

# JUDICIAL STANCE ON THE HORIZONTALITY OF THE BILL OF RIGHTS: A CRITIQUE

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## 1. Introduction

Traditionally, constitutional rights applied in the public sphere rather than in the private sphere<sup>284</sup> and, as such, private actors were not seen as entities bound by human rights.<sup>285</sup> However, the Constitution of Kenya 2010 marks a paradigm shift from traditional constitutional architecture and design. It has been described as a post liberal constitution that does more than merely assigning and checking state power, as it is also an instrument of transformation and reconstruction.<sup>286</sup> The constitution binds state organs as well as natural and legal persons.<sup>287</sup> The supremacy clause stipulates that the constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government.<sup>288</sup> This extends to the bill of rights which applies to all law and binds all state organs and all persons.<sup>289</sup>

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284. Khobe. W., 'The Horizontal Application of the Bill of the Rights and the Development of the Law to Give Effect to Rights and Fundamental Freedoms' (2014) 1 *Journal of Law and Ethics* 100, 110.

285. Ibid.

286. Mwenda. M., 'The Context of Transformative Constitutionalism in Kenya' available at [https://www.academia.edu/13738064/The\\_Context\\_of\\_Transformative\\_Constitutionalism\\_in\\_Kenya](https://www.academia.edu/13738064/The_Context_of_Transformative_Constitutionalism_in_Kenya) (accessed on 25/08/2022).

287. Ibid.

288. Constitution of Kenya, 2010, Article 2 (1).

289. Ibid, Article 20 (1).

Article 20(1) of the Constitution introduces the concept of horizontal application of the bill of rights. This provision extends the application of the bill of rights to all state organs and all persons, including corporations.<sup>290</sup> Horizontal application of the bill of rights has been defined as the aspect of constitutional law that determines how relations between private individuals are to be regulated.<sup>291</sup> Horizontal application of the bill of rights entails the possibility of private persons being held accountable in constitutional litigation, that is, constitutional rights having application in the private sphere.<sup>292</sup>

This paper seeks to critically examine whether the Kenyan judiciary has embraced the horizontal application of the bill of rights as envisioned under Article 20 (1) of the Constitution. It discusses the rationale for the horizontal application of the bill of the rights as envisioned under the constitution. The paper then uses judicial authorities to discuss whether the concept of horizontal application of the bill of rights has been embraced in Kenya. It also highlights concerns about the concept of horizontal application of the bill of rights and proposes recommendations on the issues raised.

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290. Mwaura. K., 'Horizontality and the Bill of Rights: Defining Parameters of Corporate Complicity in Human Rights Violations' (2011) 7 (1) *The Law Society of Kenya Journal* 1.

291. Matu. D., 'Improving Access to Justice in Kenya through Horizontal Application of the Bill of Rights and Judicial Review' available at [https://press.strathmore.edu/uploads/journals/strathmore-law-review/SLR2/2SLR1\\_Article\\_4.pdf](https://press.strathmore.edu/uploads/journals/strathmore-law-review/SLR2/2SLR1_Article_4.pdf) (accessed on 25/08/2022).

292. The East African Centre for Human Rights., 'A compendium on economic and social rights cases under the Constitution of Kenya, 2010' available at [https://eachrights.or.ke/wp-content/uploads/2020/07/A\\_Compendium\\_On\\_Economic\\_And\\_Social\\_Rights\\_Cases\\_Under\\_The\\_Constitution\\_Of\\_Kenya\\_2010.pdf](https://eachrights.or.ke/wp-content/uploads/2020/07/A_Compendium_On_Economic_And_Social_Rights_Cases_Under_The_Constitution_Of_Kenya_2010.pdf) (accessed on 25/08/2022).

## **2. Justification for the Horizontal Application of the Bill of Rights**

The concept of horizontal application of the bill of rights has developed due to the emergence of new centres of power, besides the state.<sup>293</sup> These include multi-national corporations, political parties, trade unions and associations, such as clubs and societies. Similar to states, these entities are capable of violating human rights.<sup>294</sup> Horizontal application of the bill of rights is thus an important safeguard in the protection of rights.<sup>295</sup> Given that most socio-economic resources are distributed through the markets,<sup>296</sup> most functions that were previously vested in the state are now exercised by private actors, such as multinational corporations. The services they provide include: energy, telecommunications, transport, water and sanitation.

Horizontal application of human rights acknowledges the fact that, in the wake of globalization, some non-state actors have acquired as much power as states. Indeed, decisions of non-state actors, such as large multinational corporations, are capable of doing more harm to natural persons in terms of human rights violations.<sup>297</sup> It has been argued that globalization has offered corporations enormous opportunities for trade and a vast majority of them have seized this opportunity not only to trade legitimately, but also to exploit weak regulatory national frameworks with a view to maximizing their profits.<sup>298</sup> Indeed, investigation into corporate conduct, especially in developing countries, reveals egregious

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293. Op cit, n 8.

294. Ibid.

295. Op cit,n 9.

296. Ibid.

297. Op cit, n 3.

298. Op cit, n 7.

violation of human rights, such as environmental degradation, poor working conditions and forced labour, sexual harassment of workers, racial discrimination among others.<sup>299</sup>

In Kenya, there have been cases of human rights violation by multinational corporations. Kakuzi Plc, a multinational corporation in the agricultural sector, has been accused of human right abuses, such as killings, rape, sexual and gender-based violence, bad labour practices and land injustices against the neighbouring communities.<sup>300</sup> This resulted in a law suit against the multinational corporation in the United Kingdom resulting in a settlement of over one billion Kenya shillings.<sup>301</sup> The company had to embark on human rights reforms as part of the settlement.<sup>302</sup>

Another instance is the case of Cortec Mining Kenya Limited. In that case, Cortec Mining Kenya Limited instituted a suit against the Government of Kenya following the revocation of its mining licence. The case proceeded to arbitration under the auspices of the International Centre for Settlement of Investment Disputes (ICSID).<sup>303</sup> During the course of proceedings, it emerged that Cortec Mining Kenya Limited had flouted environmental laws by failing to undertake a mining feasibility test and failing to obtain an Environmental Impact Assessment licence.<sup>304</sup> The company had also failed to compensate and resettle the affected landowners whose lands had been acquired to pave way for the project

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299. Ibid.

300. Kenya Human Rights Commission., 'Heavy price for Kakuzi's egregious human rights violations' available at <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/737-heavy-price-for-kakuzi-s-egregious-human-rights-violations.html> (accessed on 16/07/2022).

301. Ibid.

302. Business Daily., 'Kakuzi adopts UN policy on human rights violations' available at <https://www.businessdailyafrica.com/bd/corporate/industry/kakuzi-adopts-un-policy-human-rights-violations-3655604> (accessed on 16/07/2022).

303. International Centre for Settlement of Investment Disputes, Arbitration between Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited and Republic of Kenya, ICSID Case No. ARB/15/29.

304. Ibid.

in accordance with the laws of Kenya on compulsory acquisition.<sup>305</sup> The Tribunal thus held that the investment could not be protected since it flouted the environmental laws of the Republic of Kenya.<sup>306</sup>

The case of Shell Oil Corporation offers another example of human rights violation. The company, which is involved in oil exploration activities in the Niger Delta in Nigeria, has been accused of fuelling ethnic militancy, human right abuses, environmental degradation and unsustainable peace due to irresponsible business activities.<sup>307</sup> The activities of the multinational corporation have resulted in several environmental concerns, including the extinction of biodiversity, contamination and destruction of soil and air pollution as a result of oil spillages.<sup>308</sup> This has had an adverse impact on economic activities, social-cultural life and human health of people in the Niger Delta. Degradation of land as a result of pollution has affected farming activities in the region.<sup>309</sup> Further, there have been cases of displacement of indigenous people in the region and sexual violation against teenage girls by itinerant oil field workers, resulting in socio-cultural setbacks in the region.<sup>310</sup> Further, the disposal of natural gas during oil exploration activities in the region has resulted in human health concerns.<sup>311</sup>

Such cases clearly demonstrate that non state entities are capable of violating human rights. The concept of horizontal application of human rights was developed out of this realization in order to hold non state actors accountable. The next part of the paper discusses the extent to

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305. Ibid.

306. Ibid.

307. Maiangwa.B & Agbibo.D., 'Oil Multinational Corporations, Environmental Irresponsibility and Turbulent Peace in the Niger Delta' *Africa Spectrum*, 2/2013: 71-83.

308. Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' (2009) 3 (1) *African Research Review* 111, 124.

309. Ibid.

310. Ibid.

311. Ibid

which the Kenyan judiciary has embraced the concept of horizontal application of the bill of rights as envisioned under article 20 (1) of the constitution.

### **3. Horizontal Application of the Bill of Rights in Kenya**

#### **3.1. Pre-2010 Position**

In the Pre-2010 constitutional dispensation, courts were reluctant to embrace the concept of horizontal application of the bill of rights. In a majority of decisions, courts held that the repealed Constitution of Kenya only envisaged vertical application of the bill of rights, where fundamental rights and freedoms could only be enforced by a citizen against the state. Courts, however, agreed that non state actors have the capacity to infringe human rights.

This position can be clearly seen in the case of *Kenya Bus Services Limited & 2 Others –vs- The Attorney General & 2 Others*.<sup>312</sup> In this case, the Plaintiffs contended that the Defendants, whilst enforcing road transport rules and regulations, had violated their fundamental right to protection of law and the right not to have their properties entered into. The court observed as follows:

‘Fundamental rights and freedoms are contained in the Constitution and are principally available against the State because the Constitution’s function is to define what constitutes Government and it regulates the relationship between the Government and the governed. On the other hand, the rights of individual interests are taken care of in the province of private law and are invariably redressed as such<sup>313</sup> (emphasis added).’

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312. *Kenya Bus Services Limited & 2 Others –vs- The Attorney General & 2 Others*, Miscellaneous Civil Suit No.413 of 2005, (2005) eKLR.

313. *Ibid.*

In that case the Court adopted the reasoning that in cases of infringement of rights by non-state actors, the appropriate course of action is to bring the claim under the substantive law where such infringement is founded and not under the Constitution.

Further, in the case of *Richard Nduati Kariuki v Leonard Nduati Kariuki & Kariuki Enterprises Ltd*,<sup>314</sup> the court noted that fundamental rights and freedoms are capable of being violated by non-governmental bodies and agencies. However, the court decided that the Constitution only envisages vertical application of the bill of rights out of the desire to protect people from the misuse of power by the state rather than from the actions of private individuals.<sup>315</sup> The court held that in cases of violation of fundamental rights and freedoms by individuals, appropriate remedies can be sought against such individuals through private causes of action under common law.<sup>316</sup>

This reasoning was also adopted in *Alphonse Mwangemi Munga & 10 Others –vs- African Safari Club Limited*,<sup>317</sup> where the Petitioner instituted a constitutional petition against the Respondent in respect of delayed salaries and termination of an employment contract. The court decided that the claim was based on a contract of employment which was in the private law sphere.<sup>318</sup> The court thus held that the Respondent was not liable for any violations of fundamental rights.<sup>319</sup>

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314. *Richard Nduati Kariuki v Leonard Nduati Kariuki & Kariuki Enterprises Ltd*, Miscellaneous Civil Application No. 7 of 2006, (2006) eKLR.

315. *Ibid.*

316. *Ibid.*

317. *Alphonse Mwangemi Munga & 10 Others v African Safari Club Limited*, Petition 564 of 2004, (2008) eKLR.

318. *Ibid.*

319. *Ibid.*

### **3.2. Post-2010 Position**

Following the promulgation of the Constitution of Kenya 2010, courts have interpreted the application of the bill of rights both vertically to bind the state and horizontally to bind private persons. This issue was succinctly discussed in the case of *Isaac Ngugi v Nairobi Hospital & 3 others*,<sup>320</sup> where the court was called upon to determine whether the detention of a patient in hospital for non-payment of hospital bills is a violation of the person's fundamental rights and freedoms. The First Respondent in the case, Nairobi Hospital, argued that a constitutional petition cannot be lodged between two private persons. The court in its decision cited articles 2 (1) and 20 (1) of the Constitution and stated that the issue whether the bill of rights applies horizontally or vertically is beyond peradventure.<sup>321</sup> The court further held that the real issue was whether and to what extent the bill of rights is to apply to private relationships. The court, however, cautioned that the issue whether the bill of rights is to be applied horizontally or just vertically against the state depends on the nature of the right and fundamental freedom and the circumstances of the case.<sup>322</sup>

Horizontal application of the bill of rights was also discussed in *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*.<sup>323</sup> The Petitioners in the case alleged violation of fundamental rights and freedoms by the Respondents, including the right to accessible and adequate housing; right of access to information held by the State; right not to be treated in a cruel, inhuman or degrading manner and the right of every child to be protected from inhuman treatment. The First Respondent in the case argued that it is not a public body and that the reliefs sought by the Petitioner were not

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320. *Isaac Ngugi v Nairobi Hospital & 3 others*, Petition No.407 of 2012, (2013) eKLR.

321. *Ibid.*

322. *Ibid.*

323. *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*, Petition No. 65 of 2010.

appropriate since the issues involved in the circumstances of the Petition revolve around private law and not public law. The court, in its decision, held that the provisions of articles 2(1), 19(3) and 20(1) of the Constitution provide that the bill of rights can be enforced as against a private citizen, a public or a government entity.<sup>324</sup> The court further opined that from a wide definition of the term “person” as contained in article 260, the intention of the framers of the constitution was to have both a vertical and a horizontal application of the bill of rights.

The concept of horizontal application of the bill of rights was also considered in the case of *Jemimah Wambui Ikere v Standard Group Limited & Another*.<sup>325</sup> In the case, the court held that the constitution in articles 2 (1) and 20 (1) and the definition of a person under article 260 envisages both vertical and horizontal application of the bill of rights. The court further held that no person is above the constitution and every person is bound by the provisions of the constitution, including the bill of rights.<sup>326</sup>

This position was also restated in *Baobab Beach Resort and Spa Limited v Duncan Muriuki Kaguuru & Another*.<sup>327</sup> In the case, the Court held that, unlike the repealed constitution, the provisions of the current constitution apply both vertically and horizontally. The court noted as follows:

‘In so far as the bill of rights was enacted to provide guarantees against the violation of the constitutional rights of persons, its application is required to be invoked, either directly or indirectly against another person, whether a person, company, association or other body of persons whether incorporated or unincorporated or against any public entity so as to give full effect to the aspirations of the Kenyan people, and the

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324. Ibid.

325. *Jemimah Wambui Ikere v Standard Group Limited & Another*, Petition No. 466 of 2012, (2013) eKLR.

326. Ibid.

327. *Baobab Beach Resort and Spa Limited v Duncan Muriuki Kaguuru & another*, Civil Appeal No. 296 of 2014, (2017) eKLR.

provisions of the Constitution, so as to safeguard against actions by persons who indiscriminately choose to trample upon the rights of others (emphasis added).<sup>328</sup>

Further, in *Mike Rubia & Another v Moses Mwangi & 2 Others*<sup>329</sup> the court noted that there is nothing in the constitution that draws the distinction between vertical and horizontal application of the bill of rights. The Court further decided that the bill of rights applies to all persons and binds everybody.<sup>330</sup>

From these decisions, it is evident that courts have embraced the concept of horizontal application of the bill of rights as espoused under Articles 2 (1) and 20 (1) and the definition of a person under Article 260 of the Constitution of Kenya 2010. However, courts have also cautioned that the doctrine of horizontal application of the bill of rights is not absolute, but will depend on the nature of the right as well as the circumstances of the case.<sup>331</sup> In some instances, courts have refused to adopt this concept and directed parties to seek remedies under private law. This was succinctly captured in the case of *Uhuru Muigai Kenyatta v Nairobi Star Publications Limited*.<sup>332</sup> The petitioner in the case accused the Respondent of violating his fundamental rights and freedoms on grounds of defamation as espoused under Articles 28 and 33 of the constitution.<sup>333</sup> The court, however, decided that the appropriate remedy in the circumstances was under civil law. The court adopted the reasoning that not every ill in society should attract a constitutional sanction and that where there is a remedy in civil law, a party should pursue that remedy. The court observed:

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328. Ibid.

329. *Mike Rubia & Another v Moses Mwangi & 2 Others*, (2014) eKLR.

330. Ibid.

331. Op cit, n 37.

332. *Uhuru Muigai Kenyatta v Nairobi Star Publications Limited*, (2013) eKLR.

333. Ibid.

*'The constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the constitution.'*<sup>334</sup>

A similar reasoning was also adopted in *Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi*.<sup>335</sup> The court in the case recognized the concept of horizontal application of the bill of rights and noted that the rigid position that human rights apply vertically is being overtaken by emerging trends in the development of human rights law and litigation.<sup>336</sup> The court decided that the bill of rights applies both vertically and horizontally save that horizontal application would not apply as a rule but rather as an exception.<sup>337</sup>

These cases demonstrate that while the concept of horizontal application of the bill of rights has been embraced by the judiciary, its application is not absolute. Courts will consider a number of factors before adopting this concept, including the nature of the right in question, the nature and extent of powers exercised by an entity, and the nature of the duty that accrues to the private party.<sup>338</sup>

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334. Ibid.

335. *Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi* (2011) eKLR.

336. Ibid.

337. Ibid.

338. Op cit, n. 8.

#### **4. Application of indirect liability (complicity) for human rights violations to corporations**

As seen above, the constitution provides a mechanism for enforcement of rights against private persons.<sup>339</sup> Where a person is found liable, the court may grant appropriate remedies, including a declaration of rights; an injunction; a conservatory order; an order for compensation; and an order for judicial review, among others.<sup>340</sup>

Kenya is a signatory to various international legal instruments, including the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights and the Convention on Elimination of all Forms of Discrimination against Women (CEDAW). These instruments espouse the cardinal state responsibility in the protection of human rights.<sup>341</sup> By acceding to these instruments, states assume the duties and obligations, under international law, to protect, respect and uphold human rights. This duty is further anchored by the United Nations Guiding Principles on Business and Human Rights.<sup>342</sup> The Principles espouse three key pillars being the state's duty to protect human rights; the corporate's responsibility to respect human rights; and access to appropriate remedies for victims of business-related human rights abuse.<sup>343</sup>

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339. Constitution of Kenya, 2010, Article 22.

340. Ibid.

341. See for example the Preamble to the Universal Declaration of Human Rights and article 2 of the International Covenant on Civil and Political Rights.

342. United Nations Guiding Principles on Business and Human Rights., available at [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf) (accessed on 24<sup>th</sup> August 2022).

343. Ibid.

States can thus undertake various domestic measures towards fulfilling their obligations under international law. In Kenya, recognition of the doctrine of horizontal application of the bill of rights is an important step towards fulfilling the state's obligation under international law.

Corporate liability for gross human rights abuses can either be direct or indirect. Direct liability occurs where corporations are implicated in gross human right abuses as the primary perpetrators or contributors.<sup>344</sup> Indirect liability, on the other hand, arises where corporations acted as contributors to human rights abuses.<sup>345</sup> Corporate liability for human rights violations attracts the possibility of corporations being sanctioned under both criminal and civil law of host states.<sup>346</sup> Various theories have been adopted in interpreting the concept of indirect liability (complicity) for human rights violations by corporations.

The theory of corporate culpability entails the attribution of actions, intent and negligence to corporate entities.<sup>347</sup> This could be through the identification method where acts of officers are treated as those of the company itself.<sup>348</sup> It could also be through the idea of corporate culture, inference of culpability could be drawn from a corporate culture that encouraged or tolerated human rights abuses.<sup>349</sup> Corporate culpability could also be attributed through the theory of vicarious liability.<sup>350</sup> This applies where the wrongful acts of agents are attributed to the private person.<sup>351</sup>

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344. Op cit, n 40.

345. Ibid.

346. Ibid.

347. Meyer, W. H. (1996). 'Human Rights and MNCs: Theory versus Quantitative Analysis.' *Human Rights Quarterly*, 18(2), 368-397.

348. Ibid.

349. Ibid.

350. Friedman, N. (2021). Corporate Liability Design for Human Rights Abuses: Individual and Entity Liability for Due Diligence. *Oxford Journal of Legal Studies* 41(2), 289-320.

351. Ibid.

## **5. Conclusion**

The doctrine of corporate liability for human rights violations is an important safeguard against human rights violations. Under this doctrine, corporations are increasingly being held directly and indirectly liable for human rights violations. However, private law remedies, such as damages in tort law, which courts often prefer may not be adequate, especially in the case of large multinational corporations<sup>352</sup> given that most can easily pay and continue with their abuses. Financial penalties and fines may thus lack deterrent value and social stigma. The doctrine of horizontal application thus remains an important step in safeguarding rights.

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352. Kamminga, M. T., & Zia-Zarifi, S. (Eds.). *Liability of Multinational Corporations under International Law*. (BRILL, 2021), 10.