes their proper development. Additionally, the Declaration obliges member states to eliminate discrimination in employment and occupation which denies individuals opportunities to develop themselves and robs societies of the benefits accruing from what

²²³ Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998.

²²⁴ See <http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm> (accessed 12 June 2014).

individuals can and could contribute. Kenya as a member of the International Labour Organisation (ILO) has an obligation “*to respect, to promote and to realise*” the principles contained in the Declaration.²²⁵ It is noteworthy that Kenya has ratified seven of the eight core ILO Labour Conventions.²²⁶

2.3.3.5 The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises are recommendations by governments adhering to the Declaration on International Investment and Multinational Enterprises to multinational enterprises.²²⁷ These guidelines provide non-binding standards and principles for responsible business conduct. They aim to promote positive contributions by enterprises to economic, social as well as environmental development. For this reason, although the guidelines mainly address multinational corporations, the application of the principles therein can also be extended to small and medium sized enterprises which may have less capacity than the multinational enterprises.

The guidelines encourage business enterprises to respect internationally recognised human rights of those affected by their communities. This entails avoiding infringing on the human rights of others and addressing adverse human rights impacts of their activities.²²⁸ They provide for principles to be adhered to in regard to employment and industrial relations. These include respect for the right of workers employed by the business

²²⁵ The ILO Declaration on Fundamental Principles and Rights at Work available at <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm> (accessed 16 July 2014).

²²⁶ Kenya has not ratified Convention No. 87 on Freedom of Association and Protection on the Right to Organise. See the ILO Annual Report GB.320/INS/4 of 7th February 2014 available at http://www.ilo.org/wcmsp5/groups/public/--ed_norm/--relconf/documents/meetingdocument/wcms_236200.pdf (accessed 16 July 2014).

²²⁷ OECD Guidelines for Multinational Enterprises (OECD, 2011).

²²⁸ See Chapter IV of the Guidelines for Multinational Enterprises.

enterprises to join trade unions and engage in collective bargaining, abolition of child labour, elimination of forced and compulsory labour, elimination of discrimination and promoting equality at the workplace and ensuring occupational health and safety in their operations.²²⁹ With regard to the environment, the guidelines encourage business enterprises to protect the environment and ensure public health and safety by conducting their activities in a manner which promotes sustainable environmental development.²³⁰ On consumer protection, the guidelines urges business enterprises to take all reasonable steps possible to ensure the quality and reliability of the goods and services which they provide to the consumers and ensure that they meet the required legal standards for consumer health and safety.²³¹ They call for support and upholding of good corporate governance principles and practices by business enterprises. They also urge business enterprises to engage stakeholders in the decision making processes of the enterprises.²³²

Though the guidelines provide standards which if adhered to would go a long way in promoting respect for human rights by corporations, as the guidelines indicate, they are not legally enforceable as observance of the standards set out therein is voluntary.²³³ They are principles and standards of good practice which cannot be enforced against a non-observing entity.

²²⁹ See Chapter V of the Guidelines for Multinational Enterprises.

²³⁰ See Chapter VI of the Guidelines for Multinational Enterprises.

²³¹ See Chapter VII of the Guidelines for Multinational Enterprises.

²³² See Chapter II of the Guidelines for Multinational Enterprises.

²³³ See Chapter I of the Guidelines for Multinational Enterprises on the Concepts and Principles.

2.4 The Regional Framework on Corporate Accountability for Human Rights

2.4.1 The African Charter on Human and Peoples' Rights

The African system for the promotion and protection of human rights is largely based on the African Charter on Human and Peoples' Rights also referred to as the Banjul Charter.²³⁴ The Charter was adopted by the Organisation of African Unity (OAU), a regional intergovernmental organisation formed in 1963 to promote unity and solidarity amongst African states and which has since been replaced by the African Union (AU).²³⁵ The African Union Charter recognises the importance of promoting and protecting human rights and provides as one of its objectives to “encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights,”²³⁶ In addition, it seeks to promote and protect human rights in accordance with the Africa Charter and other relevant human rights instruments.²³⁷

The African Charter on Human and Peoples' Rights has several distinctive features which include its incorporation of duties, which is unlike the international instruments and other regional systems that only provide for rights.²³⁸ It provides for rights of an individual as well as peoples' rights and additionally, combines civil, political, social, economic and cultural rights all under one document becoming the first international human rights convention to guarantee all the categories of human rights in a single instrument.²³⁹ The Charter recognizes that human rights derive from the attributes of human beings and hence

²³⁴ Adopted on 17 June 1981 and came into force on 21 October 1986.

²³⁵ See the Constitutive Act of the African Union adopted on 11 July 2000.

²³⁶ Article 3 (e) of the Constitutive Act of the African Union.

²³⁷ Article 3 (h) of the Constitutive Act of the African Union.

²³⁸ African Charter on Human and Peoples' Rights, *Compendium of Key Human Rights Documents of the African Union*, (2007) 29

²³⁹ Mubangizi (n.156) 27.

should be protected at the international as well as the national levels.²⁴⁰ It prohibits discrimination on the basis of race, religion, language, sex, ethnic group, national and social origin, birth, political opinion or other status.²⁴¹ Article 15 provides for the right to work under equitable and satisfactory conditions and the right to equal pay for equal work. Article 16 provides for the right to the best attainable state of physical and mental health and the right to receive medical care when unwell. Article 24 provides for the right of all peoples to a general satisfactory environment favorable for their development. These are rights which directly affect corporations and should be respected and promoted by corporations in Africa.

2.4.2 East African Community

The East African Community (EAC) is established by the EAC Treaty which was adopted in 1999 and came into force in 2000.²⁴² The EAC originally consisted of Kenya, Uganda and Tanzania but expanded its membership to include Rwanda and Burundi.²⁴³ The establishment of the EAC was to enhance cooperation between member states with a view to strengthen their economic, social, cultural, political and technological ties to the benefit of their citizens. The Treaty recognises the crucial role played by the private sector in the socio-economic development of member states and underscores the importance of creating an enabling environment for the private sector and investors.²⁴⁴

The EAC recognises that good governance is critical in the achievement of its objectives and accordingly the partner states undertake to abide by the principles of good governance

²⁴⁰ See Preamble to the African Charter on Human and Peoples' Rights.

²⁴¹ Article 2 of the African Charter on Human and Peoples' Rights.

²⁴² See <http://www.eac.int/> (accessed 16 July 2014).

²⁴³ *ibid.*

²⁴⁴ See paragraph 11 of the Preamble and Articles 27 and 28 of the EAC Treaty.

which include adherence to the rule of law, principles of democracy, transparency, social justice, equal opportunities, gender equality and the recognition, promotion and protection of universally accepted standards of human rights.²⁴⁵ The importance of respecting human rights within the Community is further enunciated by the fact that in considering membership applications from other states, one of the factors to be considered is observance of human rights and social justice.²⁴⁶ Through the adoption and ratification of the EAC Treaty, the member states undertake to ensure that human rights are respected and protected both by the public and private sectors as part of adhering to principles of good governance.

As part of realising the objective of promoting good governance within the Community, a committee of experts was convened in 2009 to come up with a framework in line with the principles outlined under Article 6 (d) on good governance.²⁴⁷ The experts developed the EAC Protocol on Good Governance (Draft Protocol) which is still in draft form and therefore is yet to be adopted.²⁴⁸ It is premised on seven key pillars which are Constitutionalism, Rule of Law and Access to Justice, Protection of Human Rights and Promotion of Equal Opportunities, Democracy and Democratization process, Combating Corruption and enhancing Ethics and Integrity, Separation of Powers, Economic

²⁴⁵ Article 6 (d) and 7(2) of the EAC Treaty.

²⁴⁶ Article 3(3) (b) of the EAC Treaty.

²⁴⁷ http://federation.eac.int/index.php?option=com_content&view=article&id=181&Itemid=144 (accessed 16 July 2014).

²⁴⁸ The East African Legislative Assembly, *Report of the Committee on Legal, Rules and Privileges on the Assessment on Adherence to Good Governance in the EAC and the Status of the EAC Political Federation* (January 2014, Clerk's Chambers, Arusha Tanzania) available at <file:///C:/Users/jkm/Downloads/Final%20Good%20Governance%20in%20the%20EAC%20and%20the%20status%20of%20the%20EAC%20Political%20Federation%20report.pdf> (accessed 17 July 2014).

Governance, and Private Sector Development and Corporate Governance.²⁴⁹The Draft Protocol advocates for the development of a culture of respecting and observing of human rights within partner states.²⁵⁰ Under article 6 of the Protocol partner states will undertake to cooperate to ensure that their citizens enjoy human rights and fundamental freedoms taking into account their universality, interdependence and indivisibility. Hence the Protocol seeks to ensure that human rights are respected in partner states by all including the private sector.

The Draft Protocol also acknowledges the significance of developing the private sector as a tool for enhancing and promoting economic development and thereby reducing poverty in the partner states. It recognises the role played by the private sector in economic growth and wealth creation and acknowledges that good corporate governance is a prerequisite for the private sector to grow.²⁵¹ To this end, the Draft Protocol proposes the development of enabling regulatory frameworks in member states and harmonised corporate governance principles, engagement between regional and national institutions with a view to enhance awareness on the need for good corporate governance as well as the adoption and more importantly enforcement of acceptable accounting and auditing best practices and standards.²⁵² Once adopted, the Draft Protocol will bolster the efforts towards ensuring respect for human rights as well as promotion of good corporate governance in the private sector.

²⁴⁹ Article 3 of the Draft East African Community Protocol on Good Governance.

²⁵⁰ See Preamble of the East African Community Protocol on Good Governance.

²⁵¹ Article 12 of the Draft Protocol.

²⁵² Article 13 (2) of the Draft Protocol.

2.5 The Domestic Human Rights Regulation of Business Corporations

One of the primary duties of corporations in any country is to obey and comply with the domestic laws.²⁵³ The domestic legal framework often influences the conduct and behaviour of corporations with respect to their operations and their corporate governance structure which ultimately has an impact on their respect for human rights. In Kenya, corporations' actions and activities are governed and regulated by the Constitution and a myriad of statutes and regulations including the Companies Act,²⁵⁴ the Penal Code,²⁵⁵ the Capital Markets Authority Act, 2002, the Capital Markets Regulations the Nairobi Stock Exchange (NSE) Regulations for publicly listed companies, labour laws, consumer protection laws and environmental laws.

2.5.1 The Constitutional Framework

The Constitution of Kenya, 2010²⁵⁶ is the supreme law of the country and forms the basis or foundation of all laws in Kenya.²⁵⁷ Article 2(4) provides that any law which is inconsistent with the Constitution is void to the extent of the inconsistency. It has been termed as one of the most progressive constitutions in the world.²⁵⁸ It sets out the aspirations and goals of Kenyans, the national values and principles of governance and promotes public participation, transparency and accountability. Among the national values and principles of governance set out in the Constitution is human dignity, human rights, non-discrimination and the protection of the marginalised.²⁵⁹ In addition, the Constitution set outs principles of good governance, integrity, transparency and accountability as

²⁵³ OECD (n.35) 17.

²⁵⁴ Chapter 486, Laws of Kenya.

²⁵⁵ Chapter 63, Laws of Kenya.

²⁵⁶ Promulgated on 27 August 2010.

²⁵⁷ Article 2 (1) of the Constitution.

²⁵⁸ Government of Kenya, *Understanding the Constitution of Kenya* (MOJNCCA, 2012).

²⁵⁹ Article 10(2)(b) of the Constitution.

national principles which are binding on and should be applied by all persons whenever they make or implement public policy decisions.²⁶⁰ These values and principles should be internalised and implemented by the private sector and should inform corporations' activities and decision making.²⁶¹

In a bid to ensure that that international law standards and principles are incorporated in the country's legal framework, the Constitution at Article 2 (5) provides that the general rules of international law shall form part of the law of Kenya. Further, Article 2(6) provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya. This has been upheld by the courts, for instance, in the case of *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company and 2 others*,²⁶² where the court observed that the right to information has been recognised in “.....*international conventions to which Kenya is a party and which form part of Kenyan law by virtue of Article 2(6) of the Constitution*”. These provisions are significant to the development and implementation of human rights in the country and especially in light of the fact that the international human rights standards form the basis of human rights protection in the world.

The Constitution binds all persons and all State organs at both the national and county levels of government.²⁶³ Further, Article 3(1) provides that every person has an obligation to respect, uphold and defend the Constitution. The term ‘person’ is defined under Article 260 as including “*a company, association or other body of persons whether incorporated*

²⁶⁰ Article 10(1) and 10 (2) (c).

²⁶¹ Ministry of Justice, National Cohesion and Constitutional Affairs, *Understanding the Constitution of Kenya* (MOJNCCA, 2012) 12.

²⁶² High Court at Nairobi Petition Number 278 of 2011 available at <http://kenyalaw.org/caselaw/cases/view/88569/> (accessed 17 June 2014).

²⁶³ Article 2 (1) of the Constitution.

or unincorporated.” This means that all persons including private or public entities should respect the provisions of the Constitution. This was upheld in the case of *Isaac Ngugi v Nairobi Hospital and 2 Others*²⁶⁴ where the Court held that every person which term includes a corporation is obligated to respect the provisions of the Constitution.

2.5.2 The Statutory Framework

The statutory law governing corporations in Kenya is embodied in the Companies Act. It is both an enabling and regulatory legislation and deals with among other issues the requirements for incorporation, registration and the management of companies. The Companies Act, like in most Commonwealth countries, is based on and is substantially the same as the United Kingdom Companies Act of 1948.²⁶⁵ The 1948 Companies Act which was adopted by Kenya on gaining independence was an Act consolidating the law relating to companies as at that time in England.²⁶⁶ It was not a complete code of the company law in England since common law principles such as agency and trust which had been developed by the English courts and were not provided for in the statute still applied.²⁶⁷ Consequently, our company law is both governed by the Companies Act as well as principles of common law.²⁶⁸ In view of the changing economic trends brought about by globalisation, there have been efforts to reform company in Kenya with a view to consolidate and modernise the law relating to the registration and management of companies in Kenya through the drafting of the Companies Bill 2010. However, the Bill is

²⁶⁴ Nairobi Petition No. 407 of 2012 [2013] eKLR. See also *Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort and Another* [2013] eKLR at paragraph 30.

²⁶⁵ John Joseph Ogola, *Company Law* (3rd edn, Nairobi: Focus Publishers Ltd 2010).

²⁶⁶ Davies (n.9).

²⁶⁷ *ibid.*

²⁶⁸ Section 3 (1) (c) of the Judicature Act, Chapter 8, Laws of Kenya provides that English statutes and common law doctrines in force in England on August 12 1897 are of general application in Kenya.

yet to be adopted which means that the existing regulation remains under the Companies Act.

The provisions for incorporation of companies under the Companies Act recognises the company's obligations towards its shareholders only and does not include obligations towards other stakeholders such as the community within which the company operates and the society in general. Hence, there are no direct provisions under the Act that deal with human rights issues. However, the duties of directors of companies in Kenya together with the nature of business carried out by the company to some extent require respect for human rights. The duties of directors are governed under common law and are categorised into fiduciary duty of loyalty and good faith and duties of care and skill. The duty of loyalty and good faith requires that directors exercise their powers in the best interests of the company.²⁶⁹ This means that all decisions taken on behalf of the company must be taken solely for the benefit of the company and not with a view to seeking a collateral advantage for directors. Accordingly, directors can make decisions which promote the respect of human rights with the aim of benefiting of the company. It is also most likely that directors will seek to make decisions that protect the company's image and hence would avoid violating human rights which would adversely affect the company's reputation thus affecting its profitability as well. However, this duty is subjective since the decision on what is in the best interest of the company is left to the directors to decide as there are no guiding principles which the directors should take into account when making decisions.

²⁶⁹ See the case of *Re Smith & Fawcett Ltd* [1942] Ch.304.

The Companies Bill 2010 has proposed some guidelines which should be used by directors when making decisions which will promote the success of the company for the benefits of its members. These include having regard to the long term consequences of the decisions, the interests of the employees of the company, the need to foster relations with supplier customers and others, the impact of the company's activities to the community and the environment, the need to have high standards of business conduct and the need to act fairly within the members of the company.²⁷⁰ The inclusion of the above principles in the Bill is one way of ensuring that corporations respect human rights as they will be obliged to take into consideration the interests of other constituents of the corporations other than shareholders. The adoption of the Bill will therefore go a long way in promoting the respect for human rights in corporations through corporate governance mechanisms.

Publicly listed companies in Kenya are also regulated by the Capital Markets Act²⁷¹ which establishes the Capital Markets Authority which is responsible for the licencing and regulation of corporations listed in the Nairobi Stock Exchange. The Guidelines on Corporate Governance Practices by Publicly Listed Companies in Kenya issued under the Act²⁷² recognises the role of stakeholders of the corporation. It defines corporate governance as “*the process and structure used to direct and manage business affairs of the company towards enhancing prosperity and corporate accounting with the ultimate objective of realizing shareholders long-term value while taking into account the interest of other stakeholders*”.²⁷³ It provides that the board of directors of corporations should in

²⁷⁰ Section 104(1) of the Companies Bill, 2010.

²⁷¹ Cap 485A of the Laws of Kenya.

²⁷² Gazette Notice No. 3362

²⁷³ Section 1.2 of the Guidelines.

their decision making processes take into account the interests of their stakeholders. By this recognition, the guidelines encourage for the respect of the rights and interests of stakeholders of corporations who include employees, suppliers, consumers and the society at large. The interests of the corporation's stakeholders include their human rights issues and therefore in essence, the guidelines can be used as a tool to enforce the respect for human rights by publicly listed companies. However, this has not been the case largely because the guidelines are not legally binding and their implementation adopts the 'comply or explain' approach which gives corporations the choice to either comply with the provisions of the guidelines and where they do not, to explain the reasons for non-compliance.²⁷⁴ In other words, since the guidelines are not mandatory in nature, they cannot be effectively enforced.

2.5.3 Corporate Human Rights Accountability Framework in Kenya

Protection of human rights is enshrined in the Constitution under the Bill of Rights.²⁷⁵ The protection of human rights is also provided for under statutes dealing with the protection of workers and employees, consumers and the environment. The Bill of Rights under the 2010 Constitution is more comprehensive than the one in the previous constitution. In addition to civil and political rights it also includes social, economic and cultural rights. The inclusion of these rights is in line with the internationally accepted standards of human rights.

²⁷⁴ Gakeri (n.43) 104.

²⁷⁵ Chapter Four of the Constitution.

The Constitution provides that the Bill of Rights “*applies to all law and binds all State organs and all persons*”.²⁷⁶ The import of this is that all corporations in Kenya, public or private, are bound by the Bill of Rights and have a duty to comply with all its provisions. This position was upheld in the case of *Rose Wangui Mambo and 2 Others v Limuru Country Club and 17 Others*²⁷⁷ where the Court stated, inter alia, “*It cannot be safe, in a progressive democratic society, to arrive at a finding that allows private entities to hide behind the cloak of ‘privacy’ to escape constitutional accountability.*” This will definitely have an impact on the way business is conducted in the country as corporations are now required to take into account human rights considerations in their activities and decision making processes.

Although, as noted above, the Constitution requires corporations to respect and protect to all the rights included in the Bill of Rights, we are cognisant of the fact that there are human rights issues which have direct and greatest impact on corporations. These include employment and labour relations, consumer rights and product safety, access to land and natural resources and environmental protection. The Constitution has provided for protection of the rights relating to these issues as will be outlined below.

2.5.3.1 Human Dignity

Protection of human dignity is one of the national values and principles of good governance articulated in the Constitution. More specifically, Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity respected and protected. In other words, every person has intrinsic worth and should be respected and

²⁷⁶ Article 20 (1)

²⁷⁷ Nairobi Constitutional Petition Number 160 of 2013 [2014] eKLR.

treated in an ethical manner.²⁷⁸ This means that like every other organ of the society is expected to do, corporations should treat persons they interact with such as employees, consumers or customers, suppliers and the community with respect hence ensuring protection of their dignity. They should not engage in actions or activities that violate or injure a person's dignity. In the case of *Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort and Another*²⁷⁹ where the Respondent, a private corporation, had detained the Petitioner on account of an unpaid debt, Justice Majanja held that the Petitioner's right to be accorded respect and her inherent dignity protected had been violated by the Respondent. In the Judge's words, "*It is also an affront to human dignity to detain someone on account of a debt that cannot be enforced against them*".²⁸⁰

Accordingly, corporations should ensure that their actions and activities do not in any way violate the human dignity of the persons they interact with. One of the ways corporations can do this is to enhance the standards of living of their employees, consumers and the community through, for example, by providing reasonable working conditions, adequate housing and sanitation and a safe and healthy working environment to its employees, providing quality goods and services to its consumers and ensuring protection of the environment.

²⁷⁸ Kenya National Commission on Human Rights, *Making the Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations* (Occasional Report, 2011) 110.

²⁷⁹ Nairobi Petition Number 156 of 2011 [2013] eKLR.

²⁸⁰ *ibid* at paragraph 28.

2.5.3.2 Labour Rights

2.5.3.2.1 Equality and Freedom from Discrimination

Article 27 (3) of the Constitution provides that men and women have the right to equal treatment and equal opportunities in political, economic, cultural and social spheres. Further Article 27 (4) and (5) prohibits direct or indirect discrimination against any person on any grounds including race, sex, pregnancy, marital status, health status, ethnic and social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. In the case of *Rose Wangui Mambo and 2 Others v Limuru Country Club and 17 Others* the court held that “*It is thus evident that both under the Constitution of Kenya and international and regional treaties to which Kenya is a party, the principle of equality of the sexes is recognized, and discrimination on any basis prohibited*”.²⁸¹

In addition, the **Employment Act**, which defines the fundamental rights of employees and the basic conditions for employment in Kenya, obligates employers to promote equal opportunity in employment and eliminate discrimination at the workplace.²⁸² Section 5(3) of the Act prohibits direct or indirect discrimination against employees or prospective employees on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental or HIV status. Discrimination is prohibited under the Act in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or such other matters as arising from employment. Additionally, Section 5(4) obligates employers to pay workers equal wages for work of equal value. Accordingly, private sector corporations, being

²⁸¹ Supra (n. 167) paragraph 99.

²⁸² Section 5 of the Employment Act.

employers, are required to ensure equality of opportunity and treatment at the workplace at all times and especially in areas such as recruitment, retention, promotion and remuneration of staff. It is therefore important that private sector corporations audit their operations, procedures and processes to ensure that their actions do not amount to direct or indirect discrimination. Notably however, the Act does not contain all the prohibited grounds of discrimination as provided for under Section 27(4) of the Constitution and hence requires amendment to include the same.

One of the practices that results in discrimination especially against female employees is sexual harassment. For a long period of time, this degrading behaviour had not formally been addressed in the Employment Act. However, following the review of the Employment Act in 2007, sexual harassment is now expressly prohibited and employers are obligated to have a sexual harassment policy which ensures that every employee works in an environment free from sexual harassment.²⁸³ They should also ensure that the workplace is free from any form of sexual harassment which is detrimental to an employee's performance. Admittedly, it is one thing to have a sexual harassment policy in place and another to enforce or comply with the policy. In our view therefore, although the provision in the Employment Act is a commendable step towards reducing and eradicating sexual harassment in the workplace, it is not sufficient to require a sexual harassment policy at the workplace. Much more needs to be done to ensure compliance with the policies that corporations put in place as required under the Act.

²⁸³ Section 6 of the Employment Act.

2.5.3.2.2 Freedom from slavery, servitude and forced labour

Article 30 of the Constitution provides that a person shall not be held in slavery or servitude or be required to perform forced labour. Additionally, Section 4 of the Employment Act prohibits use of forced or compulsory labour. Consequently, corporations should not engage forced labour in order to maximise on their margins. However, despite these provisions, private sector corporations especially in the manufacturing and agribusiness sectors continue to engage workers under terms which can be equated to forced labour. For instance, in the flower industry, workers have been found forced to work for long hours while being denied overtime pay which amounts to exploitation of the workers.²⁸⁴

2.5.3.2.3 Labour relations

Article 41 of the Constitution provides for fair labour practices, fair remuneration which would entail reasonable salaries and wages, reasonable working conditions, and the right to collective bargaining for workers which entails the right to form, join or participate in a trade union as well as the right to go on strike. Employers who include corporations and other business enterprises have the right under Article 41(3) to form, join and participate in an employers' organisation. In addition, the Constitution under Article 43 guarantees every person which includes workers or employees in private sector corporations the right to the highest attainable standard of health which includes the right to health care services, accessible and adequate housing and reasonable standards of sanitation, clean and safe water, social security and education. Although to a large extent the implementation of

²⁸⁴ Kenya Human Rights Commission, *Wilting in Bloom: The Irony of Women Labour Rights in the Cut-flower Sector in Kenya* (KHRC: Nairobi, 2012)

Article 43 is deemed to be the obligation of the state,²⁸⁵ private sector corporations are also responsible to ensure that their workers are provided with adequate housing, sanitation facilities as well as clean and safe water or in the alternative adequate housing allowance to enable them access these facilities and that they have access to health care facilities and services.

The right of employees to fair labour practices and working conditions are also contained in a number of legislative instruments namely, the **Employment Act**²⁸⁶, the **Labour Relations Act**²⁸⁷, the **Labour Institutions Act**²⁸⁸, the **Work Injury Benefits Act**²⁸⁹, the **Occupational Safety and Health Act**²⁹⁰ and the **Public Health Act**²⁹¹. The rights provided for under these statutes include the right to at least one day of rest for every period of seven days of work, annual leave, maternity leave, sick leave, reasonable housing accommodation or payment in lieu thereof, medical attention in the event of an employee becoming sick in the course duty, fair hearing during disciplinary action and conditions of termination of employment, the right of association and collective bargaining and the safety, health and welfare of workers at the workplace.

Unfortunately, as will be evidenced in the subsequent chapter, these rights continue to be violated by private sector corporations. One of the possible reasons for this is the fact that some the provisions protecting the rights of workers are not quite clear exposing them different interpretations. For instance, Employment Act provides that the employer shall

²⁸⁵ See Articles 20 (5) and 21 (2) of the Constitution.

²⁸⁶ Cap 226 of the Laws of Kenya.

²⁸⁷ Cap 233 of the Laws of Kenya.

²⁸⁸ Cap 234 of the Laws of Kenya

²⁸⁹ Cap 236 of the Laws of Kenya.

²⁹⁰ Cap 514 of the Laws of Kenya.

²⁹¹ Cap 242 of the Laws of Kenya.

provide reasonable housing accommodation for the employees or pay such sufficient sum in addition to the salary or wages as to enable the employees obtain reasonable accommodation.²⁹² By using the word ‘reasonable’, the Act has left it to the discretion of the employers to determine what kind of housing accommodation they will provide with the result that in most cases, the accommodation or payment in lieu thereof provided is not always adequate.

2.5.3.2.4 Consumer Rights

Prior to the promulgation of the Constitution in 2010, the rights of consumers had not been exhaustively provided in the Constitution. Moreover, consumer rights were contained in different legislations which made it difficult to enforce the same. However, the Constitution now expressly provides for consumer rights.²⁹³ These include the right to goods and services of reasonable quality, information necessary for consumers to gain full benefit from the goods and services provided, the protection of consumers’ health, safety and economic interests and to compensation for loss or injury arising from defects in goods and services. It is noteworthy that the Constitution provides that these consumer rights apply to goods and services offered by both public and private persons.²⁹⁴ This perhaps is in recognition of the immense role played by the private sector in the provision of goods and services in the country. Accordingly, private sector corporations are bound under the Constitution to respect and protect consumer rights.

In addition to the constitutional protection of consumer rights, there are a number of legislations which seek to protect the rights of the consumers. Key among these is the

²⁹² Section 31 of the Employment Act.

²⁹³ Article 46 of the Constitution

²⁹⁴ Article 46(3) of the Constitution.

newly enacted **Consumer Protection Act**²⁹⁵ which provides for the protection of the consumer and prevents unfair trade practices in consumer transactions. As earlier observed, before the enactment of this Act, consumer protection laws were scattered in various statutes and there was no single statute that expressly and comprehensively dealt with consumer rights. The Consumer Protect Act was therefore a welcome step towards enhancing consumer protection in Kenya. The Act aims at achieving and maintaining a fair, accessible, efficient responsible and sustainable market for the benefit of the consumer, promote fair and ethical business practices and protecting consumer from unconscionable and improper trade practices amongst other objectives.²⁹⁶

Other statutes which deal with different aspects of consumer protection include the **Sale of Goods Act**,²⁹⁷ which provides for implied conditions and warranties which must exist in a sale of goods contract and the **Kenya Anti- Counterfeit Act** of 2008 which prohibits counterfeit and substandard goods. There is also the **Standards Act**²⁹⁸ which establishes the Kenya Bureau of Standards and provides protection against substandard goods and services, the **Public Health Act** which aims at securing and maintaining public health standards, the **Hotels and Restaurants Act**²⁹⁹ which seeks to ensure proper sanitary conditions in hotels and restaurants, the **Pharmacy and Poisons Act**³⁰⁰ which aims at ensuring the safety and quality of pharmaceutical products and services through the **Pharmacy and Poisons Board, the Food Drugs and Chemical Substances Act**³⁰¹ which

²⁹⁵ Act No. 46 of 2012.

²⁹⁶ Section 4 of the Consumer Protection Act.

²⁹⁷ Cap 31 of the Laws of Kenya

²⁹⁸ Cap 496 of the Laws of Kenya.

²⁹⁹ Cap 494 of the Laws of Kenya.

³⁰⁰ Cap 244 of the Laws of Kenya.

³⁰¹ Cap 254 of the Laws of Kenya.

seeks to prevent adulteration of food, drugs and chemical substances, the **Trade Description Act**³⁰² which prohibits false description of goods, services, accommodations and facilities provided in the course of trade, and the **Weights and Measures Act**³⁰³ which provides for standardisation of weights and measures and the **Competition Act** of 2010 which aims to promote and safeguard competition in the national economy and to protect consumers from unfair and misleading market conduct.

Despite the many statutes providing for consumer protection in Kenya, the challenge of effective implementation of the law remains. Weak enforcement of the protection afforded by legislation means that the consumer continues to be exploited. It is therefore imperative that enforcement of these laws is enhanced and that private sector corporations should actively be involved in this by making sure that they do not infringe on consumer rights when providing goods and services. They should ensure that the goods and services they provide to consumers are of good quality and do not cause harm to the consumer. In addition, they should ensure sufficient information is provided to the consumers to enable them make informed choices when selecting the goods and services.³⁰⁴

2.5.3.2.5 Environmental Rights

There exists an irrefutable link between the environment and human right. A clean, healthy and conducive environment is a prerequisite to the enjoyment of human rights. For instance, the damage to the environment can result in climate change which brings drought and famine and hence affecting the enjoyment of the right to life and health. Thus, that

³⁰² Cap 505 of the Laws of Kenya.

³⁰³ Cap 513 of the Laws of Kenya.

³⁰⁴ Kenya National Commission on Human Rights, *Making the Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations* (Occasional Report, 2011) 116.

environmental preservation and conservation enhances the enjoyment of human rights cannot be gainsaid.³⁰⁵

Article 42 of the Constitution guarantees the right to a clean and healthy environment which includes the preservation and conservation of the environment not only for the present generation but also for future generations. Consequently, corporations have the obligation under the Constitution to promote the right to a clean and healthy environment, ensure public health and safety standards, protect natural resources and observe the principle of sustainable development.³⁰⁶ Any person whose right to a clean and healthy environment is or is likely to be denied, violated, infringed or threatened may apply to court for redress.³⁰⁷

The **Environmental Management and Co-ordination Act**,³⁰⁸ provides a framework for the management and conservation of the environment. It prohibits acts or activities that may be injurious and detrimental to the environment. A key provision that affects private sector corporations is the requirement for an Environmental Impact Assessment to be conducted and a report provided where any proposed activities are likely to affect the environment.³⁰⁹ It is noteworthy that under this Act, the management of corporations which includes its directors would be held responsible for violations of the Act by the corporation and hence cannot invoke the legal personality doctrine of the corporation as a

³⁰⁵ Kenya National Commission on Human Rights, *Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi* (KNCHR: 2006) 114.

³⁰⁶ Article 69 (2) of the Constitution.

³⁰⁷ Article 70 of the Constitution.

³⁰⁸ Chapter 387 of the Laws of Kenya.

³⁰⁹ Part VI of the Environmental Management and Co-ordination Act.

defence.³¹⁰The management of corporations are therefore required to carry out due diligence to ensure that the corporations' activities are compliant with the provisions of the Act. Additionally, section 19 of the **Physical Planning Act**,³¹¹ allows members of the public to raise objections to any developments or construction works that are likely to interfere with their right to a clean and healthy environment. This allows the community to participate and have a say when it comes to the protection of the environment.

2.5.3.2.6 Land use rights

Land as a primary factor of social production and reproduction forms an essential element of the discourse on human rights.³¹² Agriculture and other related economic activities which are dependent on land form the backbone of Kenya's and other developing countries' economies.³¹³ Consequently, proper land use and management is the key towards economic growth and poverty reduction in developing countries. In view of this, access to land is recognised as a fundamental human right.

The Constitution provides for the protection of the right of every person to acquire and own property of any description and in any part of Kenya.³¹⁴ This provides an enabling framework for land to be utilised as primary factor of production. Without the guaranteed right to own property, it would be difficult to develop and invest in land as most private sector corporations and individuals have done for fear of loss of their investments. This

³¹⁰ See Section 145 of the Environmental Management and Co-ordination Act.

³¹¹ Cap 286 of the Laws of Kenya.

³¹² Kenya National Commission on Human Rights, *Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi* (KNCHR: 2006) 54.

³¹³ Agriculture is one of the sectors prioritised in Kenya's Vision 2030 toward raising the country's GDP and improving the economy.

³¹⁴ Article 40 of the Constitution. This right is however subject to the provisions of Article 65 which restricts the tenure of ownership of land for non-citizens.

constitutional guarantee of property ownership rights attracts both local and foreign investments in the country and contributes towards the growth of the economy.

In the same breath, however, the right of ownership of property can be misappropriated when individuals or communities are deprived of their ancestral or communal land in the name of economic development. This has particularly been witnessed in areas where private sector corporations have without adequate compensation acquired land for their operations from the government and prohibited access and use of the land to the community leaving of the original land owners as squatters and without a livelihood.³¹⁵ To prevent against this, the Constitution provides protection against deprivation of property unless it is for public purposes and unless adequate compensation is made not only to the owner of the property but also to occupants in good faith of the land.³¹⁶ This means that private corporations have to ensure that they do not encroach in any way into the land rights of the communities within which they operate and when they acquire land for their operations, this is done in accordance to the law and adequate compensation is made to the land owners.

2.6 Conclusion

Private sector corporations are required to respect human rights recognised under both international law and the national law of the countries within which they operate. Therefore, although the international human rights framework does not yet provide for binding legal obligations with respect to corporate human rights accountability, the Constitution by extending human rights obligations to corporations has provided a

³¹⁵ Kenya National Commission on Human Rights, *Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi* (KNCHR: 2006) 60.

³¹⁶ Article 40 (3) and (4) of the Constitution.

mechanism to hold corporations accountable for human rights violations in Kenya. This has also buttressed the various legislative instruments which already contained human rights obligations for corporations. However, despite this binding and enforceable corporate human rights accountability framework, the obligation of corporations to respect human rights in Kenya is yet to be fulfilled to the acceptable standards. This is because human rights violations by corporations continue to be reported and documented in various parts of the country and this forms the subject matter of the subsequent chapter.

CHAPTER THREE

AN OVERVIEW OF HUMAN RIGHTS VIOLATIONS BY PRIVATE SECTOR CORPORATIONS IN KENYA

3.1 Introduction

As previously observed, private sector corporations play a major role in domestic as well as international economic and social orders. Globalisation has provided immense opportunities for corporations to trade both in the domestic and international arena. With greater opportunities and power of corporations comes greater potential for corporations to influence and affect the society either positively or negatively. Promotion and protection of human rights is one of the areas whereby corporations have an impact in the society.

For a long time, the subjects of business and human rights have been regarded as very separate issues with no direct linkage. The obligations of human rights have been seen as falling within the realm of the state and not of business. This perception has perhaps been due to the greater focus placed on civil and political rights as opposed to economic, social and cultural rights and hence perpetuating the belief that human rights relate only to civil and political rights which are perceived to be the preserve of the state.³¹⁷ Moreover, as has been noted in the previous chapter, a number of the internationally recognised human rights instruments recognise States as parties and hence even though requiring some action from non-state actors, primarily bind the States as the primary duty holders under the

³¹⁷ Klaus M. Leisinger, Business and Human Rights in The United Nations Global Compact and the Office of the High Commissioner of Human Rights, *Embedding Human Rights Into Business Practice* (Joint Publication of the UN Global Compact and OHCHR)51.

instruments.³¹⁸ Consequently, business managers in corporations have not viewed themselves as duty bound to ensure that their corporations protect human rights.

Increasingly, however, it has become evident that whilst States have the primary responsibility to protect and safeguard human rights, corporations also have an obligation to ensure that their activities do not violate human rights.³¹⁹ Accordingly, the question is not whether corporations should bear responsibility for protection of human rights but rather to what extent should corporations be held to account for human rights. As Kiarie Mwaura correctly puts it, “... *it is not questionable whether corporations can bear human rights obligations, but what remains controversial is... the extent to which they should respect and protect human rights violations given that states also have similar responsibilities.*”³²⁰ A right created in favour of one person gives rise to a corresponding duty for someone else. Human rights give rise to four levels of duties, namely, to respect, protect, promote and fulfil.³²¹ To respect human rights essentially means not to infringe on the rights of others and constitutes a passive or negative duty on the duty bearer.³²² On the other hand, to protect, promote and fulfil human rights constitutes an active and positive duty which entails ensuring that the human rights are not infringed and further taking the necessary positive measures that ensure that the rights are actually realised. States as primary human rights duty holders bear both the positive and negative obligations to

³¹⁸ For example, the ICCPR and the ICESCR bind the state parties to the covenants.

³¹⁹ Lucy Amis, Peter Brew and Caroline Ersmarker, “Human Rights: It is Your Business: The Case for Corporate Engagement” (International Business Leaders Forum, 2005)

³²⁰ Mwaura (n. 47) 5.

³²¹ Danwood Mzikenge Chirwa, “Non-State Actors’ Responsibility for Socio-economic Rights: The Nature of their Obligations under the South African Constitution (2002) 3(3) ESR Review.

³²² John Ruggie, “Protect, Respect and Remedy: A Framework for Business and Human Rights”, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc A/HRC/8/5 (7 April 2008) paragraph 24.

respect, protect, promote and fulfil human rights. For example, both international and domestic human rights standards stipulate that individuals have the right to free speech or freedom of expression. This means that the State in addition to not infringing on the individual's freedom of expression it should also enact laws prohibiting others in the society from infringing on the right. Hence, it has both a negative as well as a positive obligation.

For corporations, human rights duties are largely framed in negative terms and their responsibilities entail 'doing no harm' as opposed to taking positive measures towards the realisation of human rights.³²³ However, it is not necessarily the case that the human rights duties for corporations only constitute a passive responsibility. To the contrary, to respect human rights also involves both negative and positive requirements.³²⁴ Although corporations have the responsibility to respect all human rights, there are human rights standards which directly affect business and are thus directly pertinent to corporations.³²⁵ These standards include the principles and rights that directly affect the corporation's employees and workers such as labour rights, health and safety standards, principles that affect the community to which the corporation provides goods and services such as consumer rights and protection and rights which affect the community within which the corporation operates such as, land use rights and environmental rights.³²⁶ In these pertinent

³²³ *ibid.*

³²⁴ Justine Nolan and Luke Taylor, "Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?" (2009) 87 (2) *Journal of Business Ethics* 433-451, 443.

³²⁵ United Nations (n. 21) xv.

³²⁶ See Kenya National Commission on Human Rights, *Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi* (KNCHR: 2006) in which the human rights investigated related majorly to labour rights, land use rights and environmental rights; Kenya National Commission on Human Rights, *Making the Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations* (Occasional Report, 2011)

areas, corporations have both negative and positive obligations in relation to human rights protection. For instance, corporations are expected to provide a healthy and safety environment for its employees. This includes providing them with the necessary protective gear where necessary to ensure that they are not injured in the course of their duties. Hence, corporations in such instances are expected not just to be passive or ‘do no harm’ but to take positive measures that ensure that human rights are protected. It is however important to note that the corporations responsibility do not replace or take away the obligations of the State to protect human rights. Rather, corporate human rights responsibilities should supplement the obligations of the State.³²⁷

However, as noted above, corporations have not only failed to respect human rights, their minimum responsibility, but they have been involved in violations of human rights. Private sector corporations, large and small, all over the world are being found guilty of violating human rights.³²⁸ Kenya is no exception and reports continue to be published of violation of human rights by private sector corporations in the country. This chapter will examine these human rights violations perpetrated by private sector corporations and the effect of these violations.

3.2 Human Rights Abuses by Private Sector Corporations in Kenya

Corporations contribute positively towards human development by, inter alia, providing employment, supplying of goods and services to the community, being the consumer of

which categorises the rights in the bill of rights that have the greatest impact on business operations as those dealing with employment and labour relations, consumer rights and product safety and environmental safety.

³²⁷ Nolan and Taylor (n. 366) 444.

³²⁸ Amis, Brew and Ersmarker (n. 360).

raw materials and products.³²⁹ In addition, corporate initiatives which seek to improve the lives of the communities within which corporations operate such building of educational and social infrastructure promote human rights. In Kenya, companies such as Co-operative Bank of Kenya Limited and Equity Bank Limited, for example, have provided education scholarships to needy students in the country.³³⁰ This contributes towards the realisation of the right to education as provided for under the Constitution.³³¹

However, corporate activities can also undermine human rights through activities which lead to environmental degradation, engaging in forced and child labour, engaging in discrimination practices and poor working conditions for the employees.³³² Investigations on corporate conduct conducted in Kenya have revealed human rights abuse and violations across many business sectors such as the clothing, manufacturing, agricultural and mining sectors.³³³ Various inquiries have been undertaken by government agencies as well as the civil society which reveal numerous corporate activities which violate human rights largely in the cut-flower sector, the Export Processing Zones (EPZs), the tea, tobacco and pineapple plantations in Kericho, Thika and Athi River among other sectors of our economy.

³²⁹ Kenya National Commission on Human Rights (KNCHR), *Making the Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations* (Occasional Report 103, 2011).

³³⁰ See <http://co-opbank.co.ke/images/PDFs/coopbank%20increases%20education%20scholarships.pdf> and <http://equitygroupfoundation.com/> (accessed 27 January 2014).

³³¹ Article 43(1)(f) of the Constitution of Kenya, 2010.

³³² Mwaura (n.47) 1.

³³³ See for example: The Kenya Human Rights Commission, *A Comparative Study of the Tea Sector in Kenya: A Case Study of Large Scale Tea Estates* (Nairobi: Kenya Human Rights Commission, 2008) and Kenya National Commission on Human Rights, *The Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi* (2006).

In 2002, the Kenya Human Rights Commission (KHRC), a non-governmental organisation, released a report which lay out the extent of violations of human rights of workers in Del Monte Kenya Limited and the struggle to expose these violations.³³⁴ Among the human rights violations being carried out by the Del Monte Company against its employees and the community within which it operated included displacement of people from their land, unsafe use of pesticides which had adverse effect on the employees, exploitative wages, poor working and living conditions, poor safety and health measures at work, discrimination practices and sexual harassment. The Del Monte case brought into sharp focus the corporate human rights impact in Kenya and the violations perpetrated by private corporations.

In 2005, the Kenya National Commission on Human Rights (KNCHR) which is established under the Kenya National Commission on Human Rights Act, 2002, undertook a public inquiry into allegations of human rights violations resulting from the activities of salt manufacturing companies in Magarini Division of Malindi District.³³⁵ This was as a result of complaints lodged with the KNCHR by the community of Magarini to the effect that the salt manufacturing companies in the area were committing serious violations of human rights against the community. These violations ranged from violations of workers' rights, eviction or displacement of the community from their land, health complications affecting the residents in the community resulting from salt manufacturing and environmental degradation. The salt manufacturing companies investigated in Magarini

³³⁴ Kenya Human Rights Commission, *Exposing the Soft Belly of the Multinational Beast: The Struggle for Workers' Rights at Del Monte Kenya* (KHRC: Nairobi, 2002).

³³⁵ Kenya National Commission on Human Rights, *Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi* (KNCHR: 2006)

were Krystaline Salt Company, KEMU Salt Packers Production Limited, Kurawa Industries Limited, Malindi Salt Works, KENSALT Limited, Mombasa Salt Works Limited.

In 2008, KHRC conducted a study into labour issues in the tea sector in Kericho. The study which was carried out in two large scale tea estates, Unilever Tea Kenya Limited and James Finlay (Kenya) Limited, revealed a number of human rights violations which the workers in the two companies experienced in their place of work.³³⁶ These violations included discrimination especially against female employees who were forced to undergo medical examinations including pregnancy tests and if found pregnant were declared unfit for employment, rampant sexual harassment of female workers, casualization of labour, poor working conditions, lack of access to water and decent living conditions for the companies' employees.³³⁷

In 2012, the KHRC carried out a study on the enforcement of labour laws in the cut-flower sector. The study was conducted at flower farms in Naivasha, Athi River and Thika.³³⁸ Although KHRC noted an improvement by the companies' policies with a view to complying with labour laws and human rights standards, a number of human rights violations still persisted. These included sexual harassment of female workers, discrimination practices on grounds of pregnancy, unpaid maternity leave, poor working conditions and arbitrary dismissal from employment practices.³³⁹

³³⁶ Kenya Human Rights Commission *A Comparative Study of the Tea Sector in Kenya: A Case Study of Large Scale Tea Estates* (KHRC: Nairobi, 2008).

³³⁷ *ibid.*

³³⁸ Kenya Human Rights Commission (n. 284)

³³⁹ *ibid.*

As recently as December 2013, the Athi River Mining Company Limited was accused of causing environmental degradation in Kilifi County through pollution by the Human Rights Agenda (Huria).³⁴⁰ The report by Huria stated that the activities of the company had adverse environmental and health effects on the community neighbouring the company.

3.2.1 Violation of Labour Rights

3.2.1.1 Exploitative Wages and Casualisation of Labour

Article 23(1) of the UDHR guarantees the right to work for everyone by stipulating that “*everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.*” The Constitution provides for the right of every person to fair labour practices which include the right to fair remuneration and reasonable working conditions.³⁴¹ Every worker in Kenya is therefore entitled to fair remuneration which constitutes equal pay for equal work and to also be given good working conditions to enhance productivity which in turn results in the raising of their standards of living thus promoting their human development.

However, a number of corporations who are employers have not respected this right of their employees. According to the KHRC report, workers at Del Monte Kenya Limited were not given equal pay for equal work as the company was more focused on maximizing on its profit margin and hence workers would be employed “*according to production requirements*”.³⁴² Employees’ entry point at the company would be either as permanent employees, seasonal employees or casual employees. Although the permanent employees

³⁴⁰ The Standard Digital, “Firm Defended against Pollution Claims” (December 13 2013) available at <http://www.standardmedia.co.ke/> (accessed 4 March 2014).

³⁴¹ Article 41 of the Constitution.

³⁴² KHRC (n.334) 15.

had employment contracts, were entitled to sick pay, holidays as well as severance pay, the seasonal and casual employees though doing the same work were not entitled to the same benefits. In addition, workers employed on seasonal and casual basis were assigned permanent posts and hence not given the pay and benefits commensurate to the work done and the position they held. The seasonal employees would have employment contracts but earned far much less than the permanent employees and would not be entitled to severance pay. The casual employees were the most exploited by the company since they had no contract of employment, were engaged by the company for a day or a week at a time and did not have any benefits. The report indicates that the seasonal and casual employees of the company constituted 68% of the workers at the company. Hence the company sought to reduce their costs by employing the minimum possible permanent employees. In addition, no member of the three categories of workers received sufficient wages to sustain their basic necessities.

The casualization of labour was also found to be one of the major issues in the salt manufacturing companies in Magarini. The Kenya National Human Rights Commission (KNHRC) report observes that salt harvesting in Magarini was not done on a continuous basis but on a seasonal basis. For this reason, the salt manufacturing companies in Magarini opted to employ the minimum number of workers possible on contract basis. This meant that most of the workers in the companies were on casual basis. These workers were exploited by the companies as they were paid extremely low wages for their work and did not enjoy the benefits that would accrue to permanent employees such as annual leave, medical cover and severance pay. As a result, the health of the worker would be adversely

affected due to lack of access to medical care when they were unwell. In addition, some workers were engaged by the companies to carry out duties which were not seasonal in nature and yet engaged as casual workers and not permanent or contracted worker with some workers having worked for the companies for over 10 years on a casual basis.³⁴³ This meant that these workers despite having worked for the companies for long periods of time could be terminated at any time and without any severance payment for the years worked. This was largely done in order to reduce the costs for the companies and in turn to ensure that the profit margins were maximised. Such engagements are contrary to the labour laws in the country.

This was also the trend in the companies in the tea sector in Kericho. Majority of the permanent employees in the tea factories in Kericho were not issued with appointment letters in contravention of the Employment Act.³⁴⁴ This is despite most of them having worked for more than three years in tea plantations. At Unilever Tea Kenya Limited, there were casual workers who were engaged for periods not exceeding six months at any one time but had worked for periods as long as six years on casual basis. In addition, it had become a company policy not to employ permanent workers.³⁴⁵ This was mainly done in order to cut the costs for the companies.

In the cut-flower farms, it was found that the companies would avoid payment of gratuity to workers by summarily dismissing them from work. There were high cases reported of

³⁴³ Kenya National Commission on Human Rights, *Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi* (KNCHR: 2006) 87.

³⁴⁴ The Act, (Cap 226) required that a written contract of service should be issued to employees engaged for more than six months. This provision has since been revised to require a contract for workers engaged for more than three months.

³⁴⁵ Sanne van der Waal, "Certified Unilever Tea: Small Cup, Big Difference?" (SOMO: Amsterdam, 2011)

unfair dismissal from employment and lack of fair disciplinary hearings being granted to workers.³⁴⁶ Although some of the flower companies had disciplinary policies and procedures in place, the same were not effective or helpful to the employees. In some of the flower companies, workers were employed for more than three years as casual labourers without any benefits such as annual leave. Some companies did not provide their workers with service contracts as required under the Employment Act while others did not pay their workers for overtime worked.³⁴⁷

By denying workers the right to fair remuneration and good working conditions, private sector corporations infringe on the workers' individual rights and negatively affect their livelihood and human development. Casualization of labour results in the denying of workers of proper terms of service which include job security which contributes to the realisation of the right to human dignity, access to medical care for them and their families as well as other benefits such as payment of pension which contributes towards the right to social security provided for under the Constitution.³⁴⁸

3.2.1.2 Poor Working and Living Conditions for Employees

Good working and living conditions for employees contributes towards the maximisation of the employees' productivity which is not only to the benefit of the employing corporation but also to the society as a whole which benefits from the goods and services provided by the corporation. Provision of good working and living conditions for employees also contributes to enhancing their dignity as human beings.

³⁴⁶ KHRC (n.336) 54.

³⁴⁷ KHRC (n .336) 59.

³⁴⁸ See Article 43 (1) (a) and (e) which provide for the right of every person to health care services and to social security.

However, investigations into working conditions of employees in private sector corporations reveal the violation of the right to good working and living conditions. Workers employed at the salt manufacturing companies in Magarini, worked under poor conditions. The workers who harvested salt and those who processed the salt in the factories were not provided with protective gear, work attire and equipment as required under the law. They were not provided with boots, helmets, gloves or overcoats. This meant that their health and even lives were at risk in the event of injuries being sustained in the course of their work. They were also not provided with working tools and equipment that was necessary for the harvesting of salt and were instead required to buy their own tools such as hoes and basis. In addition, the vehicles provided for the transportation of the workers to and from the workplace were not insured hence putting their lives and health at risk in the event of an accident. In addition, majority of the workers were also not provided with housing and most of them lived in shanties. Those provided with housing were not given adequate housing facilities.

In Kericho, although the tea companies provided housing for their workers, the housing facilities were inadequate. The workers are forced to share houses occasioning lack of privacy for them. During the high tea production season, more casual labourers would be employed by the tea companies which resulted in shortage of housing since the companies did not expand their housing facilities. According to the KHRC report, a two roomed house would be allocated to up to six workers.³⁴⁹ In addition, the management of the tea

³⁴⁹ Kenya Human Rights Commission (n.336) 10.

companies did not ensure proper maintenance of the houses provided to their workers. The houses were in deplorable conditions with some leaking and not having been repainted for a long period of time.

3.2.1.3 Poor Safety and Health Conditions for Employees

Safety at the workplace and the health of employees should be an important concern for private sector corporations. This is because the well-being of employees translates into higher productivity to the benefit of the corporations. In the converse, when the well-being of employees and workers in a corporation is not safeguarded, the corporation is adversely affected. Health, protection and safety of workers at the workplace is key to enhancing the livelihood of workers as well as protecting their human dignity.

Lack of protecting the health and safety of workers is a violation of their human rights. This was the case in the corporations investigated. The workers in the salt manufacturing companies worked in dangerous, hazardous and inhuman conditions. Some salt manufacturing companies were found to be operating without a certificate of registration from the Occupational Health and Safety Department. This meant that the working environment in these companies had not been inspected by the officials from the Ministry of Labour to ensure that they met the required standards according to the law. Lack of proper maintenance of machines in the factories of salt manufacturing companies in Magarini led to high number of accident cases in the factories to the detriment of the workers. The workers were on a daily basis at risk of injury due to malfunctioning machinery in the factories. This was aggravated by the fact that the companies were in most cases reluctant to provide first aid facilities and equipment as required under the

repealed Factories Act. In addition, there was delay in compensation and sometimes non-payment by the companies for the injuries sustained by the workers at the workplace. The companies did not also provide proper sanitation facilities for the workers such as toilet and washing facilities and thereby exposing the workers to risky health conditions.

In the cut-flower farms, companies were found to violate the health and safety rights of their employees. There were cases of spraying of agrochemicals in green houses while the workers were still working inside the green houses and thereby exposing them to the chemicals which were detrimental to their health. There was also lack of sufficient break periods given to the workers and in some farms the companies refused to give workers rest days during the peak flower season contrary to the Employment Act.³⁵⁰ In addition, some companies though providing housing for the workers, the houses were not adequate since they comprised of small rooms which the workers were forced to share. Moreover, the houses were close to the green houses and therefore the workers were affected by the chemicals from the said green houses.

3.2.1.4 Maternity Leave and Pay

Maternity leave and pay is important for female employees and workers and contributes to the realisation of their right to human dignity as well as the right to the highest attainable standard of health provided for in the Constitution. According female employees maternity leave ensures that they are given adequate time to allow for full recovery from delivery and also take care of their new born babies in the crucial foundational months.³⁵¹

³⁵⁰ KHRC (n.284) 63.

³⁵¹ KHRC (n.284) 18.

The rights of women in the cut-flower farms were violated by private sector corporations by not being accorded the full pay during maternity leave as required by the Employment Act.³⁵² Although the KHRC report records improvement witnessed by female workers in accessing the three months maternity leave as provided under the law, there are still cases where the women who take the maternity leave are not paid in full as required under the Employment Act. In other cases, the flower farms require the women to take part of the maternity leave before confinement and hence reducing the post delivery period of leave.

3.2.1.5 Violation of the right to join trade unions

A number of corporations investigated engaged in practices that prohibited or discouraged their workers from joining trade unions and pressing for their rights. The Del Monte Kenya Limited engaged in anti-trade union practices such as the sacking of workers who organised in trade unions and engaged in strikes to protest against mistreatment of workers in the company.³⁵³ In Magarini, the salt manufacturing companies discouraged and suppressed the workers' attempts to join trade unions resulting in majority of workers not being unionised. In addition, there were cases of workers whose services were terminated without them being given the specific reasons for termination and having not been accorded an opportunity to defend themselves or challenge the termination.³⁵⁴ In the cut-flower industry, joining a union was a risk for workers since they had no much redress available if they were victimised. KHRC's report indicates that "*cases of over sixty workers from different companies who had been dismissed for joining the union...*"³⁵⁵

³⁵² KHRC (n.284) 45.

³⁵³ KHRC (n.334) 17.

³⁵⁴ KNHRC (n.343).

³⁵⁵ KHRC (n.284) 31.

The right of workers to associate and join trade unions of their choice is important to protect workers from being exploited by their employers and also to ensure that the workers' freedom of choice is not violated. By refusing or discouraging workers to join trade unions, private sector corporations infringe on the right of choice of workers and impede upon the protection of workers from violations by their employers.

3.2.1.6 Discrimination Practices

Equality of everyone under the law is guaranteed under the Constitution. The Constitution recognises the right to equal protection and equal benefit of the law for every person which includes the right to full enjoyment of rights and fundamental freedoms without any discrimination. This is significant for workers, since for the first time, they can look to the bill of rights for enjoyment of their rights and freedoms. The outlawing of discrimination complements the Employment Act in providing for its elimination in all workplaces.

One of the forms of discrimination against female workers in the workplace is the requirement for a pregnancy test. Pre-employment medical tests are conducted by most companies in Kenya. For women, some of the tests undertaken by companies include pregnancy tests whose results determines whether one is employed or not. Some flower companies have been reported to require pregnancy tests every time female employees renewed their contracts.³⁵⁶ Such a requirement clearly implies that the status of a female employee with regard to pregnancy was a factor determining whether their contracts would be renewed or not and hence a basis for discrimination. In the tea companies, female employees were subject to pregnancy tests and *“If the tests revealed that the woman was*

³⁵⁶ KHRC (n.284) 45.

*not pregnant her form would be stamped 'fit' however if she was pregnant the form would not be stamped.*³⁵⁷ This implies that the pregnant woman is not fit for employment. In addition, in instances where female workers got pregnant in the course of employment, they were not assigned lighter duties as would be expected.³⁵⁸

3.2.1.7 Sexual Harassment

In 2002 the International Labour Rights Fund (ILRF) conducted a study on sexual harassment in the workplace in the commercial agriculture and textile manufacturing industries of the Export Processing Zones (EPZs) in Kenya.³⁵⁹ The study showed that sexual harassment of female workers was rampant in the EPZ areas in Kenya. Over 90% of those interviewed had experienced some form of sexual harassment and abuse in the workplace. The women who were sexually harassed were afraid to report the harassment for fear of being victimised and losing their jobs. As a result, the women suffered devastating psychological and physical effects such as depression and trauma. These effects were not only experienced by the women but by their families as well as their communities.³⁶⁰

A joint fact finding mission, conducted by the International Federation of Human Rights (FIDH), the KHRC and the Centre for Research on Multinational Corporations (SOMO) in 2006 to investigate the impact of foreign direct investment and trade liberalisation on human rights in Kenya, found that indeed sexual harassment was prevalent within the

³⁵⁷ KHRC (n. 336) 14.

³⁵⁸ Sanne van der Waal (n.345) 16.

³⁵⁹ International Labour Rights Fund, *Violence Against Women in the Workplace in Kenya: Assessment of Workplace Sexual Harassment in the Commercial Agriculture and Textile Manufacturing Sectors in Kenya* (ILRF, 2002).

³⁶⁰ *ibid.*

companies operating in the EPZ in Kenya.³⁶¹ Sexual harassment has also been reported as being prevalent in the tea factories in Kericho. According to the KHRC report, “*sexual harassment was one of the violations that was predominantly highlighted by all the workers interviewed from both companies.*”³⁶² The supervisors, who were predominantly men, would ask the female employees for sexual favours and if the employees declined they would be victimised as the supervisor would look for any excuse to have them fired. The aggrieved women in most cases did not have adequate form of redress since when they reported the matter to the managers no action would be taken against the supervisors. It was also reported that the members of the allocation of houses committees would often ask for sexual favours from the female employees in exchange for allocation of houses. In the cut-flower industry, cases of sexual harassments are still being reported. This has been particularly witnessed in flower farms in Thika which are located in deep coffee plantations. The lack of housing and transport facilities provided to workers by the flower companies means that they have to walk for long distances and hence providing opportunities for sexual harassment of the female workers.

3.2.2 Violation of the right to privacy

The respect of the privacy of an individual is essential in the safeguarding of the individual’s human dignity. The Constitution recognises this by providing for the right of privacy.³⁶³ The right of privacy entails the protection of the person as well as the person’s home and property from arbitrary searches and seizures. It also comprises of the protection

³⁶¹ International Federation for Human Rights and Kenya Human Rights Commission, *Economic Development or Human Rights: Assessing the Impact of Kenya’s Trade and Investment Policies and Agreements on Human Rights* (FIDH:KHRC, 2008).

³⁶² Kenya Human Rights Commission (n.336) 10.

³⁶³ Article 31 of the Constitution.

of an individual's private affairs and information as well as communication. Thus, a person's information relating to their private affairs such as family information as well as private communication should not be unnecessarily revealed or infringed.³⁶⁴ Private sector corporations should therefore not infringe on the privacy of their workers or coerce their workers to reveal their private information without a just cause.

The requirement for medical examination and tests for joining and existing workers by corporate employers is a violation of the right to privacy of the workers. In the tea factories in Kericho, KHRC found that it was a mandatory requirement for the workers to undergo a medical test before employment. The procedure when undergoing the tests would include having a physical examination hence the requirement to remove all clothing and for female employees to undertake a pregnancy test. The tests undertaken or the reasons thereof were not explained to the employees. This violated the privacy of the employees. In some companies within the cut-flower sector, it was a requirement for a pre-employment mandatory medical testing to be conducted for every employee and in addition these tests were conducted on an annual basis before the renewal of contracts of the employees who are employed on a yearly basis.³⁶⁵

This position was upheld in a recent case where a private sector corporation, Spin Knit Limited was found to have violated the claimant's (a former employee) right to privacy by forcing him to undertake a medical exam.³⁶⁶ The Court ruled that an employer should never force an employee to undertake medical examination or present medical reports

³⁶⁴ Article 31 (b) and (c) of the Constitution.

³⁶⁵ Kenya Human Rights Commission (n.284) 45.

³⁶⁶ *AMM vs Spin Knit Limited Industrial* [2013] eKLR available at <http://www.kenyalaw.org> (accessed 12 May 2014).

exposing the employee's status of health which he or she was entitled to hold in their privacy. The Court held that *"It is the court's considered opinion that it is unfair for an employer to intrude into the health status of the employee or prospective employee in a manner that does not justify breaches of the doctor-patient confidentiality."*³⁶⁷ The practice therefore which is undertaken by many companies in Kenya requiring mandatory medical examinations to be undertaken by their employees is a violation of the employees human rights.

3.2.3 Environmental Degradation

As previously observed, the protection of the environment is a key element in the process of safeguarding human rights. This is because human beings depend on the environment in which they live for basic needs such as food, water and shelter. A safe, clean and healthy environment is therefore essential to the enjoyment of other human rights.³⁶⁸ The degradation of the environment undermines the human dignity and well-being and impedes other human rights such as the right to life, health, food, water and sanitation. Private sector corporations can through their activities contribute towards the degradation of the environment.

In Magarini, for example, the activities of the salt manufacturing companies had adverse effects on the environment to the detriment of the community in the area. There were findings of contamination of fresh water sources surrounding the community as well as depletion of the coastal forests and woodlands due to the salt manufacturing companies'

³⁶⁷ ibid paragraph 4.

³⁶⁸ See Office of the High Commissioner on Human Rights Commentary on Human Rights and the Environment available at <http://www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/IEEnvironmentIndex.aspx>.

actions and activities.³⁶⁹ Mangrove trees, coastal forests and woodlands were destroyed to make way for the construction of salt harvesting ponds. The dykes constructed by the companies restricted free flow of water to and from the sea resulting in high salinity in the area and thereby causing harm to the vegetation which was a habitat for different types of fish.

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

3.2.4 Violation of land rights resulting in displacement of people

Land as a primary factor of production is crucial for sustainable development of the society especially developing countries which focus on poverty reduction. Violation of the right to own and use land especially in Kenya impedes on the ability of individuals who rely on land as a factor of production to contribute towards the development of their nation.

This is evidenced in Magarini where deprivation of land of the residents by salt manufacturing companies was a major complaint. The KNHRC found that the residents of Magarini had been deprived of their land resource which was taken over by salt

³⁶⁹ KNHRC (n.343).

manufacturing companies and in most cases had not been adequately compensated.³⁷⁰ The leasing of land in the locality to salt manufacturing companies by the government was done without taking into account the need to have alternative settlements for the community affected. The salt manufacturing companies used the provincial administration and the police to harass and illegally detain members of the Magarini community who had refused to leave their land. As a result, the community in Magarini lost ancestral land and had their properties destroyed during eviction exercises, had no access to land in the area and are therefore unable to use land and thereby deprived of their source of livelihood.

3.2.5 Violation of Consumer Rights

Effective consumer protection is necessary to ensure that the products bought by consumers are safe to use and meet the required performance standards. In addition, it ensures that adequate information should be availed to the consumer to enable them make informed decisions and marketers are prevented from using fraudulent methods to sell their products. As observed in the previous chapter, before 2012, Kenya did not have a specific legislative instrument that governed consumer protection. Provisions relating to consumer protection in different sectors of the economy were scattered in a number of statutes resulting in lack of a “*comprehensive and significant policy direction*” to effectively ensure the protection of the consumers.³⁷¹ This was one of the challenges facing the implementation of consumer protection laws in Kenya.

Consumer exploitation is witnessed in a wide range of sectors in which private sector corporations are major actors. These include the banking and financial sector, the

³⁷⁰ KNHRC (n.343).

³⁷¹ Daniel Asher and Rijit Sengupta, *State of the Kenyan Consumer 2012*, CUTS, Kenya 2012) iv.

information and communication technology (ICT) sector, the energy sector, the health services sector, the agricultural sector and the manufacturing sector. This is attributed largely, as observed earlier, to poor compliance and weak enforcement machinery of consumer protection laws. Unfortunately, consumer protection has not taken prominence in Kenya's foreign policy on bilateral and multilateral relations either. This is exemplified by the fact that Kenya remains a dumping ground for substandard, counterfeit and contraband goods.³⁷²

In the energy sector, consumers are exploited of consumers through constantly increasing prices of fuel which adversely affects the consumers. Although there have been attempts to regulate the sector and control the prices by the government through the Energy Regulatory Authority, more needs to be done to ensure that consumers are not at the mercy of the corporations in the sector. In the health sector, where privately run health facilities continue to increase, the services provided by these private facilities are not always to the expected standards. There have been increasing complaints and reports of negligence in these private health facilities with some cases leading to fatalities.³⁷³ Mistreatment of patients has also been a major complaint in private hospitals in Kenya.³⁷⁴

There have been reported cases of goods which are not fit for the consumers being distributed even to the vulnerable people in the community. The scandal on unimix feed contaminated with aflatoxin and distributed to consumers in Turkana and Mandera is a

³⁷² Stephen Mutoro, "Reflections on Consumer Rights in Kenya" (*Business Today*, 15 March 2012) available at <http://businesstoday.co.ke/news/2012/03/15/reflections-consumer-rights-kenya> (accessed 18 July 2014).

³⁷³ Cyrus Ombati, "IEBC Commissioner Blames Hospital For Wife's Death" (Standard Digital, 12 April 2013) available at http://standardmedia.co.ke/?articleID=2000081307&story_title=IEBC-commissioner-blames-hospital-for-wife%20s-death (accessed 18 July 2014).

³⁷⁴ <http://www.cofek.co.ke/Response%20letter%20of%20Nairobi%20Hospital.pdf> (accessed 18 July 2014).

clear example of this.³⁷⁵ In the telecommunication sector, there have been cases of corporations in the sectors misrepresenting their products in their advertisements, for instance, having promotional offers with attractive rates which lure consumers in the pretext that they are permanent rates.³⁷⁶ In the financial services sector, banks have been accused of having hidden charges in their products and not disclosing them to consumers thereby infringing consumer rights.³⁷⁷ This conduct by private sector that impedes the flow of information in the market through false advertising, deception or overt coercion affects the right of the consumer's ability to choose freely thus infringing on consumers' rights.³⁷⁸

3.3 Conclusion

The results and findings of the above studies clearly demonstrate that private corporations not only have the potential of undermining and abusing human rights but have indeed taken part in the violation of human rights. These violations range from the flouting and abusing labour laws, discrimination practices to environmental degradation. These violations affect not only the individuals against whom the violations are targeted at but also their families and the communities in which they live. The violations of the rights of workers and employees do not create a conducive environment for optimal productivity by the workers. It instead causes high turnover of workers which is detrimental to the

³⁷⁵ *Idy Pembere*, "Understanding Consumer Protection in Kenya" (Think Business, 12 February 2012) available at http://thinkbusinessafrica.biz/site_04/index.php?option=com_k2&view=item&id=31:understanding-consumer-rights-in-kenya&Itemid=160&lang=en (accessed 18 July 2014)

³⁷⁶ *ibid.*

³⁷⁷ FSD Kenya, Consumer Protection Diagnostic Study-Kenya (January 2011).

³⁷⁸ Joseph Kieyah, "Kenyan Consumer has become King." (*Business Daily*, 27 May 2014) available at <http://www.businessdailyafrica.com/Opinion-and-Analysis/Kenyan-consumer-has-become-king/-/539548/2328478/-/item/0/-/acmIwcz/-/index.html> (accessed 18 July 2014).

companies. As a result, the productivity levels targeted by the business are not reached and ultimately this also affects the economy of the country.

The degradation of the environment by corporations, for example in Magarini and Naivasha, has the effect of causing the local community to lose their source of livelihood and hence perpetuating instead of eradicating poverty. Moreover, it results in loss of foreign exchange and the economic gains which derive from tourist attractions such marine parks in Magarini and Lake Naivasha and thereby negatively affecting the economy of the country. In addition, the use of water for irrigation from Lake Naivasha by the flower companies has led to the reduction of water levels at the lake hence affected the availability of fish in the lake which are not only a source of food for the community but also a source of livelihood as well as foreign exchange through tourism.³⁷⁹ Exploitation of the consumer by private sector corporations affects the society in general and is not conducive to the well-being of the citizens of the county. As shown above, some of the practices which do not take into account the rights of the consumers can have far reaching effects thus affecting the right to life and health of the citizenry. These practices also lead to the tarnishing of the corporation's image and reputation thereby having negative long term effects on the corporation itself.

Although some of the companies under study above had corporate policies and procedures which sought to act as guidelines on how to deal with human rights issues and particularly labour issues, most of these policies were found to be ineffective. Moreover, the fact that, human rights violations by business enterprises continue to be reported shows that more

³⁷⁹ International Federation for Human Rights and Kenya Human Rights Commission (n. 361).

needs to be done to ensure effective enforcement of human rights standards within private sector corporations. There is, therefore, need to establish effective mechanisms within the corporate governance structures of private sector corporations to ensure that the activities of corporations are consistent with human rights standards, human rights abuses are prevented and that corporations are held accountable for any violations of these standards.³⁸⁰ This in turn would ensure that the country's private sector continues to grow the economy and the country is able to achieve the economic as well as social growth targets it has set.

³⁸⁰ Steiner, Alston and Goodman (n.48) 1388-1389.

CHAPTER FOUR

THE INCORPORATION OF CORPORATE RESPECT FOR HUMAN RIGHTS IN CORPORATE GOVERNANCE MECHANISMS OF PRIVATE SECTOR CORPORATIONS IN KENYA

4.1 Introduction

Corporate governance mechanisms within private sector corporations play an important role in the development and success of the corporations. Good corporate governance within private sector corporations fosters development in the private sector. With the growth of the private sector comes growth in the country's economy. Corporate governance is thus critical for economic development of a country.

There is no one universally accepted definition of corporate governance. As **Stijn Claessens and Yurtoglu** observe, the definitions of corporate governance vary widely and largely either focus on the behavioural patterns of the corporation or the normative framework governing corporations.³⁸¹ However, corporate governance is widely understood to mean the way companies are controlled and managed.³⁸² Thus, it is a set of principles, systems and processes by which corporations are run. It is concerned with the rights, responsibilities and duties of the participants in a corporation, namely, company's management, board of directors, shareholders and other stakeholders.³⁸³ In other words, corporate governance encompasses the mechanisms within which corporate authority is exercised and controlled for the benefit of all the stakeholders.

³⁸¹ Stijn Claessens and Burcin Yurtoglu, "Corporate Governance and Development – An Update" (Global Corporate Governance Forum: IFC, 2012).

³⁸² Sir Adrian Cadbury defines corporate governance as "the system by which companies are directed and controlled". See Cadbury Committee Report of 1992.

³⁸³ OECD (n.35).

Corporate governance as a concept emerged with the separation of ownership and control within the corporation and hence it largely focussed on mechanisms to enhance accountability of the managers of the firm to the shareholders. The corporation's board of directors were under fiduciary duty to act in the best interests of the corporation. The corporation's best interests were largely translated as being the shareholders' interests with profit maximisation being the primary indicator of success of the corporation. As a result, the shareholders' interests remained supreme.³⁸⁴

However, corporations do not operate in a vacuum. They operate within a given society and rely on the society for its resources such as labour and raw materials. They impact on other constituents such as consumers, employees and the larger community within which the corporations operate. In addition, the society benefits from the goods and services provided by the corporations and hence the development and success of corporations also benefits the society. Consequently, the decisions and activities of corporations have an impact on society and their social influence cannot be overlooked. As such, corporations must ensure that their impact on society is positive and not negative. Additionally, they must consider the interests of their stakeholders in their decision making processes. Good corporate governance must therefore encompass other stakeholders of the corporation. This cannot be done without respecting the rights of the stakeholders of the corporation such as employees, consumers and the community at large. As such, the respect for human rights is an integral component of good corporate governance.

³⁸⁴ Minal Ramnath and Vincent O. Nmehielle, "Interpreting Directors' Fiduciary Duty to Act in the Company's Best Interests Through the Prism of the Bill of Rights: Taking Other Stakeholders into Consideration" (2013) 2 *Speculum Juris* 98-115, 99.

This chapter will begin by discussing the link between corporate governance and human rights. Thereafter it will analyse the corporate governance framework in Kenya and the integration of respect for human rights in the said framework. It will also examine the integration of respect for human rights in South Africa with a view to come up with positive aspects of their corporate governance structure which can be borrowed or adopted in Kenya.

4.2 Corporate Governance and Human Rights.

Good corporate governance is essential for sustainable development, not only for the individual corporation, but also for the economy as a whole. Corporations play a vital role in promoting economic and social development and are increasingly responsible for providing employment, goods and services as well as infrastructure development.³⁸⁵ Good corporate governance is necessary in order to ensure that the corporations are competitive, effective and efficient in their operations.³⁸⁶ This will in turn enhance accountability, transparency and the performance of those entrusted to manage the corporations. Good corporate governance encompasses transparency, accountability, integrity, fairness, responsibility, efficiency and effectiveness.³⁸⁷ Accordingly, corporate governance is concerned with promoting efficient, responsible, transparent and accountable governance of corporations for the benefit of all stakeholders which includes the communities within

³⁸⁵ *ibid.*

³⁸⁶ Gakeri (n.43).

³⁸⁷ International Finance Corporation, Global Corporate Governance Forum, Frequently Asked Questions available at http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Global+Corporate+Governance+Forum/Frequently+Asked+Questions/ (accessed 1 July 2014).

which the corporations operate.³⁸⁸ These basic essentials of corporate governance also form part of the basic tenets for the protection of human rights.³⁸⁹ Thus, the respect and protection of human rights promotes good corporate governance.

Good corporate governance enhances investor protection.³⁹⁰ Whenever outside investors finance a corporation, they require assurance that the corporation will be managed in such a way as to ensure that they get a return on their investment. If the corporation is poorly managed and as a consequence it does not succeed, the investors will have lost their investment. Corporate governance provides a mechanism through which investors can assure themselves that their investment will be secure and be effectively and efficiently managed.³⁹¹ Corporations use outside investors as one way to raise the required capital for their operations. Without outside investors, corporations will be limited to internal financing or bank financing thus making it difficult to raise capital at a reasonable cost.³⁹² With investor confidence, corporations are more likely to attract both local and foreign investment. This will result in greater access to capital through reduced cost of capital hence growth of corporations. Accordingly, this will contribute towards the growth and development of the economy which is critical especially for developing countries. It will contribute towards poverty reduction leading to uplifting of the standards of living of the communities within which the corporations are situate which ultimately results in the promotion of the people's human rights.

³⁸⁸ *ibid.*

³⁸⁹ Mary Robinson, "What Rights can Add to Good Development Practice" in Phillip Alston and Mary Robinson, *Human Rights and Development* (OUP: Oxford, 2005) 38.

³⁹⁰ Ozden Deniz, "The Importance of Corporate Governance for a Well Functioning Financial System: Reforming Corporate Governance in Developing Countries." (2012) 14 *Duq. Bus. L. J.* 219.

³⁹¹ Private Sector Corporate Governance Trust (n. 41) 3.

³⁹² Deniz (n.390) 220.

Corporate governance also involves the management of the relationships of the corporation which is crucial for the success of the corporation. Corporate governance involves the system that governs the relationship between the shareholders, the corporation and its creditors; between financial markets, institutions and the corporation as well as between the corporation, its employees and the society in general.³⁹³ Since corporations operate within the society, their activities have an impact on various stakeholders and thus corporate governance also entails of stakeholder management. Hence, the essence of corporate governance is to enhance trustworthy relations between the corporation and its stakeholders, which is essential for an effective relationship to be maintained between the stakeholders of a corporation.

The corporate governance structure in an organisation “*specifies the distribution of rights and responsibilities among the different participants in the organization – such as the board, managers, shareholders and other stakeholders – and lays down the rules and procedures for decision-making.*”³⁹⁴ It provides a structure for the setting of the objectives of the corporation as well as the means of attaining and monitoring those objectives in a manner that adds value to the corporation as well as benefits the stakeholders of the corporation.³⁹⁵ The objective of a good corporate governance mechanism therefore is to ensure that the corporations’ objectives and goals are met while promoting responsible behaviour by corporations. Good corporate governance entails the balancing the interests of all stakeholders of the corporation – those who can affect and are affected by the

³⁹³ Claessens (n.18) 94.

³⁹⁴ See OECD Glossary of Terms at <http://stats.oecd.org/glossary/detail.asp?ID=6778> (Last accessed 30 June, 2014).

³⁹⁵ OECD (n.35).

corporation.³⁹⁶ Considering and taking into account the interests of stakeholders serves to enhance the long-term value and success of the corporation.³⁹⁷ It therefore follows that corporations should consider the rights and interests of their stakeholders in their operations and their decision making processes. Thus the issue of respecting human rights becomes a corporate governance issue. Human rights issues which are directly pertinent to corporations such as provision of good working conditions for employees by having fair remuneration and non-discriminatory policies, safe working conditions, recognition of trade unions and collective bargaining agreements, issues relating to consumer protection and the respect for the environment are central to good corporate governance.³⁹⁸ Mechanisms to ensure respect for human rights needs to be incorporated in the corporate governance systems of private sector corporations for effective protection of human rights within corporations. By respecting human rights, corporations promote values such as transparency, accountability and professional responsibility thereby enhancing good corporate governance which is essential for the achievement of sustainable socio-economic development.³⁹⁹

³⁹⁶ Addo (n.13) 17.

³⁹⁷ Williams and Conley (n.12) 76.

³⁹⁸ *ibid.*

³⁹⁹ Kenya National Commission on Human Rights, *The Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi* (2006).

4.3 Corporate Governance and Human Rights Protection in Private Sector Corporations in Kenya

4.3.1 The Corporate Governance Structure in Kenya

As observed earlier, corporate governance as a concept arose with the separation of ownership and control within the corporation.⁴⁰⁰ The corporation is comprised of different relationships such as between managers, investors, suppliers and other corporate participants.⁴⁰¹ As a result of these relationships, there are bound to be conflicts arising amongst the corporate participants. These include conflicts between managers and shareholders, conflicts among shareholders themselves and conflicts between managers and the corporation's other constituencies including creditors and employees.⁴⁰² These conflicts have been referred to by economists as 'agency problems'.⁴⁰³ Arising from these agency problems are agency costs which relate to the structuring and monitoring the set of contracts among agents with conflicting interests.⁴⁰⁴ For instance, the interests of managers in a corporation may be different from the interests of the shareholders of the corporation. Hence the need to control these agency costs if the corporation is to survive. This is aimed at creating a corporate structure that ensures that the decisions relating to initiation and implementation of the corporation's affairs are effectively monitored in order to ensure that the objectives of the corporation are met.

⁴⁰⁰ Davies (n.20) 359.

⁴⁰¹ Frank H. Easterbrook and Daniel R. Fische, "The Corporate Contract" (1989) 89 Columbia Law Review 1416.

⁴⁰² John Armour, Henry Hansmann and Reinier Kraakman, "The Essentials Elements of Corporate Law" (ECGI Law Working Paper No. 134/2009, November 2009) 4.

⁴⁰³ *ibid.*

⁴⁰⁴ Eugene Fama and Michael Jensen, "Separation of Ownership and Control" (1983) XXVI Journal of Law and Economics 5.

The corporate ownership structure in a jurisdiction largely affects the corporate governance issues that arise in that jurisdiction. In developed jurisdictions such as the United Kingdom and the United States of America, dispersed ownership structure is prevalent where the ownership of a corporation is dispersed among a large number of individual and institutional investors.⁴⁰⁵ This means that the investors in the corporation do not get involved in the day to day running of the business but delegate this function to the management of the corporation usually comprising of the board of directors, the managing director and the senior managers of the corporation. Corporate governance in such a system is a mechanism to ensure that there is accountability by the managers of a corporation to the shareholders and investors.⁴⁰⁶ In developing jurisdictions such as Kenya, the ownership structure of corporations is concentrated which means that majority if not all the shares are held by an individual, a family or a small group of firms.⁴⁰⁷ Such corporations are run either by an individual who is usually the founder of the corporation and a dominant shareholder and who acts both as owner and manager of the corporation or a small group of shareholders. The concern of corporate governance in such jurisdictions with concentrated ownership structure is mainly the protection of the minority shareholders.⁴⁰⁸

However, as noted above, corporate governance should not only be concerned with the issues affecting the shareholders of the corporation but more importantly the issues

⁴⁰⁵ Brian Cheffins, "Current Trends in Corporate Governance: Going from London to Milan via Toronto" 10 *Duke J. Comp. & Int'l L.* 5.

⁴⁰⁶ Gakeri (n.43) 96.

⁴⁰⁷ Melvin D. Ayogu, *Corporate Governance in Africa: The Record and Policies for Good Governance* (African Development Bank Economic Research Papers No. 66, 2001)

⁴⁰⁸ Cheffins (n.405).

affecting all stakeholders of the corporation. This is because the impact of the success or failure of a corporation is not limited to its shareholders but also affects its customers, suppliers, employees and the society in general. Kenya has witnessed the collapse of a number of corporations especially state owned corporations such as the Kenya Co-operatives Creameries and the Kenya National Assurance Company which has had adverse social and economic consequences.⁴⁰⁹ In addition, there have been a number of corporate scandals occasioned by weak corporate governance structures which have had adverse effects not only the shareholders of the corporations but also the public at large.⁴¹⁰ The success of a corporation, therefore, does not only benefit the shareholders but also other stakeholders which include the society in general. Accordingly, effective corporate governance structures are of great benefit to the society.

The legal framework in a jurisdiction plays a significant role in corporate conduct and consequently in corporate governance. The rules of formation and operation of corporations in Kenya are contained in the Companies Act. The management of a corporation is overseen by the board of directors. The Companies Act provides for the position of the director of a corporation and prescribes the minimum number of directors a public or private company should have.⁴¹¹ However, the Companies Act is silent on the role of the directors in a corporation. In addition, the Companies Act does not provide for any principles or guidelines that the board of directors should follow in their decision

⁴⁰⁹ Lois Musikali, “The Law Affecting Corporate Governance in Kenya: A Need for Review” (2008) *International Company and Commercial Law Review* 213 available at <http://ssrn.com/abstract=1275308> (accessed 20 May 2014).

⁴¹⁰ These include the near collapse of Uchumi Supermarkets Co. Limited, the wrangles between directors in Access Kenya Limited and the more recent scandal affecting CMC Holdings Limited. See also the Capital Markets Steering Committee on Corporate Governance, *A Corporate Governance Blueprint for Kenya* (in draft form) (2014), Version 10(a) at p.8 available at [file:///C:/Users/jkm/Downloads/10%20\(a\)%20Draft%20Kenya%20CG%20Blueprint%20-13.2.14%20\(1\).pdf](file:///C:/Users/jkm/Downloads/10%20(a)%20Draft%20Kenya%20CG%20Blueprint%20-13.2.14%20(1).pdf) (accessed 27 August 2014).

⁴¹¹ Section 177 of the Companies Act.

making processes.⁴¹² This is a major shortcoming of the legal framework underlying corporate governance in Kenya. This is because the board of directors is an integral feature of corporate governance and serves as link between the shareholders, the management and stakeholders of the corporation. The board of directors is an important organ of the company mandated with providing leadership and direction to the corporation as well as overseeing the management of the corporation.⁴¹³ Since corporations are artificial persons, their activities are determined by the decisions made by their board of directors.⁴¹⁴ The decisions of the board of directors determine the policies and practices of the corporation and thus impact not only the shareholders but also the stakeholders of the corporation. The integration of the respect for human rights in the corporate governance mechanisms of corporations largely depend on the decisions of the board of directors. The lack of specific provisions or guidelines in the Companies Act requiring the board of directors of corporations to consider stakeholders' interests and thereby human rights therefore has meant that to respect human rights is viewed as voluntary for corporations and not accorded the importance it requires in the corporate governance agenda.

An initiative to institutionalise corporate governance principles in Kenya began in 1999 when several leading organisations such as the Nairobi Stock Exchange, the Capital Markets Authority, the Institute of Certified Public Accountants and the Kenya Chapter of the Association of Chartered Certified Accountants convened a forum to discuss the role of

⁴¹² There are no direct provisions under the Companies Act that deal how the directors should deal with their stakeholders and human rights issues. The provisions dealing with directors at Sections 177-205 largely deal with matters relating to the numbers of directors for public or private company, process of appointment and removal of directors and disqualification of directors.

⁴¹³ See Article 80 of Table A in the Companies Act.

⁴¹⁴ See *Lennard's Carrying Co. Ltd v Asiatic Petroleum* [1915] AC 705 and *Bolton Engineering v Graham* [1957] QB 157.

non-executive directors in corporations.⁴¹⁵ This initiative led to the formulation of principles for corporate governance in Kenya and a sample Code of Best Practice for Corporate Governance. The principles are geared towards encouraging the board of directors of corporations to enhance accountability, efficiency and effectiveness, integrity and fairness, responsibility and transparency in their decision making processes. The principles recognise the role of the board of directors in ensuring the corporations act responsibly towards both internal and external stakeholders and that the rights of these stakeholders are “*respected, recognised and protected*”.⁴¹⁶ The principles also emphasise the need for board of directors of corporations to promote the “*interests, rights and welfare of host communities*” and ensure that the corporation “*protects and preserves the environment*”.⁴¹⁷ Hence, the principles have to some extent integrated the respect for human rights in the corporate governance processes. However, the principles as formulated are not legally binding requirements for corporations as they are “neither prescriptive nor mandatory.”⁴¹⁸ They are only to act as a guide to corporations in Kenya when formulating their specific codes of best practice. Consequently, private sector corporations are not mandated to adopt the principles and cannot be held legally accountable for not conforming to the said principles.

In 2002, the Capital Markets Authority promulgated the Guidelines on Corporate Governance Practices By Public Listed Companies in Kenya (the “Guidelines”) under the

⁴¹⁵ Private Sector Corporate Governance Trust (n.41).

⁴¹⁶ *ibid* 9.

⁴¹⁷ Private Sector Corporate Governance Trust (n.41) 10.

⁴¹⁸ *ibid* 6.

Capital Markets Act.⁴¹⁹ This was a positive step towards institutionalising corporate governance in Kenya and more particularly, to provide a framework through which corporate governance practices can be applied and monitored. The Guidelines provide for, among others, the need for the board of directors to have a balance of executive and non-executive and independent directors in order to enhance the decision making process of the board.⁴²⁰ They further provide that there should be a clear separation of the role and responsibilities of the chairman and the chief executive to provide for checks and balances within the corporation.⁴²¹ It is noteworthy that the Guidelines provide that the board of directors of a corporation should take into consideration the interests of the corporation's stakeholders in its decision making process.⁴²² This is also reflected in the Guidelines definition of corporate governance as "*the process and structure used to direct and manage business affairs of the company towards enhancing prosperity and corporate accounting with the ultimate objective of realising shareholders long-term value while taking into account the interest of other stakeholders.*"⁴²³ In other words, the Guidelines recognise the important role played by the stakeholders of a corporation and the need to have their rights respected and protected. To this extent, the Guidelines do, albeit indirectly, promote the respect for human rights by corporations in Kenya.

However, the Guidelines have not been quite effective in enhancing the respect for human rights by corporations in Kenya. One of the reasons for this is that the Guidelines adopted the "comply or explain" approach towards compliance. In other words, corporations have a

⁴¹⁹ Gazette Notice No. 3362 of 2002.

⁴²⁰ Guideline 2.1.4.

⁴²¹ Guideline 2.2.1.

⁴²² Guideline 3.1.1 (viii).

⁴²³ Guideline 1.2.

choice to comply with the provisions of the Guidelines and where they do not comply, they can provide an explanation for non-compliance. Hence, non-compliance to the Guidelines is largely non-consequential since they are not mandatory requirements. Another limitation of the Guidelines is the fact that they only apply to public listed corporations. While noting this limitation the Guidelines provide that private sector corporations are also encouraged to practice good corporate governance.⁴²⁴ This however is not sufficient to enforce good corporate governance practices which include the respect for human rights in the private sector as there are largely no monitoring or accountable mechanisms to ensure the same is practiced.

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

Respecting and promoting human rights is of great benefit to corporations. Firstly, respecting human rights enhances the corporation's reputation and image. By respecting human rights, corporations safeguard their reputation hence maintaining their competitive advantage. Human rights principles are ordinarily contained in national as well as international law. Hence by respecting human rights, corporations are in essence complying with the domestic and international legal framework and consequently avoiding legal challenges that may be brought against their activities and which may be injurious to their reputation. Secondly, respecting human rights helps corporations nurture greater productivity in their business through high attraction and retention of competent staff. Corporations which protect human rights and the labour rights of their employees are likely to have more productivity as employees who are treated fairly and their dignity respected

⁴²⁴ Paragraph 1.11 of the Guidelines.

are more productive. Thirdly, by respecting human rights corporations cultivate good relations with the society within which they operate by ensuring active stakeholder engagement and hence retain and maintain the licence to operate. Respect for human rights enhances the relationship between the corporation and consumers as well as investors thus leading to a stable and productive business environment.⁴²⁵

Conversely, violating human rights by corporations is detrimental to corporations and their businesses. It may result in the decline of share value due to negative publicity which adversely affects the brand or image of the corporation. This would lead to decline of profits due to incurring expenses resulting from expensive court actions and consumer boycotts which is detrimental to the corporation. This would also affect the productivity of the corporation as the retention and recruitment of employees would be adversely affected as well. The importance of respecting human rights by corporations cannot therefore be overstated. The respect for human rights is an important and unavoidable part of responsible business.⁴²⁶ As has been exemplified in the previous chapter, business corporations have the capacity to either advance human rights goals or violate human rights standards. This is more pronounced in human rights standard which directly affect corporations. These, as earlier mentioned, include the rights of employees of the corporation, the rights of the consumers of the corporations' goods and services as well as the rights of the communities in which the corporations operate as regards their land and the environment. The previous chapter demonstrates how corporations in Kenya have

⁴²⁵ International Business Leaders Forum, "Human Rights: It is Your Business: The Case for Corporate Engagement" (IBLF, 2005).

⁴²⁶ *ibid.*

violated these rights and therefore undermined human rights standards in contravention of the law.

As previously mentioned, the Constitution, unlike before, binds both natural and artificial persons such as corporations to respect fundamental human rights and freedoms as contained in the Bill of Rights. The horizontal application of human rights standards has been recognised by the courts leaving no doubt that corporations must respect human rights or face court action.⁴²⁷ This provides a good basis for which human rights issues which are pertinent to corporations should be taken into account in the corporate governance processes and structures of corporations. These issues include the taking into account the interests and rights of stakeholders of the corporation. Undoubtedly however, the Companies Act which embraces the shareholder primacy paradigm does not provide for the inclusion or consideration of stakeholders in the operation of the corporation. Thus it does not provide a facilitative framework for good corporate governance practices which seek to include the consideration of the rights and interests of stakeholders in the operation of the corporation thus promoting human rights. Furthermore, although the Guidelines recognise the role of stakeholders in the corporation and encourage the board of directors to consider their interests in the decision making processes, the Guidelines do not expressly address the issues of human rights and how these can be integrated into the corporate governance framework. It can, therefore, be deduced that corporate governance in private sector corporations in Kenya does not adequately provide mechanisms to ensure that corporations respect human rights. Moreover, because of the lack of enforcement of the

⁴²⁷ *Rose Wangui Mambo and 2 Others v Limuru Country Club and 17 Others* Nairobi Constitutional Petition Number 160 of 2013 [2014] eKLR.

Guidelines, as noted above, coupled with the lack of a comprehensive corporate governance framework for corporations which are not publicly traded, the issue of respect for human rights has not been fully integrated into the corporate governance mechanisms of corporations and therefore has not been given the attention it requires within the management of most corporations.

Most corporations in Kenya address the issue of human rights in business as part of their Corporate Social Responsibility (CSR) initiatives. Although there is no one universally agreed definition of CSR it is generally perceived to be what corporations do to give back to the society in return for the benefits they receive from the society.⁴²⁸ It relates to how corporations conduct their business practices and processes to ensure or produce an overall positive impact on the society.⁴²⁹ The World Business Council for Sustainable Development defines CSR as “*the continuing commitment by business to contribute to economic development while improving the quality of life of the workforce and their families as well as of the community and society at large.*”⁴³⁰ In other words, CSR relates to not only what corporations do with their earnings but the methods and processes they use to make the earning. CSR activities also involve stakeholder management as well as participation in social issues.⁴³¹ This includes building of meaningful and sustainable relationships with stakeholders of the business through deliberate action aimed at assisting to address the issues affecting the community within which the corporation operates. From

⁴²⁸ World Business Council for Sustainable Development, *Corporate Social Responsibility: Meeting Changing Expectations* (1998) available at <http://www.wbcsd.org/work-program/business-role/previous-work/corporate-social-responsibility.aspx> (accessed 24 July 2014) 2.

⁴²⁹ K.V. Bhanu Murthy, *Business Ethics and Corporate Responsibility – A New Perspective* (Paper presented at Workshop on ISO 26000 Guidance on Social Responsibility and the implications for Developing Countries, New Delhi, 2007).

⁴³⁰ World Business Council for Sustainable Development (n. 428).

⁴³¹ Claessens (n.18).

this point of view, CSR can be a useful tool in engaging with the stakeholders of the corporation which then results in ways in which the corporation can integrate the respect for human rights in their activities.

Although CSR has also been described as going “*beyond philanthropy and compliance and addresses how companies manage their economic, social, and environmental impacts, as well as their relationships in all key spheres of influence: the workplace, the marketplace, the supply chain, the community, and the public policy realm*”,⁴³² it has largely been used as a tool to promote the image and reputation of corporations as opposed to a means of promoting human rights. CSR initiatives and activities have been used as brand promoting initiatives with the main aim of enhancing the public image of the corporations with a view to increasing their sales and consequently profits.⁴³³ Additionally, corporations have tended to view their CSR policies and activities as being equivalent to a human rights policy and hence viewing their engagement in CSR activities as tools for compliance with human rights standards.⁴³⁴ Consequently, greater attention has been placed on CSR initiatives and discussions on human rights in relation to business have been couched in the language of CSR. This has resulted in many believing that corporate respect for human rights is equivalent to CSR activities undertaken by the corporation.⁴³⁵

⁴³² John F. Kennedy School of Government, *Corporate Social Responsibility Initiative: Defining CSR* available at http://www.hks.harvard.edu/m-rcbg/CSRI/init_define.html (accessed 24 July 2014).

⁴³³ James Wafula Wanyama, “Corporate Social Responsibility: A Perspective of Kenyan Firms” (2012) 2 (10) *International Journal of Research in Management, Economics and Commerce* 38-52, 40.

⁴³⁴ Robert McCorquodale, “Corporate Social Responsibility and International Human Rights Law” (2009) 87 *Journal of Business Ethics, Supplement 2: Spheres of Influence/Spheres of Responsibility: Multinational Corporations and Human Rights* 385-400, 391.

⁴³⁵ Jena Martin, “Business and Human Rights: What’s the Board Got to Do with It?” (2013) 3 *University of Illinois Law Review* 101-140, 103.

However, though engaging in CSR related activities may result in the promotion of human rights standards, CSR is distinct from protection of human rights. In other words, the conduct of corporations required to discharge the responsibility to respect human rights goes beyond philanthropic activities of corporations.⁴³⁶ Philanthropic activities which private sector corporations are increasingly engaging in are not sufficient to discharge the responsibility to respect human rights. For instance, although a corporation can be involved in generous philanthropic programmes such as assisting the disadvantaged and improving the infrastructure in the community it operates, it can at the same time be involved in violating human rights such as the rights of its employees. As has been shown in the previous chapter, in the EPZ and horticultural sectors, for example, corporations have continued to exploit workers by paying low wages and subjecting them to poor working conditions. Hence, even though these corporations may engage in community development programmes such as building schools or dispensaries, these activities are not sufficient to fulfil their obligation to respect human rights. Thus, “*a failure to respect human rights in certain areas cannot be offset by positive benefits provided in other contexts*”.⁴³⁷ Respect for human rights involves protection of human rights standards as required under both national and international law and cannot therefore be equated to CSR initiatives. Furthermore, CSR policies are largely management driven, that is, the management gets to decide the areas they will focus on with the aim of assisting in the

⁴³⁶ Rae Lindsay, Robert McCorquodale, Lara Blecher, Jonathan Bonnitcha, Antony Crockett and Audley Sheppard, “Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles” (2013) 6 (1) *Journal of World Energy Law and Business* 2, 16.

⁴³⁷ *ibid.*

corporations' business and reputation.⁴³⁸ The respect for human rights, on the other hand, is people centred and is aimed at promoting and protecting the human dignity. Additionally, CSR initiatives and policies are largely voluntary in nature while human rights obligations are not voluntary and have legal mechanisms to ensure compliance.⁴³⁹ Respect for human rights is a legal obligation which corporations must abide by. It is therefore imperative that private sector corporations understand the distinction between human rights protection as required by law and CSR and thus take deliberate measures to address human rights issues in their corporations.

4.3.3 The Integration of Human Rights in Corporate Governance of Private Sector Corporations in South Africa

The relationship between human rights and business is particularly pertinent in South Africa. This is because of the apartheid legacy in the country and the role of business in undermining human rights in apartheid South Africa. During the apartheid regime, many corporate human rights abuses occurred especially in the mining and energy industries contributing to corporate abuses resulting mining-related illnesses of black workers and environmental degradation.⁴⁴⁰ According to the South African Truth and Reconciliation Commission, mining corporations benefited from apartheid policies as they were able to get cheap migratory labour resulting from land expropriation and

⁴³⁸ See, for instance, Safaricom Limited (a leading Kenyan telecommunication company) indicates that the goal of its CSR programme is “*to impact communities in direct ways through support for community projects while generating positive publicity for the company.*” at <http://www.safaricom.co.ke/about-us/about-safaricom/safaricom-csr> (accessed 24 July 2014).

⁴³⁹ McCorquodale (n.434) 391.

⁴⁴⁰ International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations - South Africa* (Geneva, 2010) available at <http://equalbeforethelaw.org/library/access-justice-human-rights-abuses-involving-corporations-south-africa> (accessed 30 August 2014).

displacements.⁴⁴¹ Additionally, the mining industry violated the human rights of their black employees through payment of low wages and non-provision of health and safety measures at the workplace. As a result the black South African community was highly disenfranchised and business corporations played a significant role.⁴⁴² Following the end of apartheid in South Africa in 1994 and the carrying out of the first all-race democratic general elections, South Africa adopted an interim constitution to replace the apartheid era constitution.⁴⁴³ This constitution was later in 1996, replaced by the existing constitution which “is renowned for the spread and depth of human rights enshrined in its Bill of Rights.”⁴⁴⁴

It is therefore not surprising that the Constitution of the Republic of South Africa, 1996, imposes human rights responsibilities on both natural and juristic persons. It provides “A provision of the Bill of Rights binds a natural and juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”⁴⁴⁵ Hence the Bill of Rights is binding on companies as juristic persons and companies are required to respect fundamental human rights and freedoms

⁴⁴¹ Truth and Reconciliation Commission of South Africa Report, Institutional Hearing: Business and Labour (1998) (Volume Four: Chapter Two) available at <http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf> (accessed 30 August 2014) 58.

⁴⁴²In *Du Plessis v De Clerk* [1996] (3) SA 850 (CC) at 732E-F, Madala J stated, “*Ours is a multi-racial, multi-cultural, multi-lingual society in which the ravages of apartheid, disadvantage and inequality are just immeasurable. The extent of the oppressive measures in South Africa was not confined to government/individual relations, but equally to individual/individual relations*”.

⁴⁴³ Phillip C. Aka, *Corporate Governance in South Africa: Analysing the Dynamics of Corporate Governance Reforms in the “Rainbow Nation”* (2007) 33 N.C. J. Int’l L. & Com. Reg. 119-292, 229.

⁴⁴⁴ Ralph Hamman, Paresha Sinha, Farai Kapfudzaruwa and Christoph Schild, “Business and Human Rights in South Africa: An Analysis of Antecedents of Human Rights Due Diligence” (2009) 87 *Journal of Business Ethics* 453-473, 456.

⁴⁴⁵ Section 8(2) of the Constitution of the Republic of South Africa, 1996.

contained in the Bill of Rights.⁴⁴⁶ Furthermore, where it has been found that a natural or juristic person is bound by the Bill of Rights, courts are also enjoined to develop common law with a view to give effect to the applicable rights.⁴⁴⁷ Consequently, corporations in South Africa are required to consider human rights issues and take into account the rights of stakeholders in their management decisions.

From a corporate governance perspective, South African company law traditionally emphasised on the maximisation of shareholder value.⁴⁴⁸ Hence the corporate governance system upheld the shareholder value approach and did not make provision for the consideration of stakeholders' interests and human rights. However, the recent constitutional and corporate reform has changed the corporate governance framework in the country and introduced the requirement to consider human rights and rights of the corporation's stakeholders in the management of corporations.⁴⁴⁹ The Companies Act, 2008⁴⁵⁰ recognises the constitutional requirement for respect of human rights by corporations. It states that one of its purposes is "*to promote compliance with the Bill of Rights*".⁴⁵¹ In essence, it seeks to incorporate the respect of human rights in the management of companies. Consequently, the directors of companies in their management duties are obliged to respect fundamental human rights as provided in the Constitution of

⁴⁴⁶ Linda Muswaka, "The Corporate Responsibility for Human Rights: A Conceptual Framework" (2014) 5 (3) MJSS 219-225, 220.

⁴⁴⁷ Section 8(3) provides that the court should apply or if necessary, develop common law to the extent that legislation does not give effect to the right in question; *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 31 available at <http://www.saflii.org/za/cases/ZACC/2002/12.html> (accessed 28 July 2014).

⁴⁴⁸ Richard Croucher and Lilian Miles, "Corporate Governance and Employees in South Africa" (2010) 10 (2) Journal of Corporate Law Studies 367-389, 372.

⁴⁴⁹ In addition to the constitution reform of 1996, South African company legislation has undergone reform with the Companies Act 61 of 1973 being replaced by the Companies Act 71 of 2008 which became effective on 1st May 2011.

⁴⁵⁰ Act No. 71 of 2008 promulgated on 8th April 2009.

⁴⁵¹ Section 7 (a) of the Companies Act, 2008.

the Republic of South Africa, 1996.⁴⁵² This provision is significant in inculcating the culture of respecting human rights in corporate governance.

In relation to the duties of directors, the Companies Act, 2008 does not provide an explicit duty of directors to consider stakeholders interests when managing their corporations. This is not surprising as traditionally, as observed above, the corporate governance system in South Africa has been based on the shareholder value approach where directors are expected to manage corporations in the best interests of shareholders.⁴⁵³ Under this approach, stakeholders' interests do not form part of the considerations taken by the board of directors in the management of the corporation. However, the Companies Act, 2008 requires that directors must act in the best interests of the company by providing that “a *director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director...in the best interests of the company*”.⁴⁵⁴ Taking into consideration the purpose of the Companies Act, 2008 to promote respect of human rights, it can be construed that directors would be permitted to consider the rights and interests of stakeholders provided that such action was in the best interest of the company. This, therefore, gives directors an opportunity to consider human rights in their decision making processes. As has been pointed out above, consideration of human rights benefits a corporation and therefore is to the best interest of the corporation.

⁴⁵² Muswaka, (n.446) 220.

⁴⁵³ Linda Muswaka, Corporate Governance Best Practices Vital for Good Corporate Citizenship: Guidance from King III” (2013) 3(4) WJSS 25-35.

⁴⁵⁴ Section 76 (3) (b) of the Companies Act, 2008.

In addition to the Constitution and the Companies Act, corporations in South Africa are also governed by the King Reports.⁴⁵⁵ The first King Report (King I) was issued in 1994 with the aim of promoting corporate governance by providing for acceptable standards of governance for board of directors of listed companies. It also highlighted the need for corporations to be socially responsible in the areas and communities in which they operate. King II report on Corporate Governance was published in 2002. The report established seven good corporate governance principles: discipline, transparency, fairness, social responsibility, independence, accountability and responsibility. The Johannesburg Stock Exchange requested listed companies to comply with the report or otherwise justify why they were not adhering to the norm. This report was revised in 2009 with the publication of the King Committee Report on Corporate Governance in South Africa 2009 (King III).

King III promotes good corporate governance in South Africa and has been termed as a “*significant milestone in the evolution of corporate governance in South Africa.*”⁴⁵⁶ It applies to all entities incorporated and resident in South Africa regardless of the manner of incorporation or establishment and whether in the public, private or non-profit sectors. In essence, the King III applies to all corporations in South Africa including those listed and those not listed in the Johannesburg Stock Exchange Limited (JSE).⁴⁵⁷ This is important in helping to streamline corporate governance practices across all sectors in the country and is unlike in Kenya where the CMA Corporate Governance Guidelines only apply to listed corporations in the Nairobi Stock Exchange. It operates on the “apply or explain” basis

⁴⁵⁵ Issued by the King Committee on Corporate Governance and the Institute of Directors in South Africa. It took effect on 1 March 2010 replacing the previously existing King II Report.

⁴⁵⁶ See PricewaterhouseCoopers (Pwc), *Corporate Governance- King Report III- Introduction and Overview* available at <http://www.pwc.co.za/en/king3/> (accessed 28 July 2014).

⁴⁵⁷ King III para 13.

which though voluntary in nature is considered to provide the flexibility that corporations require in their operations but at the same time emphasise on the importance of applying the principles contained therein.⁴⁵⁸ King III acknowledges that the corporation is an integral part of society and operates within the social, economic and environmental context of the society. It, therefore, advocates for the triple bottom line approach to business which takes into account the social, economic and environmental aspects in which corporations operate for purposes of ensuring sustainability. *“Boards should no longer make decisions based only on the needs of the present because this may compromise the ability of future generations to meet their own needs”*.⁴⁵⁹ Furthermore, King III recommends for corporations to incorporate in their decision making processes the inclusive stakeholder approach where *“the legitimate interests and expectations of stakeholders are considered when deciding in the best interests of the company”*.⁴⁶⁰ It also provides guidance on what is to be considered when determining what is in the best interest of the company by providing that *“the best interests of the company should be interpreted within the parameters of the company as a sustainable enterprise and the company as a responsible corporate citizen”*.⁴⁶¹ The King reports have played a major role in enhancing corporate governance in South Africa and *“promoting effective corporate governance in South African countries”*.⁴⁶²

⁴⁵⁸ King III para 3.

⁴⁵⁹ King III para 9.

⁴⁶⁰ King III para 9.

⁴⁶¹ King III para 9.

⁴⁶² Cloete Jansen van Vuuren and Jess Schulschenk, *Perceptions and Practice of King III in South African Companies* (Institute of Directors in Southern Africa and the Albert Luthuli Centre for Responsible Leadership, University of Pretoria, 2013).

The corporate governance approach in South Africa is a clear departure from the narrow approach which sees the financial value for shareholders as the only bottom line for corporations. The King Reports have been pivotal in promoting corporate integrity, accountability and sustainable reporting by corporations in South Africa.⁴⁶³ King III has been reported as having had a positive impact on board deliberations and decision making in relation to stakeholders of corporations with increased awareness by boards of directors of the need to be accountable to stakeholders.⁴⁶⁴ It promotes the notion that the success of a corporation should be defined in terms of the long term positive effects of the corporation on all stakeholders. In essence it promotes the responsibility of corporations to take into account the interests and rights of its stakeholders as they conduct their operations. This has been a positive step towards promoting respect for human rights by corporations in South Africa. By providing that corporate law should promote compliance with the Bill of Rights, the corporate governance framework in South Africa clearly recognises the importance of corporations respecting human rights.

4.4 Conclusion

Corporate governance relates to how corporations are managed and run. Good corporate governance promotes “*responsible behaviour by corporations for the attainment of the maximum possible level of efficiency and profitability*”.⁴⁶⁵ It involves the management of the relationships between the corporation and its stakeholders.⁴⁶⁶ Consequently, respect for human rights improves good corporate governance by enhancing good relationships of a

⁴⁶³ Evelynne Change, “Corporate Governance Reform in Africa: Key Considerations”, A Paper presented at the HHL Center for Corporate Governance, *Key Corporate Governance Issues in Emerging Markets: Theory and Practical Execution* International Conference on June 11-12, 2012.

⁴⁶⁴ Vuuren and Schulschenk (n.499) 14.

⁴⁶⁵ Gakeri (n.43).

⁴⁶⁶ Addo(n.13) 17.

corporation with individuals affected by its activities and the society as a whole. The principles underlying corporate governance include accountability, transparency, participation, fairness which encompasses inclusion and non-discrimination, integrity and responsibility. These are also the values that underpin the fundamental principles of human rights.⁴⁶⁷ Accordingly, by respecting human rights, corporations enhance accountability and therefore good corporate governance.

Although the corporate governance framework in Kenya has, to some extent, recognised the need to respect human rights through the recognition of stakeholders as important constituents of the corporation, it has yet to fully embrace the need to incorporate human rights issues in the management of corporations. The constitutional recognition that corporations should respect human rights as they are bound by the provisions of the Bill of Rights is a welcome step towards ensuring that corporations do consider human rights impacts of their activities. However, more still needs to be done to actualise this by reforming the corporate governance regulatory framework to streamline its provisions with the requirement for corporate respect for human rights provided in the Constitution.

⁴⁶⁷ Mary Robinson, “What Rights Can Add to Good Development Practice”, in Phillip Alston and Mary Robinson, *Human Rights and Development* (OUP: Oxford, 2005) 38.

CHAPTER FIVE

SUMMARY, RECOMMENDATION AND CONCLUSION

5.1 Introduction

This chapter seeks to summarise the study by highlighting the main purpose for the study, the important findings of the study, and recommendations based on the findings of the study. It is hoped that the findings and the recommendations will assist in enhancing the respect for human rights in private sector corporations in Kenya. This will in turn have the effect of enhancing good corporate governance of private sector corporations resulting in enhanced growth of the private sector in the country and ultimately contributing towards the growth of the economy.

5.2 Summary

This research investigated the role played by human rights in enhancing corporate governance in private sector corporations in Kenya. It was intended to examine human rights violations by private sector corporations in Kenya and how these violations undermine good corporate governance in private sector corporations in Kenya. Despite the existence of a legal framework which governs the protection of human rights in Kenya numerous cases of human rights violations by private sector corporations continue to be reported. This research set out to investigate the framework for human rights protection with regard by private sector corporations in Kenya, the interrelationship between corporate governance of private sector corporations and their respect for human rights and how the respect for human rights can enhance corporate governance of private sector corporations in Kenya.

The study specifically sought to investigate the human rights violations committed by private sector corporations in Kenya; assess the adequacy of the regulatory framework governing the respect for human rights by private sector corporations in Kenya; examine the relationship between respect for human rights and good corporate governance by private sector corporations in Kenya and make recommendations towards improvement of the regulatory framework governing respect for human rights by private sector corporations in Kenya.

The study established that private sector corporations have not been at the forefront as far as promoting human rights is concerns. Instead, they have been involved in undermining human rights standards by violating human rights through their actions and activities. They have been involved in activities which result in environmental degradation, engaging in forced labour, discrimination practices, sexual harassment at the workplace and having poor working conditions for their workers. The corporate governance structures and mechanisms in private sector corporations in Kenya have not incorporated the protection of human rights effectively and thus, respect for human rights has not been adopted purposefully by private sector corporations. This was found to be due to a number of reasons.

5.2.1 Outdated Corporate Law.

The Companies Act which regulates the governance of corporations in Kenya is substantially the same as the United Kingdom Companies Act of 1948.⁴⁶⁸ The 1948 Companies Act which was adopted by Kenya on gaining independence was an Act

⁴⁶⁸ J. J. Ogola, *Company Law* (2nd edn, Nairobi: Focus Publications Ltd 2000).

consolidating the law relating to companies as at that time in England.⁴⁶⁹ It has not changed to accommodate current practices and trends. Consequently, despite the fundamental changes which have been outlined in the Constitution on corporate governance and the extension of human rights obligations to corporations, the legal framework to support these changes remains inadequate.

The Companies Act does not provide for an express requirement for the respect of human rights by corporations. Although outside of the Companies Act, it has been shown that corporations have independent legal duties to comply with human rights standards such as labour, consumer protection and environmental laws, the Companies Act does not provide for clear duties of directors of corporations that require them to consider the interests and rights of stakeholders and thereby promote and respect human rights. Consequently, respect for human rights has not been given the appropriate priority and focus when it comes to corporate decision making. Instead corporations have tended to equate their philanthropic activities within the communities they operate in, which are conducted through CSR policies, as being sufficient to demonstrate their respect for human rights and hence compliance with human rights standards.⁴⁷⁰ Moreover, corporations get to choose which activities to engage in as part of their CSR activities and thus this does not in itself guarantee the respect for all human rights as required under the Constitution. Consequently, the Companies Act does not adequately promote the respect for human rights by private sector corporations.

⁴⁶⁹ Davies and Prentice (n.9) 48.

⁴⁷⁰ McCorquodale (n. 434).

5.2.2 Inadequate Corporate Governance Regulations

The Capital Markets Act provides for guidelines on corporate governance practices.⁴⁷¹ The guidelines provide for the principles of good corporate governance practices and are geared towards inculcating good corporate governance culture within corporations in Kenya. The guidelines have assisted in creating awareness of the importance of good corporate governance practices within corporations in Kenya. To some extent, they have contributed towards adoption of good corporate governance practices in publicly listed companies in Kenya and are therefore a positive contribution towards enhancement of good corporate governance in Kenya.⁴⁷² Although they recognise the role of stakeholders of a corporation and the importance of taking into account their interests in corporate decision making, the guidelines do not expressly provide for the respect for human rights by corporations. Furthermore, even if they did, the guidelines only apply to publicly listed companies. Consequently, private sector corporations which are not listed in the Nairobi Securities Exchange are not bound to apply the guidelines in the management of their corporations. This is especially pertinent when it is considered that a large number of private sector corporations in Kenya which command a significant market share in their respective sectors are not publicly listed.⁴⁷³ Moreover, the guidelines are not mandatory in nature and corporations can choose to comply with their provisions or not. Consequently, the guidelines, in their current status, are not adequate to enforce human rights protection within private sector corporations.

⁴⁷¹ Gazette Notice Number 3362 of 2002.

⁴⁷² Gakeri (n.43) 98.

⁴⁷³ For example, large supermarkets chains such as Nakumatt owned by Nakumatt Holdings Limited and Tusky's owned by Tusker Mattresses Limited.

5.2.3 Shareholder Oriented Corporate Governance System

Good corporate governance, should aim to maximise the contribution of corporations to the overall economy, including all stakeholders. Corporate decision making should therefore take into account the rights and interests of all stakeholders of the corporation. By so doing, the corporation would be respecting and promoting human rights. However, corporate governance regime in Kenya is largely shareholder oriented. In other words, it seeks to maximise the value for shareholders only. For instance, the recommended best practices in corporate governance by the Capital Markets Guidelines on Corporate Governance Practices are viewed as essential “*in order to maximize shareholders value through effective and efficient management of corporate resources.*”⁴⁷⁴ In addition, the Companies Act does not directly provide the consideration of stakeholders’ interests as a duty for directors. This is also the case under the common law which is applicable in the corporate governance regime in Kenya. Under common law, directors are under a fiduciary duty to act in the best interests of the corporation. What is in the best interest of the corporation is largely left to the directors to decide. Consequently, the directors can choose not to consider the interests and rights of the corporation’s stakeholders if they deem the same not to be in the best interest of the corporation. This is all geared towards ensuring shareholder primacy in the corporate decision making process. Consequently, protection of human rights as a corporate responsibility is in most cases not a consideration for the corporations.

⁴⁷⁴ Gazette Notice Number 3362 of 2002 (n.5) 482.

5.2.4 Weak Human Rights Enforcement Mechanisms

Generally, the greatest challenge that the international and national human rights frameworks face is the enforcement gap.⁴⁷⁵ This is especially true for corporate human rights obligations. Kenya is no exception as although there is a legal framework for human rights protection in country, the enforcement of corporate human rights obligations remains a challenge. As exemplified in the previous chapter, private sector corporations in Kenya continue to violate basic labour rights of their employees despite the existence of labour laws governing labour relations. This shows that these laws which promote and protect human rights are not fully enforced as expected. Without effective enforcement of these laws is as good as having no regulation in place. Consequently, human rights violations continue to be witnessed across the private sector to the detriment of the individuals and communities affected.

5.3 Recommendations.

5.3.1 Adoption of a Stakeholder Oriented Corporate Governance

Private sector corporations should adopt a corporate governance system that incorporates the corporation's impact on its stakeholders in the decision making processes. This would involve a process of identifying the corporation's stakeholders and in particular those whose human rights would be affected by the corporation's activities. Undoubtedly, the interests of most stakeholders of corporations can be linked to particular human rights and fundamental freedoms.⁴⁷⁶ Hence, by identifying the corporation's stakeholders and considering their interests and rights in the decision making processes, corporations

⁴⁷⁵ Herik and Cernic (n. 14) 726.

⁴⁷⁶ For instance, the interests of a corporation's employees can be linked to labour relations rights and those of consumers linked to consumer protection rights.

would take decisions that ensure that human rights are respected and protected. It is noteworthy that a process to review and strengthen the corporate governance framework of the capital markets in Kenya is ongoing.⁴⁷⁷ In its draft corporate governance blueprint, the committee recognises the important role played by stakeholders in the proper governance of the corporation and advocates for corporations to develop policies and strategies to manage their stakeholders which includes considering their interests and rights in the decision making processes.⁴⁷⁸ However, they should go further and expressly incorporate the obligation to respect human rights by private sector corporations. In addition, it is noted that proposed reforms in the corporate governance blueprint are largely targeted at corporations which are publicly listed and hence the non-listed corporations are left out. It is recommended that the ongoing corporate governance reforms should apply to all corporations both listed and non-listed. This will ensure that there are comprehensive corporate governance reforms across the private sector in the country.

5.3.2 Reform of Corporate Law

The Companies Act needs to be reviewed with a view to codifying and explicitly providing for directors' duties. This will go a long way towards strengthening their impact on corporate governance in Kenya. In addition, the Act should provide for the requirement for directors to consider the rights and interests of the corporation's

⁴⁷⁷ On December 17, 2012 the Capital Markets Authority of Kenya (CMA) appointed a nine-member Capital Markets Corporate Governance Steering Committee to review the corporate governance framework with a view to strengthen corporate governance in Kenya.

⁴⁷⁸ Capital Markets Steering Committee on Corporate Governance, *A Corporate Governance Blueprint for Kenya* (in draft form) (2014), Version 10(a) at p.8 available at [file:///C:/Users/jkm/Downloads/10%20\(a\)%20Draft%20Kenya%20CG%20Blueprint%20-13.2.14%20\(1\).pdf](file:///C:/Users/jkm/Downloads/10%20(a)%20Draft%20Kenya%20CG%20Blueprint%20-13.2.14%20(1).pdf) (accessed 27 August 2014).

stakeholders in their decision making processes. It is imperative that the Companies Act should include the obligation of corporations to respect human rights. The board of directors should be required under the Act to respect human rights and comply with the provisions of the Bill of Rights in the Constitution. This is especially important in order to align the company law with the provisions of the Constitution which extend human rights obligations to corporations. It is noted that the reform of company law in Kenya is already underway with the introduction of the Companies Bill in Parliament. However, the Bill is yet to be passed and there is a need to expedite this process.

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

The Constitution through the Bill of Rights has directly extended human rights obligations to corporations. Thus, human rights responsibilities are no longer mere moral imperatives which corporations can choose to abide by or not. They are now practical concerns and risks which the board of directors for corporations must address. Corporations should therefore have a clear human rights policy endorsed by the board of directors which will guide them in dealing with the human rights issues that may arise. The human rights policy should be a commitment to respect human rights at all levels and functions of the corporation. It should clearly stipulate what respecting human rights entails in the day to day operations and functions of the corporation and should be enshrined in the operational processes and procedures of the corporation.⁴⁷⁹ In other words, the human rights policy should not just be a policy statement on paper but should be reflected in the operational policies and procedures of the corporation in order to

⁴⁷⁹ Rae Lindsay, Robert McCorquodale, Lara Blecher, Jonathan Bonnitche, Antony Crockett and Audley Sheppard, "Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles (2013) 6 (1) Journal of World Energy Law and Business 2-66, 17.

ensure that it is implemented at all levels of the corporation. In this way, the commitment to respect human rights will become part of the fabric and culture of the corporation.

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

In order to ensure that a corporation's human rights policy is effectively implemented, the corporation must have in place effective human rights monitoring mechanisms. One of the ways this can be done is through undertaking human rights impact assessments. This involves the identification and assessment of the corporation's actual and potential human rights impacts in its operations, products, services and relationships.⁴⁸⁰ This assessment is essential to enable the corporation to determine the action it needs to take to avoid or respond to human rights impacts it may have. Through the human rights impact assessments corporations can identify and engage with the stakeholders who are impacted by their actions and consequently take into account their rights and interests corporate decision making. The board of directors will be sensitized to the impact of their decisions from the stakeholders' perspective and as a result will seek ways to prevent adverse human rights impacts directly linked to the corporation's business activities.⁴⁸¹ This will help promote transparency and accountability in the corporation and thereby enhance good corporate governance within the corporation.

Corporations should also report and disclose the measures they have taken to adhere to their commitment to respect human rights. In other words, the actions taken by the

⁴⁸⁰ United Nations Office of the High Commissioner for Human Rights (OHCHR), "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework" (2011) UN Doc HR/PUB/11/04 available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed 4 March 2014)(Guiding Principles), Guiding Principle 18.

⁴⁸¹ Muswaka (n. 446) 224.

corporation relating to addressing human rights impact of their activities should be communicated externally in order to ensure transparency and accountability to the stakeholders affected. It is recommended that corporations should be required to include a human rights impact report in their annual reports.

5.3.5 Further Research

It is also recommended that further research be conducted to establish the extent to which private sector corporations in Kenya recognise and respond to corporate human rights obligations. This is especially important to assess the compliance levels of private sector corporations to the human rights obligations provided for in the Constitution.

5.4 Conclusion

Private sector corporations are the economic drivers in the society. They create employment opportunities and contribute towards income generation through the payment of taxes. However, the activities of private sector corporations can also be detrimental to the society. Their activities could result in violation of worker's labour rights, displacement of people from their land as well as degradation of the environment. In other words, private sector corporations have a human rights impact in the society especially on issues relating to labour rights and relations, consumer rights, land rights and environmental rights.

It has been argued that corporations do have human rights responsibilities. In fact, respect for human rights is a fundamental part of being a responsible corporation. Respect for human rights should not be viewed as a burden to corporations. On the contrary, by respecting human rights, corporations protect and enhance their image and reputation,

increase their customer base as more and more customers are seeking corporations with ethical values, attract and retain competent staff and thereby reducing staff turnover and increasing productivity, attract local and foreign investors who are increasingly taking into account ethical issues in investment decisions and reduce costs by avoiding human rights related costs caused by strikes by workers or the community, labour disputes and litigation. Accordingly, by respecting human rights, corporations will promote good corporate governance values such as accountability, transparency, responsibility, integrity, fairness and efficiency. This will result in well run corporations, which will ultimately contribute positively to the society at large. It is therefore imperative that respect for human rights be integrated into the corporate governance mechanisms of private sector corporations which will result in the thriving of the corporations ultimately positively impacting the economy and development of the country.

BIBLIOGRAPHY

BOOKS

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

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

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

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

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

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

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

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

Lucke K, “States’ and Private Actors Obligations under International Human Rights Law and the Draft UN Norms” in Thomas Cottier, Joost Pauwelyn and Elisabeth Burgi Bonanom (eds), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005).

Mugenda O and Mugenda A, *Research Methods: Quantitative and Qualitative Approaches* (Nairobi: Acts Press. 1999).

Omony P, *Key Issues in Jurisprudence: An In-depth Discourse on Jurisprudence Problems* (1st edn, Kampala: Law Africa Publishing (U) Ltd).

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

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

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

JOURNAL ARTICLES

Aka P, Corporate Governance in South Africa: Analysing the Dynamics of Corporate Governance Reforms in the “Rainbow Nation” (2007) 33 N.C. J. Int’l L. & Com. Reg. 119-292.

Berle A, Corporate Powers as Powers in Trust (1931) 44 Harvard Law Review.

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

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

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

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

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

Dodd E, "For Whom Are Corporate Managers Trustees?" (1932) 45 Harvard Law Review.

Easterbrook F and Fische D, "The Corporate Contract" (1989) 89 Columbia Law Review.

Fama E and Jensen M, "Separation of Ownership and Control" (1983) XXVI Journal of Law and Economics.

Gakeri, J "Enhancing Kenya's Securities Markets through Corporate Governance: Challenges and Opportunities" (2013)3(9) International Journal of Human and Social Sciences.

Herik L and Cernic J, "Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again", (2010) 8 Journal of International Criminal Justice.

Hamman R, SinhaP, Kapfudzaruwa F and Schild C, "Business and Human Rights in South Africa: An Analysis of Antecedents of Human Rights Due Diligence" (2009) 87 Journal of Business Ethics 453-473.

Jensen M and Meckling W, “Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure ” (1976) 3 Journal of Financial Economics.

Kinley D and Chambers R, “The UN Human Rights Norms for Corporations: The Private Implications of Public International Law” (2006)6 Human Rights Law Review.

Lindsay R, McCorquodale R, Blecher L, Bonnitcha J, Crockett A and Sheppard A, “Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles” (2013) 6 (1) Journal of World Energy Law and Business.

Lois Musikali, “The Law Affecting Corporate Governance in Kenya: A Need for Review” (2008) International Company and Commercial Law Review 213.

Jena Martin, “Business and Human Rights: What’s the Board Got to Do with It?” (2013) 3 University of Illinois Law Review 101-140.

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

Muswaka L, “The Corporate Responsibility for Human Rights: A Conceptual Framework” (2014) 5 (3) MJSS 219-225.

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

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

Penelope Simons P, “International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights” (2012) 3 (1) Journal of Human Rights and the Environment.

Ratner S, “Corporations and Human Rights: A Theory of Legal Responsibility.” (2001) 111 The Yale Law Journal.

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

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

Wanyama J, “Corporate Social Responsibility: A Perspective of Kenyan Firms” (2012) 2 (10) International Journal of Research in Management, Economics and Commerce 38-52.

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

REPORTS

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

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

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

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

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

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

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

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

NEWSPAPER, MAGAZINE AND OTHER ARTICLES

Armour J, Hansmann H and Kraakman R, *The Essentials Elements of Corporate Law* (European Corporate Governance Institute Law Working Paper No. 134/2009, November 2009).

Ayogu M, *Corporate Governance in Africa: The Record and Policies for Good Governance* (African Development Bank Economic Research Papers No. 66, 2001).

Cheffins B, *The History of Corporate Governance* (European Corporate Governance Institute Working Paper No. 184/2012).

Claessens S, “Corporate Governance and Development” (Global Corporate Governance Forum – Focus 1, World Bank, Washington 2003).

Claessens S and Yurtoglu B, “Corporate Governance and Development – An Update” (Global Corporate Governance Forum: IFC, 2012).

Evelynne Change, “Corporate Governance Reform in Africa: Key Considerations”, A Paper presented at the HHL Center for Corporate Governance, *Key Corporate Governance Issues in Emerging Markets: Theory and Practical Execution* International Conference on June 11-12, 2012.

Friedman M, *The Social Responsibility of Business Is to Increase Its Profits*, New York Times Magazine (13 September 1970).

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

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

International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations - South Africa* (Geneva, 2010) available at <http://equalbeforethelaw.org/library/access-justice-human-rights-abuses-involving-corporations-south-africa>.

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

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

Nyamu-Musembi C, *Towards an Actor-Oriented Perspective on Human Rights* (Institute of Development Studies, Working Paper 169, 2002).

Vuuren C and Schulschenk J, *Perceptions and Practice of King III in South African Companies* (Institute of Directors in Southern Africa and the Albert Luthuli Centre for Responsible Leadership, University of Pretoria, 2013).

World Business Council for Sustainable Development, *Corporate Social Responsibility: Meeting Changing Expectations* (1998).

CONVENTIONS, UN DOCUMENTS AND OTHER INTERNATIONAL INSTRUMENTS

John Ruggie, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. E/CN.4/2006/97 (22 February 2006).

John Ruggie, "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporates Acts," *Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/4/35 (9 February 2007).

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

John Ruggie, “Business and Human Rights: Towards Operationalizing the ‘Protect, Respect and Remedy’ Framework”, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/11/13 (22 April 2009).

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

United Nations Global Compact.

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

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

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