

Legal approaches to NCD prevention in Africa

Addressing NCD risk factors through laws and policies promoting healthy diets and physical activity

Peer Review

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Introduction

Valentina Castagnari

About this publication

Non-communicable diseases (NCDs), including cardiovascular diseases, respiratory diseases, diabetes and some forms of cancer, are the leading cause of death and disability in the world (World Health Organization, 2025). Once deemed diseases of affluence, NCDs are increasingly prevalent and deadly in low- and middle-income countries, which account for over 70% of all NCD-related deaths and approximately 82% of premature NCD deaths globally (World Health Organization, 2024b). NCDs are largely preventable. Over two-thirds of NCDs are the product of modifiable risk factors, including tobacco, unhealthy diets, alcohol consumption and physical inactivity (World Health Organization, 2024b). Therefore, tackling NCDs and their risk factors provides a unique opportunity to improve health outcomes, particularly in low- and middle-income countries, where the burden is greatest.

Nonetheless, despite the growing NCD burden across Africa, scholarly research on this topic remains scant, especially in low- and middle-income countries. One of the bottlenecks identified is the limited interactions between legal and public health teaching and research at academic level, leading to a narrow and, at times, siloed understanding of the opportunities offered by legal and regulatory approaches to NCD prevention. This publication contributes to addressing this gap by advancing research and exploring solutions to the NCD crisis, with a particular focus on two major risk factors: unhealthy diets and physical inactivity. Grounded in a uniquely African perspective, the publication addresses the continent's specific challenges through the work of African authors and underscores the importance of multidisciplinary academic engagement to produce locally-relevant, evidence-based research to inform policy action to tackle the burden of NCDs.

This publication was developed with the objective of advancing multidisciplinary research by African authors to address the NCD crises and explore potential context-specific solutions to confront it. Acknowledging the need for creative thinking and collaboration, the publication seeks to bridge the expertise of public health and legal experts whose knowledge will be essential to craft effective solutions.

The publication was made possible by the sustained effort of a committed group of scholars who, in different stages of their professional careers, accepted the challenge of doing research and publishing on topics that were sometimes outside of their comfort zones. The process was undertaken under the auspices of the Global Regulatory Fiscal and Capacity Building Programme (Global RECAP), in collaboration with the Global Center for Legal Innovation on Food Environments, housed at the O'Neill Institute for National and Global Health Law, at Georgetown University. Under Global RECAP, the International Development Law Organization (IDLO) has promoted interdisciplinary academic engagement on legal approaches to NCD prevention, as well as strengthening academic capacity to integrate legal and regulatory aspects of NCDs prevention in public health and legal curricula.¹ As a result of this, since 2020 an inter-disciplinary regional academic working group was established gathering academics from public health, legal, nutrition, human rights, economics and other disciplines from various universities across the continent aiming to foster interdisciplinary dialogue and joint initiatives, including on teaching, researching and publishing at the intersection between NCDs, law and public health.

This publication is part of that effort. Starting with a regional workshop in Nairobi, Kenya, in late 2023, this initiative was designed to pilot ideas and start conceptualizing the foundations of what is now the first compilation of interdisciplinary research on NCDs and the law in Africa. Since then, authors have demonstrated substantial

¹ The Global Regulatory & Fiscal Capacity Building Programme (Global RECAP: 2019-2026), is a collaborative project between IDLO and WHO, with financial support from the Swiss Agency for Development and Cooperation, the European Union and the OPEC Fund for International Development. The Programme aims to support countries to reduce the prevalence and harms associated with NCDs through regulatory and fiscal measures that promote healthy diets and physical activity. The programme is implemented in ten countries across two regions, including Ghana, Kenya, Mauritius, Tanzania and Uganda, in Africa; and in Bangladesh Indonesia, Nepal, Sri Lanka and Thailand in Asia.

growth in their understanding and proficiency on NCDs and the law, positioning them at a privileged place to continue developing their expertise in the future. The publication process has been lengthy and, at times, demanding, but certainly rewarding. We extend our heartfelt thanks to the outstanding academics from Kenya, Tanzania, Uganda, South Africa and Ghana, who persevered through multiple rounds of revisions, feedback, and meetings to bring this work to completion. We also extend our sincere gratefulness to the group of external peer reviewers who took the time to offer valuable suggestions to enhance the publication and its quality. Overall, this publication showcases the growing awareness, capacity, commitment, engagement and dedication of the African academic community to advance cutting-edge and context-specific research to support evidence-based decision-making to curb NCDs in the region.

Background

NCDs now constitute the largest health burden in Africa, mirroring global trends and signalling a shift in the region's disease profile, where infectious diseases used to be the primary concern (World Health Organization Regional Office for Africa, 2019, p. vii). NCDs are responsible for over one-third of all deaths in Africa, with their share rising significantly — from 24% of all deaths in 2000 to 37% in 2019. They are also expected to overtake communicable, maternal, neonatal, and nutritional diseases combined as the leading cause of death in sub-Saharan Africa by 2030 (World Health Organization Regional Office for Africa, 2023).

Notably, this shift is occurring whilst the African region is still struggling with a prevalent burden of communicable diseases, holding the largest share of infectious diseases and the highest death rate across diseases in the world (World Health Organization, 2025, p. 17). Communicable and non-communicable diseases also coexist and are mutually reinforcing. Diabetes, for example, is associated with a two-fold higher risk of tuberculosis, higher risk of death during tuberculosis treatment and increased changes of relapse and drug resistance (World Health Organization Regional Office for Africa, 2023, p. 10). Relatedly, Africa is facing malnutrition in its triple burden, whereby alarming levels of hunger and undernutrition coexist with a rising prevalence of overweight and obesity, a metabolic risk factor for NCDs, as well as micronutrient deficiencies (World Health Organization African Region, 2019). Combined with the accelerating nutrition transition and persistent structural weaknesses and limited access to essential health services, these trends present a troubling outlook for public health across the African continent (World Health Organization Regional Office for Africa, 2023, p. 10).

NCDs take a heavy toll on people's and planetary health and wellbeing. NCDs are chronic in nature, requiring healthcare for long periods in life. This hampers opportunities to lead healthy and plentiful lives and has direct impacts on people's ability to develop to their fullest potential. Relatedly, long treatments required by chronic diseases can overwhelm fragile health systems, hindering the provision of quality health-related goods and services (World Health Organization, 2024b).

While NCDs affect all individuals regardless of their individual characteristics, they have a disproportionate impact on individuals in situations of socioeconomic vulnerability, who are more exposed to NCD risk factors and have less opportunities to cope with disease. In turn, NCDs contribute to and are reinforced by economic hardship, thereby perpetuating poverty and socioeconomic inequality (World Health Organization, 2022).

NCDs also have significant economic consequences that are often overlooked. NCDs hinder productivity both for the person who is ill and for those in the family that oversee their care, often women (García-Morales et al., 2024), which is particularly grave when the person ill is the main breadwinner. In turn, reductions in productivity hamper countries' economic development, an issue of grave concern in some African countries still struggling with economic hardship (World Health Organization, 2022).

NCDs and their risk factors equally take a heavy toll on the environment. On the one hand, the healthcare system required for primary care and NCD treatment is highly energy-intensive, demanding significant resources and leaving a substantial environmental footprint (Lenzen et al., 2020). On the other hand, NCD risk factors, such as unhealthy foods, are environmentally detrimental across their lifecycle, from production to distribution,

consumption and disposal. Industrial production of ultra-processed products² foster monoculture and deforestation, manufacturing and distribution processes are heavily polluting, and production and consumption by-products lead to waste (Seferidi et al., 2020). As a result, the environmental footprint of unhealthy diets reliant on ultra-processed products is significantly higher than that of naturally or minimally processed products, hindering opportunities for sustainable development (Anastasiou et al., 2022; Garzillo et al., 2021).

In this context, the largely preventable nature of NCDs stands out as an opportunity to avoid much death, destruction and suffering. NCDs can be prevented by addressing their risk factors, including unhealthy diets and physical inactivity. Healthy eating and active lifestyles are largely determined by conditions and environments where people are born, live and develop (World Health Organization, n.d.). In turn, such environments are shaped by economic, social and institutional arrangements that determine the availability, accessibility and social desirability of healthy and unhealthy behaviours, becoming social determinants of health (WHO and Commission on social determinants of health, 2008; Marmot & Bell, 2019). Therefore, while unhealthy eating habits and lack of physical exercise are often deemed the result of poor individual decision-making, evidence shows that environmental factors — and not a lack of free will — are the key drivers of habits leading to poor health (World Health Organization, 2024a).

Eating habits have changed dramatically over the recent years due to multiple shifts in socio-cultural practices. Driven by urbanization, globalization, evolving workplace roles, and other factors, eating patterns have progressively moved away from traditional diets based on home-cooked, natural and whole foods into diets laden with products high in sugar, salt, and fats, often ultra-processed, and lacking essential nutrients to lead a healthy life (UNICEF, 2019).

Transformations in food systems have been instrumental to these changes, with market incentives and power dynamics increasingly favouring market concentration and industrialized — less healthy — foods (Mofokeng, 2023, paras 22–27). Ultra-processed foods are designed to tap into biological and behavioural susceptibilities and cognitive biases, encouraging individuals to overeat (Pan American Health Organization, 2015, p. 6; Wood et al., 2021). They are also cheap and marketed aggressively, often to children, using increasingly immersive, ubiquitous and effective strategies that make unhealthy products socially acceptable and desirable — even as a sign of social status — leading to unhealthy food choices (UNICEF, 2018; UNICEF & World Health Organization, 2023)

As a result, eating habits are increasingly shaped by products and practices of powerful transnational corporations that manufacture and market unhealthy products, and undermine efforts to regulate them effectively, constituting commercial determinants of health (Mialon, 2020; World Health Organization, 2021).

The unhealthy food market has expanded exponentially in Africa, growing by 90% in the last decade alone (Wood et al., 2023). This responds to a deliberate strategy by the unhealthy food and beverage industry, which has been purposely and steadily expanding its influence and penetration, often under the veil of corporate social responsibility efforts to tackle hunger and undernutrition (Kruger et al., 2023; Moodie et al., 2021; Wood et al., 2023). Notably, however, while unhealthy foods are already prevalent and ubiquitous in some areas of Africa, particularly in large urban settings, parts of the continent are still at earlier stages in the nutrition transition,³ where traditional, natural and minimally processed foods are the norm (Mbogori & Mucherah, 2019; World Health Organization African Region, 2019). This creates opportunities for early intervention.

Relatedly, while unhealthy food is often ubiquitous, opportunities for physical activity are scant. Open spaces and infrastructure to engage in exercise is frequently precarious or overall lacking, especially in poorer settings. Cities also lack adequate urban planning that fosters walking or biking as means of active commuting or are too unsafe to allow people to do so, a concern particularly grave for women that further increases gender disparities (Althoff et al., 2017; Criado-Perez, 2019, Chapter 1). Such constraints further create and consolidate the presence of obesogenic environments, leading to overweight, obesity and NCDs (World Health Organization & Commission on Ending Childhood Obesity, 2016).

2 Ultra-processed foods have been defined as industrial formulations typically with five or more ingredients. Besides salt, sugar, oils, and fats, ingredients of ultra-processed foods include food substances not commonly used in culinary preparations (such as hydrolyzed protein, modified starches and hydrogenated or interesterified oils, and additives). Unprocessed or minimally processed foods represent a small proportion of or are even absent from the list of ingredients of ultra-processed products (Pan American Health Organization, 2019, Appendix A).

3 The concept of the nutrition transition was first coined by Barry Popkin in a seminal paper describing shifts in dietary patterns and energy expenditure, from Stage 1 (describing hunter-gatherer populations) to Stage 4 (characterized by diet high in fats, cholesterol, sugar, and other refined carbohydrates and low in polyunsaturated fatty acids and fiber, often accompanied by increasingly sedentary life) (Popkin, 1993, See also, 2004).

Against this backdrop, law⁴ becomes a powerful tool to modify the prevailing unhealthy environments and promote health. By establishing rules and frameworks that shape economic and social environments, law plays a crucial role in influencing people's exposure to risk factors (Gostin et al., 2019, p. 1882). It shapes environments, sets safety and quality standards for food products and their marketing to protect consumer's health, establishes rules for acceptable corporate behaviour, sets food labelling requirements, establishes zoning requirements, amongst many others. In this way, law constitutes a determinant of health and is a tool with transformational power to incentivize healthy behaviours (Gostin et al., 2019, p. 1882). The potential of law to promote health underlies the foundations of the current publication, whereby designing and adopting fair, evidence-based regulatory interventions grounded on human rights can be leveraged to prevent NCDs and promote health for all.

Adopting a human-rights-based approach to NCDs

NCDs have direct impacts on the right to health and other interrelated human rights. Therefore, States must acknowledge the NCD crisis as a human rights crisis, recognizing individuals as rights-holders and States themselves as duty-bearers with an obligation to take action to address the NCD crisis to uphold rights for all (Constantin et al., 2021; Patterson et al., 2019). Adopting a human-rights-based approach to NCDs puts individuals at the front and centre, as well as underscores States' legal obligations to address NCD prevention and control as part of their duties under human rights law. It equally catalyses political action and integrates accountability mechanisms that can be leveraged to enhance efforts to effectively tackle NCDs (Gruskin et al., 2014).

The right to health is recognized in several international treaties, as well as domestically in constitutions and law. The International Covenant on Economic, Social and Economic Rights (ICESCR, 1966) was the first to recognize the binding nature of the right to health and the one which most extensively develops it. In Africa the right to health is recognized in the African Charter on Human and Peoples' Rights (Banjul Charter, 1986, Article 16), as well as in other group-specific treaties, like the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol, 2005), protecting women's rights (Art. 14) and the African Charter on the Rights and Welfare of the Child (African Charter on the Rights and Welfare of the Child, 1999, Article 14).

The right to health is the right of every person to attain the highest attainable standard of physical and mental health (ICESCR, Art. 12).⁵ Notably, it not only refers to a right to adequate and timely healthcare, but also extends to health prevention, particularly at the face of epidemic and endemic diseases, such as NCDs (ICESCR, 1966, Article 12.2; Committee on Economic, Social and Cultural Rights, 2000, p. 16). It also encompasses the determinants of health, including food and nutrition, housing, access to safe and potable water and a healthy environment, amongst others (Committee on Economic, Social and Cultural Rights, 2000, para. 4). This is particularly critical in the context of NCDs, whereby the extent to which social, commercial, and legal determinants shape environments that obstruct healthy behaviours places them squarely within the scope of the right to health, warranting active and sustained intervention by States.

The right to adequate food is equally paramount to address diet-related NCDs. This right is extensively recognized in international human rights law (including in the ICESCR, Art. 11), as well as in the African context both explicitly in the Maputo Protocol (Art. 15) and implicitly in the African Charter on the Rights and Welfare of the Child (as the right to health and nutrition, in Art. 14), and the Banjul Charter (under the right to health; economic, social and cultural development; and an environment favourable to development (Arts. 16, 22 and 24, respectively)).

The right to adequate food comprises a right of all persons to an adequate and stable supply of food adequate in quality and quantity to fulfil individual's dietary needs, that is free from adverse substances and acceptable within a given culture (Committee on Economic, Social and Cultural Rights, 1999, paras 8-12). It is equally indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights, including health (Committee on Economic, Social and Cultural Rights, 1999, para. 4). Therefore, access to adequate food is not equivalent to a set amount of nutrients and calories, but rather comprises dignified and stable access to

4 For the purposes of this paper, law is understood broadly as the legal instruments that express public policy, as well as the public institutions responsible for creating, implementing and interpreting the law (Gostin et al., 2019, p. 1857)

5 ICESCR art. 12.1. The African Charter recognizes the right using similar language as it recognizes the right to health as the right to the "best attainable state of physical and mental health" (art. 16).

food that is adequate, physically and economically accessible to support development (Committee on Economic, Social and Cultural Rights, 1999, paras 6-7).

Unhealthy and ultra-processed foods provide empty calories and are laden with nutrients and ingredients linked to ill-health (Lane et al., 2024). Therefore, diets reliant on these products do not align with the standards of the right to adequate food. Moreover, unhealthy foods are designed and marketed to displace traditional foods, usually healthier and more sustainable (Wood et al., 2021). Hence, the widespread availability and promotion of unhealthy food undermines people's ability to fully realize their right to adequate food. This is a relevant consideration for States as they address the NCD crisis.

Equally, NCDs have implications for equality and non-discrimination,⁶ cross-cutting rights fundamental for designing rights-promoting NCD prevention and control measures. In the context of social, economic and cultural rights, equality and non-discrimination entail the right of every person to exercise such rights without discrimination and mandate States' obligation to guarantee equitable conditions for all (Committee on Economic, Social and Cultural Rights, 2009, para. 7). This requires eliminating both formal discrimination -on the books- and substantive discrimination -in practice- as well as addressing systemic discrimination which creates relative disadvantages for some groups, and privileges for others (Committee on Economic, Social and Cultural Rights, 2009, paras 8, 9, 12).

The NCD burden is unequally distributed, reflecting historic patterns of discrimination and disempowerment (Mofokeng, 2023, para. 3). Individuals in situations of socioeconomic vulnerability are more exposed to NCD risk factors and less well equipped to bear the health and economic cost of disease (Cesare et al., 2013). Relatedly, while historically disadvantaged individuals and groups frequently have easy access to unhealthy foods, economic or physical access to healthy foods is limited. They are also the targets of direct marketing efforts (Adjoian et al., 2019; Cassady et al., 2015; Chiang et al., 2011), which further enhances their NCD-related risk and perpetuates inequality. These disparities limit opportunities to exercise the right to health and other interrelated rights on equal footing, having implications for the right to equality and non-discrimination that must be addressed by States.

NCDs also have an impact on a broad array of other rights that are interrelated and indivisible to the rights outlined above. Amongst them is the right to information,⁷ both a component of the right to health and a standalone right requiring access to timely and adequate information to empower individuals to make autonomous decisions that promote their health (Committee on Economic, Social and Cultural Rights, 2000, paras 37, 44). The right to information underlies discussions on nutrition labelling as a tool for NCD prevention, while equally being a key component to fulfil the right to education more broadly.

Along similar lines, the right to be free from exploitation, recognized in the Convention on the Rights of the Child (Arts. 32, 36) can be compromised by manipulative unhealthy food marketing that offers economic gain to the food industry by taking advantage of children's vulnerabilities- including their emotions, and their limited cognitive capabilities (UNICEF, 2018). Children must be protected from exploitation, including in the context of marketing, particularly in the digital realm, where their engagement and content-sharing can turn them into economic agents that can lead to their exploitation (Committee on the Rights of the Child, 2021, para. 112). This issue has recently raised the concern of the WHO and UNICEF, stressing how children and their data are used as means to enhance the promotion of unhealthy products online, often covertly or without their awareness (UNICEF & World Health Organization, 2023, p. 15).

States obligations to prevent and control NCDs

States have a duty to respect, protect and fulfil human rights. The obligation to respect entails States' duty to refrain from directly or indirectly interfering in the enjoyment of human rights, including by engaging in conducts that are likely to result in preventable NCD-related death, like incentivizing the consumption of unhealthy foods and beverages (Committee on Economic, Social and Cultural Rights, 2000, para. 8; Mofokeng, 2023, para. 11).

6 Recognized in the International Covenant on Civil and Political Rights (ICCPR), Arts. 2.1, 26; ICESCR, Arts. 2.2, 3; Banjul Charter, Arts. 2, 3; amongst many others.

7 The right to information is recognized in the ICCPR, Art. 19; in the ICESCR as a component of the right to health (Art. 12) and education (Art. 13); Banjul Charter, Art. 9; amongst many others.

In a similar vein, the obligation to protect mandates preventing third parties, including corporations, from interfering in the enjoyment of human rights (Committee on Economic, Social and Cultural Rights, 2000, para. 33). The duty to protect can require direct regulation of businesses (Committee on Economic, Social and Cultural Rights, 2017, para. 19). Therefore, the failure to regulate the activity of the food and beverage industry to prevent them from violating the right to health or other interrelated rights, as well as protecting consumers from their detrimental practices, can account to violations of the right to health (Committee on Economic, Social and Cultural Rights, 2000, para. 51).

Equally, under the obligation to fulfil, States must take appropriate measures towards the full realization of human rights, including legislative, administrative, budgetary, judicial, promotional and other measures (Committee on Economic, Social and Cultural Rights, 2000, para. 33). This includes empowering people to make informed choices about their health and taking proactive measures to ensure people's access to adequate food (Committee on Economic, Social and Cultural Rights, 2000, paras 36–37).

In the context of economic, social and cultural rights, States have an immediate obligation to take measures, to the maximum of their available resources, to move progressively towards human rights realization, without discrimination (International Covenant on Economic, Social and Cultural Rights, 1966, Art. 2.1; General Comment No. 3, 1990, para. 3). This entails a duty to take deliberate and effective measures that adequately foster human rights, whereby both inaction and ineffective action can breach States' human rights obligations (General Comment No. 3, 1990, para. 2).

In the context of NCDs, States' obligation to prevent diseases and address the underlying determinants of health mandates the expeditious adoption of effective, evidence-based interventions to address NCDs and their risk factors (Committee on Economic, Social and Cultural Rights, 2000, para. 33; Dainius Pūras, 2020) including unhealthy diets and physical inactivity. Such interventions should acknowledge and address preexisting health disparities and promote equality and dignity, while acknowledging the multiplicity of rights that are compromised by the NCD crisis (Mofokeng, 2023, para. 97).

The need for NCD prevention interventions has been extensively and increasingly recommended by both public health and human rights authorities concerned about the human toll, economic consequences and healthcare crisis provoked by the rising NCD burden (Elver, 2015; Grover, 2014; World Health Organization, 2013, 2017, amongst many others). Recently, the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Tlaleng Mofokeng, issued a report on food, nutrition and the right to health, where she outlined the crisis of malnutrition and diet-related NCDs and issued recommendations for rights-abiding and rights-promoting NCD prevention interventions. The report raises the need for a comprehensive approach to reform the food system extensively (Mofokeng, 2023, para. 97). To achieve that goal, it specifically recommends the adoption of many of the regulatory interventions addressed by the current publication, including front-of-package nutrition warning labels, restrictions to unhealthy food marketing, and fiscal policies that prioritize the rights of the population over private interests (Mofokeng, 2023, para. 97).

Outline

Framing NCDs as a human rights issue is the *fil rouge* — or theoretical foundation — of all the papers. The publication starts with a foundational paper by Evelyn Vaati Mutunga, Albert Burudi Wakoli, Peris Mbugua and Henry Ng'ethe that frames diet-related NCDs as a human rights issue and explore how a human rights-based approach can serve to ground efforts by governments to discourage unhealthy foods and beverages, as well as promote healthy diets. Grounded in the Kenyan context, the paper explores the country's legal, constitutional and human rights frameworks, as well as select court cases, to delve into the State's obligations in relation to NCD prevention. Notably, the core arguments of the paper can be transferable beyond Kenya, serving as a grounding piece for the rest of the publication.

Thereafter, a series of papers address concrete regulatory options to unravel unhealthy environments, discourage unhealthy diets and promote physical activity. The first two of these papers discuss front-of-package nutrition labelling (FOPL), a policy to effectively inform consumers, in an easy, quick and accessible manner in order to discourage the consumption of products with detrimental effects on health (Dainius Pūras, 2020). To date, no African country has

adopted mandatory FOPL. However, several countries, including Kenya, Ghana and South Africa, have been exploring such possibility, making research on the topic relevant to inform ongoing policy processes.

In the first paper on FOPL, Scholastica Mality explores opportunities to harmonise food labelling in the East African Community, analysing its legal framework, compliance with international standards and the practicalities of harmonisation. Integration mechanisms and other trade agreements, such as the one in the East African Community, have often been used to hamper or delay attempts to adopt evidence-based FOPL at the domestic level (Thow et al., 2017). Therefore, by analysing benefits and challenges of harmonisation, the paper is a timely contribution to anticipate potential trade-related conflict, as well as conceptualise solutions.

The second paper on FOPL addresses the issue through an accessibility lens, examining laws and regulations pertaining to food labelling standards in Tanzania and assessing the extent to which these legal frameworks adequately guarantee the accessibility of nutrition information for persons with visual disability. In this way, author Nicodemus Kusenha delves into an issue both relevant and underexplored at the intersection between nutrition labelling and human rights, offering insights into the need to adopt an inclusive lens that ensures the right to information and health for all.

Following, Dennis Dangbey, Emmanuel K. Ewul, Esubalew Dadi and Amos Laar explore the use of sugar sweetened beverage (SSB) taxation as a tool to prevent NCDs, exploring existing SSB taxes in Ghana and arguing in favour of strengthening them to make them effective NCD prevention measures. Health-promoting taxes that raise the price of unhealthy products, such as SSBs, are one of the most effective ways to reduce their consumption. Equally, they can offer a triple win: saving lives and disease, mobilising revenue and reducing the burden on healthcare systems, therefore advancing healthy equity (World Health Organization, 2016). By critically examining the feasibility of using SSB taxes to promote healthy diets in Ghana, the paper by Dangbey et al. explores concrete legal pathways for introducing or strengthening SSB tax laws. As such, it contributes to discussions in Ghana offering a pragmatic and meaningful approach to legal reform for NCD prevention in the country.

Work by Everlyn Vaati Mutunga, Emmanuel Konde Kitsao and Albert Burudi Wakoli dives into another key policy to tackle unhealthy food environments, the restriction to advertising of unhealthy foods to children. It is well-documented that marketing influences food choices and makes unhealthy products desirable, having a harmful effect on health, particularly in children (World Health Organization, 2023). Therefore, the authors' examination of the advances and challenges in regulating unhealthy food advertising in Kenya represents a valuable addition to the existing body of literature. Furthermore, the paper's analysis of opportunities offered by public interest litigation in Kenya provides an insightful roadmap useful to advocates seeking to advance policy measures in the country.

Afterward, David Kabanda further interrogates the issue of unhealthy food marketing, with a focus on the need to restrict it in the school environment. The paper analyses Uganda's international and constitutional obligations to tackle the marketing of unhealthy foods and beverages in schools, exploring how the human rights framework can enrich the policy dialogue and inform more comprehensive regulatory solutions. It equally portrays how these efforts can, and should, be in accordance with human rights principles described by the United Nations Food and Agriculture Organization PANTHER principles (FAO, 2014).


Paula Knipe and Tendai Mafuma then address the potential of public food procurement as a strategic tool for NCD prevention within South Africa's public health facilities. With the State being the largest purchaser of goods and services, the paper argues that aligning food procurement with nutrition and health goals could significantly improve the availability and accessibility of healthy food in public institutions. It further concludes by outlining key opportunities within the existing procurement framework to adopt a rights-based, health-promoting approach to public food procurement. Rights-promoting food procurement could serve as a critical lever for transforming food systems and advancing social justice. Against this backdrop, while the paper is focused on South Africa, some of its lessons could be equally constructive to discuss opportunities beyond.

Subsequently, a paper by Paul Ogendi explores physical inactivity as a risk factor for NCDs in Kenya. As the sole paper in this volume focusing on this subject, it draws attention to the relative neglect of this issue in academic scholarship—signalling a critical gap and a timely opportunity for deeper engagement. The author examines how Kenya's obligations in relation to human rights mandate the promotion of physical activity as a prime NCD risk factor. Focusing on one fundamental programme, Kenya's Affordable Housing Programme, he further analyses

opportunities in integrating the promotion of physical activity to the core of affordable housing initiatives, providing recommendations on how to ensure residential areas are designed to foster active and healthier lives. This is particularly crucial in the context of housing programs designed for individuals in situations of socioeconomic vulnerability—the primary targets of affordable housing initiatives. Integrating opportunities for physical activity into urban planning for low-income communities can serve as a transformative intervention, with the potential to yield far-reaching health and social benefits.

Finally, the publication concludes with a paper delving on the role of academia in strengthening capacity for NCD prevention and control, reflecting on opportunities and challenges in interdisciplinary research and teaching. Using the experience of Moi University in Kenya as a case study, Maurice Odour, Faith Yego and Patrick Kere discuss the role of higher education institutions in building bridges between law and public health. They equally reflect on their own experience in bridging the gaps between the schools of public health and law, as well as creating long lasting efforts to strengthen capacity on the adoption of effective policies to prevent NCDs.

Through these contributions, this publication seeks to advance scholarship that grounds ongoing discussions on NCD prevention and control in the specific realities of selected African countries. Drawing on a rich diversity of perspectives from both public health and legal scholars, it aims to foster dialogue, stimulate further research, and support the translation of academic insights into concrete policy action. This volume aspires to be the first of many such efforts, helping to mainstream NCD prevention as an urgent priority for safeguarding health and upholding human rights for all.



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Combating Unhealthy Diets to Reduce Diet-related Non-communicable Diseases Using a Human Rights-based Approach in Kenya

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Abstract

Non-communicable diseases (NCDs) are on the rise and have been linked to the consumption of unhealthy diets as one of their major risk factors. A human rights-based approach (HRBA) serves as an effective mechanism to ground efforts by governments to discourage unhealthy foods and beverages, as well as promote healthy diets. A HRBA enables the integration of human rights language into the NCD discourse, hence shaping policies and interventions relating to NCDs. This delineates the State as a duty bearer obligated to observe, respect, protect, promote and fulfil the right to health and other interrelated human rights. Equally, human rights language creates corresponding entitlements to the general population as rights holders of the right to health and other human rights. Both the Constitution and the laws of Kenya provide the foundation for using human rights principles in curbing the consumption of unhealthy diets. Further, developments in the Courts of Kenya illustrate how public interest can take precedence over private interests.

INTRODUCTION

Non-communicable diseases (NCDs) are on the rise and have been estimated to cause about three-quarters of all deaths around the world (The Lancet, 2022). Of these deaths, 8 million (19%) a year are the result of all dietary risks combined (Institute for Health Metrics and Evaluation, 2020). Millions of people, particularly in lower-income settings, cannot access the prevention, treatment and care that could prevent or delay NCDs and their consequences

(WHO, 2022). At least 39 million NCD deaths could be averted by 2030 if countries were to adopt effective interventions to prevent and control NCDs (The Lancet, 2022), and many more people would enjoy longer, healthier and happier lives. Such interventions include legal and regulatory interventions that are key to promoting healthy diets, including front-of-package labelling, marketing restrictions of unhealthy products and health-promoting fiscal measures (WHO, 2013).

Healthy diets provide adequate amounts and variety of nutritious, safe foods to cover (but not exceed) a person's energy and nutrient needs (Ministry of Health, 2017). Healthy dietary patterns are generally those that are rich in health-promoting foods, including plant-based foods, fresh fruits and vegetables, antioxidants, soya, nuts, and sources of omega-3 fatty acids, and low in saturated fats and trans fats, animal-derived proteins, and added/refined sugars (Pistollato, 2018). An understanding of the components of healthy diets is instrumental in assisting people to consume what is right in type, quantity and quality. Eating a balanced diet contributes greatly to reductions in NCDs, including diabetes, heart disease, stroke and cancer (WHO, 2022).

Kenya is increasingly faced with diet-related NCDs, such as cardiovascular diseases, some cancers and diabetes (Onyango & Onyango, 2018). These result from diets laden with foods that are high in calories, sugars, trans and saturated fats and salt, but low in fruits, vegetables and other unprocessed or minimally processed foods (Skerrett & Willett, 2010). The Kenya STEP-wise survey of 2015 on NCD risk factors revealed that a significant proportion of the population (95%) does not meet the recommended intake

of fruits and vegetables, which are vital sources of micronutrients (Mwenda et al., 2018). Relatedly, a systematic review established that almost 40% of Kenyans consume unhealthy foods and beverages, especially sugar-sweetened beverages (SSBs) (Rousham et al., 2020). Additionally, 20% add salt or use salty sauces before eating or at the table; 3.7% consume processed foods high in salt; and 83.5% often add sugar when cooking or preparing beverages (Mwenda et al., 2018). Diets which are high in fat and sugar are “energy dense” and contribute to overweight and obesity. Overweight and obesity increase the risks of NCDs, premature death and disabilities, therefore reducing an individual’s quality of life (Kraef et al., 2020). The Kenya Demographic Health Survey (KDHS) Report (2022) indicates that 28% of Kenyans aged 18–69 years are either overweight or obese (KNBS and ICF, 2023). It is estimated that 51 % of Kenyans suffer from one or more NCDs (Smit et al., 2020).

Food environments, defined as “the physical, economic, and sociocultural settings that influence dietary behaviors” (Maredia et al., 2024), affect dietary choices. The surge in the prevalence of diet-related NCDs is associated with, amongst other factors, the presence of unhealthy food environments where unhealthy products, high in sugar, salt and fats, often ultra-processed, are broadly accessible, affordable and fostered through aggressive advertising (Asiki et al., 2020). Such environments are largely shaped by products and practices deployed by the food industry, a trend fuelled by globalisation (Toebe & Patterson, 2020). Food producers and suppliers have capitalised on and become themselves commercial determinants of health, defined as the “strategies and approaches used by the private sector to promote products and choices that are detrimental to health” (Kickbusch, Allen & Franz, 2016). Advertisement of cheaper unhealthy diets, coupled with high levels of poverty, has been particularly detrimental in low- and medium-income countries (LMICs), where strict regulation of these foods is either lacking or minimal (Toebe & Patterson, 2020).

Limited government regulation of the food environment is attributable to various factors, often stemming from food industry behaviour (Mialon et al., 2020). Notably, industry players employ a discursive influence that, among other things, blames individuals for their choices, leading to poor diets, hence diverting attention from their own contribution to the NCD pandemic (McHardy, 2021). Tan et al. (2021) blame poor NCD response on how these diseases are framed and ultimately understood. The long-held “lifestyle diseases” tag shifts the blame from food producers to individual consumers, who are erroneously presumed to have autonomous decision-making with regard to their food choices (Manderson & Jewett, 2023). This framing ignores the role of powerful influences in the food environment, including the role of transnational corporations in availing cheap, unhealthy foods and promoting them through aggressive and persuasive advertising, besides structural issues contributing to poor diets, including limited supply of affordable healthy foods and poverty. Since “lifestyle diseases” have been associated with indulgence and, ultimately, wealth, this framing also ignores emerging overwhelming evidence that NCDs disproportionately affect the

poor (Manderson & Jewett, 2023). Significantly, confining NCDs to lifestyle choices diminishes the role of government in structuring holistic interventions that go beyond individual choices, including addressing commercial determinants of health.

Food industry players equally exaggerate the economic importance of unhealthy foods and the potential risks of regulation by emphasising the role of such foods in employment and revenue generation (Manderson & Jewett, 2023). Furthermore, powerful food industry players have been noted to lobby lawmakers for laws that favour their business, often at the expense of public health (Fleming-Milici & Harris, 2020). In turn, the perception that the food industry is a source of government revenue and employment weakens the government’s political will to apply health-promoting regulations on unhealthy foods, resulting in a lack of prioritisation of the matter, with grave public health implications (Fleming-Milici & Harris, 2020).

More recent discourses on NCDs appreciate that framing the NCD pandemic as a human rights issue could have far-reaching, positive implications. A human rights-based approach (HRBA), which conceptualises NCDs as a human rights issue modelled after international human rights law, can thus be a valuable alternative in addressing the NCD challenge (Patterson et al., 2019; Toebe & Patterson, 2020).

The Constitution of Kenya 2010 guarantees the right to the highest attainable standard of health, as well as the right to be free from hunger, and to have adequate food of acceptable quality. Additionally, the Constitution guarantees other rights that are ancillary to the fulfilment of the population’s health and food rights. Despite these important provisions, Kenya’s NCD burden continues to rise, with the implementation of existing laws, policies and programs being inadequate.

This paper proposes the adoption of a HRBA as one of the ways to reduce the burden of NCDs in Kenya. The paper is structured in two sections. After the introduction providing background, Section 1 develops a landscape of the legal, regulatory and policy framework on NCDs and healthy diets in Kenya. Next, Section 2 delves into advancing healthy diets through human rights frameworks in Kenya, focusing on developing the content of human rights affected by the NCD crisis in both international human rights law and the Kenyan constitutional and legal framework, as well as State obligations to address them. Finally, the paper ends with a conclusion and suggests a way forward.

THE LEGAL, REGULATORY AND POLICY FRAMEWORK ON NCDS AND HEALTHY DIETS IN KENYA

This section highlights the legal, regulatory and policy frameworks to which the promotion of healthy diets, as well as prevention of NCDs, is anchored in Kenya.

Law/Policy	Provision	Relevance
Constitution of Kenya 2010	Article 43 (1) (a) (c) outlines the right to socio-economic rights, including the “highest attainable standard of health”, and the right “to be free from hunger and to have adequate food of acceptable quality.”	The State shall give priority to ensuring the widest possible enjoyment of rights under Article 43, having due regard to the prevailing circumstances, including a consideration of the vulnerability of groups and individuals.
	Article 42 provides for the right to a clean and healthy environment.	Given the interdependent nature of human rights, the right to healthy food is closely interrelated and interdependent on the right to a clean and healthy environment and the right to access potable water in adequate quantities.
	Article 19 (3) (a) guarantees that rights and fundamental freedoms belong to each individual.	This expresses the inalienable nature of human rights, giving freedom to exercise the provisions of Article 43 (1) (a) (c).
	Article 21 (1) provides for the duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.	In implementing human rights, the State is mandated to “observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.”
	Article 21 (2) provides for the commitment of the State to achieve the progressive realisation of the rights guaranteed under Article 43.	The State is enjoined to take measures to achieve the progressive realisation of socio-economic rights, including legislative, policy and setting of standards.
	Article 20 (5) mandates the State to demonstrate the unavailability of resources where it claims that resources are not available to implement the rights guaranteed under Article 43.	This holds the State accountable for the availability of resources required for implementation. Such resources could include those needed to promote the consumption of healthy diets.
	Article 23 grants Courts the power to fashion appropriate remedies in the event that a right or fundamental freedom guaranteed in the Constitution is denied, violated, infringed or threatened.	The Court may grant such remedies as a declaration of rights, injunctions and an order for compensation, among others.
The Consumer Protection Act, 2012	Section 5 (1) warrants that the goods or services supplied under a consumer agreement are of a reasonably merchantable quality.	This ensures that goods supplied, including food products, as well as services provided, including those geared towards the promotion of healthy diets, are of high quality.
The Kenya Nutritionists and Dieticians Act 2007	The Act requires, among other things, that teaching institutions offer a course called “Nutrition in Disease Management” within their curriculum for students who enrol for Foods, Nutrition and Dietetics programs.	The course has a specific topic which focuses on dietary management of chronic diseases. This implies that nutrition professionals are equipped with knowledge and skills on dietary management of NCDs during their pre-service training and, consequently, the same trickles down to their clients in the course of practice.
National Guidelines for Healthy Diets and Physical Activity of 2017	The guidelines highlight principles of healthy eating that could reduce diet-related NCD prevalence.	Implementation of these guidelines could contribute to the prevention, management and control of diet-related NCDs, resulting in improved health outcomes.
Kenya Nutrition Advocacy, Communication and Social Mobilisation Strategy 2022-2027	The strategy has the overall goal of contributing towards the attainment of a malnutrition-free country through accelerated advocacy, communication, and social mobilisation.	The strategy addresses various nutrition issues, including NCDs. It utilises a HRBA by outlining various tactics/techniques needed to build the capacity of rights holders, hence empowering them to demand high-quality goods and services and holding the duty bearers accountable.

ADVANCING HEALTHY DIETS THROUGH HUMAN RIGHTS FRAMEWORKS IN KENYA

The Kenyan food environment is dominated by unhealthy foods in both urban and peri-urban settings (Maredia et al., 2024). People in poorer settings are, however, more exposed to unhealthy foods, whose prices are also lower than those of healthy foods (Maredia et al., 2024). A food environment consisting of unhealthy diets exposes the population to the risk of NCDs. In this context, law can be a significant tool to modify food environments to prevent NCDs and their associated risk factors.

Human rights law has been lauded as a possible avenue for addressing the NCD epidemic (Gentile, Campisi & Chingore, 2023; Toebe and Patterson, 2020; UNICEF, 2018; Constantin et al., 2021). Particularly, human rights law integrates human rights language into the NCD discourse, hence shaping policies and interventions relating to NCDs. Integrating human rights language into the NCD discourse delineates the State as a duty bearer obligated to respect, protect and fulfil the right to health. Equally, human rights language creates corresponding entitlements to the general population as rights holders of the right to health. A HRBA to NCDs can tap into the interrelatedness of rights and link NCDs to socio-economic and political influences that adversely affect health. By encouraging stakeholder participation, a HRBA to NCDs can also address inequalities and discrimination in NCD management and foster the availability of quality, affordable and acceptable foods (Gentile, Campisi & Chingore, 2023; Toebe and Patterson, 2020; UNICEF, 2018; Constantin et al., 2021).

A fundamental feature about a HRBA to NCDs is that it mandates States, as duty bearers, to respect, protect and fulfil the right to health and other interrelated human rights, and provides entitlements to individuals as rights holders (Toebe and Patterson, 2020). These obligations are founded on international human rights law, as well as authoritative interpretations. The latter includes the United Nations Committee on Economic, Social and Cultural Rights (CESCR) and its interpretation of social, economic and cultural rights, including the right to health and adequate food. Equally, HRBAs employ several human rights principles, including equality and non-discrimination, participation and accountability to ensure observance of human rights (Patterson et al., 2019; Gruskin et al., 2014).

A HRBA to NCDs foremost recognises the debilitating effects of NCDs on individuals, and seeks to attain the internationally guaranteed right of every person to the highest attainable standard of health through adequate prevention and control of NCDs and their modifiable risk factors. The right to health is recognised in a myriad of international human rights treaties such as the Universal Declaration of Human Rights (UDHR, 1948), the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), the African Charter on Human and Peoples' Rights (1981), amongst others. In its interpretation of the right to health, the CESCR appreciates the broad nature of the right to the highest attainable standard of health, as well as the fact that the right extends beyond the provision of timely and appropriate healthcare

to include the underlying determinants of health, including, among others, an adequate supply of safe food and nutrition (CESCR General Comment no. 14, 2000, para. 11).

Relatedly, the normative content of the right to adequate food, as interpreted by the CESCR, encompasses both physical and economic access to adequate food and includes means to procure it (General Comment no. 12, 1999, para. 13). The right to food must also be viewed within the context of food adequacy. Adequacy in this sense refers to the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture. (General Comment no. 12, 1999, para. 8)

Patterson et al. (2019) and Toebe and Patterson (2020) appreciate that a HRBA may benefit the fight against NCDs in various ways. Foremost, by assigning State obligations (to respect, protect and fulfil rights) and entitling individuals with rights, a HRBA provides a language through which citizens can demand action from government with regard to fulfilling the right to health, as well as its ancillary rights. A HRBA can also help clarify State obligations towards prevention and control of NCDs, besides informing responses towards the NCD pandemic. Human rights law can also provide useful guidance on the interpretation of seemingly conflicting proprietary rights against public health rights. Where the right to health and its ancillary rights are threatened or violated, a HRBA can help affected parties get appropriate remedies. Moreover, through human rights language, a HRBA can give a human face to NCD statistics, besides building up support for civil society activism against NCDs, as was the case with the HIV pandemic. Such advocacy is critical to establishing the requisite political will to address NCDs.

Adopting a HRBA can equally contribute to expanding access to preventive, curative and palliative care for those living with an NCD or those at the risk of getting one (Gentile, Campisi & Chingore, 2023). Further, the binding nature of human rights standards gives rise to mandatory State obligations to implement health-related obligations. This, by extension, means that States are called upon to implement aspects related to the underlying determinants of health, including the promotion of healthy diets. A HRBA ensures that laws, practices and procedures aimed at preventing and controlling NCDs conform to human rights principles (Gentile, Campisi & Chingore, 2023).

In relation to healthy diets, a HRBA guarantees availability and access to healthy foods to every person on the basis of equality (Gentile, Campisi & Chingore, 2023). Moreover, it espouses the concept of non-discrimination. This is particularly important for vulnerable and marginalised members of society who are more likely to consume unhealthy diets, hence increasing their likelihood of getting an NCD (Maredia et al., 2024). Besides, HRBAs call for accountability of both State and non-State actors for their actions or omissions with regard to healthy diets (Gruskin et al., 2014). Gruskin et al. (2014) posit that HRBAs should provide for remedial action where there is a breach and/or inadequacy in States' action towards NCD prevention and control. Since having the law is, in itself, not enough, a HRBA should demand action beyond

mere legislation and policy formulation (Gruskin et al., 2014).

In Kenya, a HRBA can invoke reduced consumption of unhealthy foods by regulating both State and non-State actors' actions that contribute to NCDs through the production and promotion of unhealthy foods. Given the interrelatedness and interconnectedness of human rights, the right to health is intricately linked to such rights as freedom of expression, the right to information, privacy, freedom of the media and the right to education, among others (Patterson et al., 2019). For example, freedom of expression allows individuals or interested parties to freely express their dissatisfaction with actions by State and non-State actors that interfere with the right to health. Relatedly, the right to information enables consumers to seek and access information concerning food products, and freedom of the media allows them to voice out the actions by State and non-State actors as they relate to healthy diets. Furthermore, the right to privacy curbs unwarranted data harvesting geared towards advertising healthy foods. Equally, the right to education mandates a right of people, especially children, to receive proper knowledge with regard to healthy diets. In the context of regulating food environments, these rights are equally critical in guaranteeing the right to safe, adequate and nutritious foods, which, in turn, contributes to the realisation of the right to health.

Prevention and control of NCDs, therefore, mandate acting against several underlying determinants of health, including those shaped by the food sector, as well as invoking several human rights to ensure that food environments have and promote healthy foods that are accessible, affordable and desirable. A HRBA can be used to address such aspects, promoting government action in tackling NCDs, as well as adequately countering the actions of industry players, including aggressive advertising and inadequate food-related information propagated through tactics such as advertising and labelling of food packages.

Guaranteeing every person the highest standard of health, as well as the right to be free from hunger and to have adequate food of acceptable quality as provided in the Constitution (Article 43) mandates several State obligations. In particular, the State is enjoined to observe, respect, protect, promote and fulfil human rights (Article 21 (1), Constitution of Kenya, 2010). The obligation to observe the right to health mandates the State to take active steps to ensure that all individuals have access to quality and nutritious food.

The obligation to respect human rights mandates the State to refrain from taking action that may directly or indirectly impact the enjoyment of a right (*Mitu-Bell Welfare Society v Attorney General & 2 others*, 2021, para. 56). In the context of healthy foods, the obligation to respect entails, e.g., refraining from suspending legislation that protects the populations from unhealthy foods (Office of the United Nations High Commissioner for Human Rights, 2020). Equally, the obligation enjoins the State to refrain from adopting laws that limit the enjoyment of the right to safe, adequate and nutritious food, as well as incentivising the consumption of unhealthy foods (Constantin et al., 2021). On the other hand, Patterson et al. (2019) highlight States' obligation to avoid discrimination in the provision of NCD-related services, as

well as suggest that States disinvest in industries that manufacture unhealthy foods and drinks.

The obligation to protect mandates the State to take measures to protect the public from rights violations occasioned by private/non-State actors (*Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others*, 2011; CESCR, General Comment no. 14, 2000, para. 33), which extends to the underlying determinant of health (CESCR, General Comment no. 14, 2000, para. 4). The office of the United Nations High Commissioner for Human Rights (2020) outlined several measures necessary to promote healthy diets in the context of the State's obligation to protect. These include, among others, regulating the activities of non-State actors in the food industry. In line with this obligation, Kenya should ensure that food industry manufacturers relay accurate, easily comprehensible, transparent and comprehensible information pertaining to their products. The obligation to protect equally enjoins the State to develop, implement and monitor regulations on such aspects as advertisement of foods and beverages, having special regard to vulnerable populations, such as children.

The obligation to promote entails positive action of a long-term nature aimed at enabling members of society to exercise their rights and freedoms. In the context of NCDs and unhealthy diets, the obligation to promote can be invoked to advance actions that seek to empower populations to consume healthy diets. Such programs include education and training, as well as government-sponsored campaigns against unhealthy diets.

Finally, the obligation to fulfil mandates the State to adopt regulatory, administrative, budgetary, judicial, promotional and other measures towards the full realisation of human rights, including the right to health (CESCR General Comment no. 14, 2000, para. 33; Patterson et al., 2019). The obligation requires States to adopt measures that enable people to enjoy their rights (*Nyabola v Attorney General & Another*, 2014). This is tied to the obligation to promote, whereby the State is required to ensure an enabling environment that allows citizens to practice their freedoms and rights. To this end, the obligation to fulfil the right to health in the context of NCDs mandates States to put in place measures to address such underlying determinants of health as unhealthy diets. The obligation to fulfil can be equally used to mandate access to quality and available medical care for those suffering from NCDs. It also compels the State to adopt measures that guarantee public access to accurate nutritional information of foods, including the mandating of nutritional front-of-package warning labels (Constantin et al., 2021). Such obligations could be incorporated in litigation strategies to counter State inaction towards unhealthy diets and NCDs.

The Constitutional provisions on health, as well as safe, adequate and nutritious food provided in Article 43 of the Constitution, can also be enforced against non-State actors. In *Satrose Ayuma* (supra), the High Court noted that by dint of Article 20 (1) of the Constitution, which provides that the Bill of Rights applies to all persons, the provisions of the Bill of Rights could be enforced against non-State actors (para 55 and 56). Article 20 (1) is crucial in

the fight against NCDs, and more especially against private businesses that thrive on the manufacture and supply of unhealthy diets.

Human rights-based approaches could also be grounded on several other constitutionally guaranteed rights (Patterson et al., 2019). For instance, the right to access information is guaranteed in Article 35 and could be invoked to compel food and beverage industry players to provide accurate and comprehensive nutrition information concerning their products. This provision can also be used to counter misinformation provided by the food and beverage industry. Such misinformation can revolve around the nutritional value, composition and/or the health effects of marketed foods (Constantin et al., 2021).

Article 46 of the Constitution is also valuable in the context of NCD prevention and control, as it guarantees consumers the right to goods and services of reasonable quality, as well as to the information necessary to gain the full benefit of such goods and services. Moreover, the provision mandates the protection of health and safety of consumers, and it further mandates compensation in the event of injury arising out of the consumption of goods and services.

In the case *Nairobi Bottlers Limited v Mark Ndumia Ndungu & Another*, the High Court of Kenya applied Article 46 of the Constitution to uphold consumers' right to food-related information. On that occasion, the Court observed that nutrition information contained in food labels assures consumers that products are of reasonable quality, provides necessary information for consumers to gain the full benefit of products and protects consumers' health, safety and economic interests (*Nairobi Bottlers Limited v Ndungu & Another*, 2024, para. 67). On the basis of this reasoning, the Court determined that providing such information was necessary to enable consumers to make informed decisions. As such, the information provided must be true and not mislead consumers (*Nairobi Bottlers Limited v Ndungu & Another*, 2024, para. 68).

A HRBA to promote healthy diets could also rely on protections of freedom of expression guaranteed in Article 33 of the Constitution, as well as freedom of the media, as provided in Article 34. These rights enable civil society, as well as the media, to raise awareness as well as report on issues relating to unhealthy foods. Notably, freedom of the media can be used to offer counter narratives on nutrition misinformation and enlighten the public on unhealthy foods, as well as their nexus to NCDs (Patterson et al., 2019).

Where food manufacturers rely on economic rights, including proprietary and commercial speech rights relating to the manufacture and advertisement of their products, to oppose regulations, human rights law becomes useful in balancing these rights against health and other human rights that regulations seek to protect. Article 24 of the Constitution outlines the guidelines for limiting rights, which include assessments on the nature of the right to be limited and the extent of such limitation. Where private business interests seem to clash with public health needs, Courts can – and have in the past – upheld public health. For example, in the case *British American Tobacco Kenya PLC (Formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Party); Mastermind Tobacco Kenya Limited (Affected*

Party), where the Supreme Court of Kenya affirmed that private business interests can be limited in favour of wider public health needs of the population. In this decision, petitioners from the tobacco industry contested regulations mandating warning labels on their products and argued that their proprietary rights would be compromised. The Supreme Court applied Article 24 of the Constitution and held that the need to protect the public from the harmful effects of tobacco surpassed the private business interests of the petitioners. This precedent is relevant to the interpretation of rights concerning private proprietary interests and public health needs, considering that both unhealthy foods and tobacco are modifiable NCD risk factors.

Finally, a HRBA has the potential to address inequalities and discrimination in relation to NCD prevention, treatment and care, as well as disparities in accessing quality, adequate and nutritious food. The right to equality and freedom from discrimination provided under Article 27 of the Constitution of Kenya can be invoked to protect poor and marginalised individuals or groups (Maredia et al., 2024). Poor persons, households and communities are at greater risk of exposure to the triple burden of malnutrition: undernutrition, overweight and micronutrient deficiencies (UNICEF, 2019). In Kenya, poor households have been found to have greater exposure to unhealthy diets (Maredia et al., 2024). A HRBA to NCDs in this context should fashion programs and policies targeting poor people's access to quality, safe and nutritious foods, as well as enhancing the participation of such persons in the development and implementation of such programs. In so doing, healthy foods would not only be available, but also acceptable to the people who consume them.

CONCLUSION

A HRBA emphasises that access to healthy food is a fundamental human right, not a privilege. Hence, rather than blaming individuals for their food choices, tackling unhealthy diets should take a broader perspective that acknowledges how food environments determine such choices. Adopting a HRBA can be a powerful tool that can be utilised to impose responsibilities on both State and non-State actors to observe, respect, protect, promote and fulfil the right to health, as well as the right to access nutritious, safe, and adequate food. A HRBA equally creates entitlements on the part of the public to demand access to adequate healthcare, nutritious food, transparent policies, and accountability from both State and non-State actors in upholding the right to health and other interrelated rights. Furthermore, a HRBA ensures that food and nutrition policies are not just voluntary guidelines but are backed up by legal mechanisms that hold the government and other stakeholders accountable. For a HRBA to work, there is a need for public awareness on human rights, as well as enforcement mechanisms and increased active participation of various stakeholders, including civil society. As a result, communities and individuals have a chance to participate in the development, implementation and monitoring of policy decisions which affect them without discrimination.

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Promoting Healthy Diets in Africa: EAC's Role in Curbing Diet-Related Non-communicable Diseases via Food Labelling

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Abstract

This paper examines the East African Community's (EAC) efforts to combat the rising burden of non-communicable diseases (NCDs) linked to unhealthy diets through harmonised food labelling regulations. It analyses the EAC's legal framework, international standards compliance and the practicality of harmonising regional food labelling regulations. It emphasises the potential benefits: increased trade, better public health and lower business costs. It also identifies challenges such as differing legal systems, economic development levels and divergent views on food labelling. The paper concludes by recommending a phased harmonisation strategy prioritising critical labelling components, allergen information, nutritional content and country of origin, and advocating for collaborative efforts with international organisations to ensure alignment with global standards.

INTRODUCTION

A healthy diet plays a crucial role in preventing and managing non-communicable diseases (NCDs) (Kraef et al., 2020). However, the evolving food environments have resulted in increased availability of unhealthy¹ and ultra-processed food products,² which are not conducive to promoting a healthy diet (World Health Organization, 2021). The consumption of unhealthy foods plays a crucial role in the increasing prevalence of NCDs, which are linked to dietary changes and contribute to conditions like diabetes, obesity, mental health issues, respiratory diseases and cardiovascular diseases at concerning rates (EAC, 2019) (Kraef et al., 2020). This shift is driven by the easy accessibility and affordability of

unhealthy and ultra-processed foods compared to healthy options like fruits and vegetables (Saravanan et al., 2023).

Food labelling is critical for empowering consumers to make informed decisions about the food they purchase (Gokani, 2024). It communicates essential details such as ingredients, quality, nutritional value and other relevant information (Grunert & Wills, 2007). These details can be conveyed through various means, including written, printed, stencilled, marked, embossed or impressed information on the product packaging or container (Food and Agriculture Organization, 2016). The information plays a significant role in addressing the issue of an increasingly unhealthy diet by enabling consumers to make more informed choices (Tonkin et al., 2016).

The East African Community (EAC), comprising eight partner states³ with a total population of 302.2 million (Haruna, 2024), faces a significant challenge due to the increasing prevalence of NCDs within the region (Adeyemi et al., 2021). Article 118 (a) of the EAC Establishment Treaty, 2000 (EAC Treaty, 2000) requires Partner States (PS) to collaborate in promoting and preventing NCDs. Articles 118 (e) and (h) require EAC Partner States (EAC-PS) to standardise policies and regulations to promote healthy diets and reduce food-related NCDs. This is crucial as NCDs are a major contributor to poor health and disability, leading to significant healthcare costs and economic burdens for the EAC-PS. Therefore, countries in the EAC are obligated to promote healthy diets (Ribeiro et al., 2019).

Trade, a significant economic sector in the EAC, plays a complex and multifaceted role in worsening NCDs (Ndulo, 1993). The

¹ Defined as items high in saturated and/or trans fats, added sugars, sodium and/or refined carbohydrate, and low in essential nutrients like vitamins, minerals and fibre (Dunford et al., 2024).

² These are industrially manufactured products with multiple additives and little to no whole ingredients (Monteiro et al., 2018).

³ Tanzania, Kenya, Uganda, Rwanda, Burundi, Democratic Republic of Congo, South Sudan and Somalia.

openness to trade can significantly influence the nutrition transition⁴ through price changes, income, norms and tastes, leading to increased availability of healthy and unhealthy food products within the EAC market and worldwide (Giuntella et al., 2020). This finding underlines that trade can make unhealthy food products more accessible and affordable, posing a serious threat to public health (Thow et al., 2015). Furthermore, trade agreements can restrict a government's ability to curb the marketing of unhealthy food and beverages due to their cross-border nature, as market liberalisation and reduced trade barriers often lower prices and increase the supply of these products. (Garton et al., 2021).

This paper examines whether existing international food labelling standards are sufficient to prevent diet-related NCDs, focusing on the EAC's efforts to harmonise labelling regulations. It analyses the EAC's adherence to international standards, the legal feasibility of harmonisation, and the potential benefits and challenges of regional policy alignment.

METHODOLOGY

The paper adopted a documentary review to arrive at its objectives. The data was collected from relevant legal documents, academic literature, research reports and policy briefs. Thematic qualitative data analysis techniques were used to analyse the data collected from the documentary review and the law. The analysis focuses on the legal feasibility for EAC to harmonise trade rules on food labelling in the region, identifying the legal opportunities and challenges of harmonising food labelling regulations and the degree to which the EAC food labelling policies adhere to existing international standards applicable to labelling in promoting healthy diets and curbing food-related NCDs in the EAC region. The limitation faced was getting empirical data; therefore, the author based the research on doctrinal research. All ethical considerations were observed in the process.

FINDINGS AND DISCUSSION

EAC Legal Framework for Regulating Trade and Promoting Healthy Diets through Food Labelling

The World Trade Organization (WTO) agreements provide a framework for regulating international trade, and they contain provisions that are relevant to the EAC's authority to regulate trade and promote healthy diets through food labelling (Hoekman & Kostecki, 2001). Article III of the General Agreement on Tariffs and Trade, 1994 (GATT) requires that WTO members treat imported and domestic products equally, without discrimination. Article XX of the GATT allows WTO members to adopt measures to ensure the safety and well-being of humans, animals, or plants, which are acceptable as long as they are not

discriminatory or unjustifiable, nor should they be used to hide restrictions on international trade. Specifically, on labelling, the Agreement on Technical Barriers to Trade, 1995 (TBT) provides for technological regulation and standards under Annex 1(1) and (2) that they should not create unnecessary obstacles to international trade.

EAC Partner States (EAC-PS) have signed several legal instruments and protocols to promote intra-regional trade, enhance economic efficiency (Muthoni, 2016), and promote healthy diets through food labelling (IDLO, 2023, p. 35). The EAC is responsible for enforcing these regulations and ensuring compliance among the PS. Article 6 of the EAC Treaty establishes the EAC's objective to "promote economic, social, and cultural development" through increased trade and investment cooperation among the PS. Article 7 establishes the principle of non-discrimination in trade among the PS, while Article 8 provides for the free movement of goods within the EAC (EAC Treaty, 2000).

Another relevant instrument is the Protocol on Establishment of the East African Customs Union Protocol, 2005 (Customs Union Protocol), which aims to promote intra-regional trade by establishing a common customs territory within the EAC. Articles 4(b) and 12 of the Customs Union Protocol require the EAC-PS to adopt a common external tariff and to harmonise their customs procedures and documentation. Article 5 establishes the principle of non-discrimination in trade among the PS, while Article 6 establishes the free movement of goods within the EAC. Then, the EAC Protocol on establishing the East African Community Common Market, 2010, aims to establish a single market within the EAC by allowing for the free movement of goods, services, capital, and people across the EAC-PS. Article 4 requires the EAC-PS to harmonise its laws and regulations related to trade in goods and services, including food labelling. Article 2 establishes the principle of non-discrimination in trade among the PS, while Article 3 establishes the free movement of goods within the EAC.

Further, the EAC has developed legal and policy instruments to promote healthy diets and address diet-related NCDs through enhanced food safety and labelling regulations. The EAC Food and Nutrition Security Policy aims to improve food and nutrition security across the region by ensuring access to safe and nutritious food (EAC, 2019). Additionally, the EAC has established standards such as EAS 38:2014 Labelling of Pre-packaged Foods Specification, which provides requirements for labelling pre-packaged foods to ensure consumers receive accurate and clear information about nutritional content, ingredients, and other essential details (East African Community Secretariat, 2018, 2020). These frameworks support informed dietary choices and contribute to reducing NCD risk factors by promoting transparency in food labelling.

The EAC Treaty (Art. 118(h)) establishes a legal framework to promote health, which this paper argues encompasses healthy diets through food labelling based on the fundamental connection

⁴ The nutrition transition is the shift in dietary patterns and disease profiles accompanying economic development, marked by increased consumption of processed foods, reduced physical activity, and a rise in diet-related chronic diseases, often alongside persistent undernutrition. (Popkin, 2004)

between dietary choices and overall health outcomes. The EAC Treaty empowers the PS to harmonise national laws and policies, including nutritional information (EAC Treaty, Art. 118(e)). The EAC Food Labelling Regulations, 2014, provide detailed requirements for food labelling in the EAC. The Regulations specify the information that must be included on food labels, such as the name of the food, the list of ingredients, the nutritional information, and the date of manufacture or expiry. They also set out requirements for the format and presentation of food labels.

To meet its objectives of promoting consumer health and protection, the EAC has developed regional standards for food labelling. EAS 38:2014 Labelling of Pre-packaged Foods Specification outlines requirements for the labelling of pre-packaged foods, including mandatory declarations of ingredients, nutritional information, and allergens (East African Community Secretariat, 2018, 2020). The EAS 803:2023 Nutrition Labelling Requirements specifies detailed requirements for nutrition labelling on pre-packaged foods, ensuring clear and standardised nutritional information (East African Community Secretariat, 2023). EAS 804:2023 Claims on Foods General Requirements governs nutrition and health claims, ensuring that claims are truthful, substantiated, and not misleading, regardless of whether the food is covered by an individual East African Standard (East African Community Secretariat, 2023). These standards collectively provide guidance on ingredient declarations, allergen labelling, nutrition information, font size, placement, and language use, enhancing consumer access to accurate information and supporting efforts to combat diet-related NCDs.

To provide clear guidance for food businesses and ensure that consumers have access to accurate and relevant information about the food they consume, the EAC's dedication to implementing the recommendations of the World Health Organization Global Strategy on Diet, Physical Activity, and Health further reinforces the importance of this cause and its role in food labelling (Kraef et al., 2020).

The EAC's existing food labelling regulations, encompassing ingredient declarations, nutritional information and allergen labelling, aim to establish common standards for consumer comparison across PS. However, the gap in enforcement mechanisms within the EAC's legal framework compromises consistent compliance. This results in variability in adherence to requirements for allergen and nutritional information declaration among food businesses. Although the EAC Food Safety Act of 2006 requires food labels to be accurate, clear and not misleading, mechanisms are needed to ensure that food businesses comply with these requirements. Without adequate monitoring and enforcement, the regulations and standards may not achieve their intended objectives, potentially leading to consumer confusion, health risks, and unfair competition among food businesses.

The inconsistent enforcement of EAC regulations within the PS presents a significant challenge as it undermines the effectiveness of the regulations, leading to unpredictability and resource-intensive processes such as litigation and dispute resolution (Wagner, 2009). This is mainly due to the limited resources and capacity available for monitoring and enforcing the rules (EAC Secretariat, 2023).

Differing national interests among PS can also create significant obstacles to implementing regional trade policies, underscoring the urgent need for effective negotiation and consensus-building mechanisms within the EAC (Döveling et al., 2018). Moreover, some EAC regulations, such as those related to food labelling, may conflict with WTO agreements, a complex issue that requires immediate attention and careful balancing of trade liberalisation and public health objectives (UNECA, 2012).

Non-legal factors also significantly influence trade regulation. The strong political commitment from PS is a key driver for effectively implementing the EAC's legal framework. This commitment influences resource allocation, enforcement efforts and overall support for regional integration initiatives (Mathieson, 2016). The EAC's institutional capacity is also crucial in developing and implementing effective trade regulations. Strengthening this capacity through training, resource allocation, and knowledge sharing is essential for successful regional integration (Bank & Fund, 2015). Also, economic factors, such as trade competitiveness, investment opportunities and regional economic disparities, are heavily influenced by stakeholders who play a crucial role in shaping their design and implementation (Kouskoura et al., 2024).

The EAC's food labelling framework represents a significant leap toward regional integration, economic efficiency, and, most importantly, improved public health. The EAC's commitment to promoting healthy diets through legal instruments is crucial for citizens' well-being, raising NCD awareness and encouraging healthier dietary choices. This framework is expected to enhance economic efficiency, foster integration, and improve public health. However, challenges and opportunities remain to strengthen the regulatory framework further.

EAC Policing Efforts in Adherence to International Standards on Food Labelling

The right to adequate food is a fundamental human right enshrined in the Universal Declaration of Human Rights, 1948 (UDHR), and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR). The law recognises that every person has the right to access safe, nutritious and culturally appropriate food (ICESCR, 1966, Art. 11(1)). The right to adequate food is inextricably linked to the right to health, as access to safe and nutritious food is a fundamental determinant of the right to health (UDHR, 1948, Art. 25); lack of access to or consumption of unhealthy foods poses severe health risks (Riches, 2018).

Food labelling is a key tool in promoting the right to health, food and other interrelated rights, because it provides consumers with the information they need to make informed choices about their food (Gokani, 2024). Accurate and clear labelling can help consumers avoid unhealthy foods, manage dietary restrictions, and make informed decisions about their health and well-being (Grunert & Wills, 2007).

In the EAC region, some of the food labelling policies align with international standards and human rights principles by ensuring access to information necessary for making healthy food choices, thus supporting the rights to health and adequate food.

The standards aligned with the EAC policies include the General Standard for the Labelling of Pre-packaged Foods (CODEX STAN 1-1985) of the Codex Alimentarius Commission, 2019. Also, the EAC food labelling policies integrate recommendations from the WHO, such as the Guide to Labelling and Claims for Food and Dietary Supplements and the Global Strategy on Diet, Physical Activity and Health (Kraef et al., 2020). EAC also endorsed EASC/TC 018, Nutrition and Foods for Special Dietary Uses, for its Partner States to adopt (EAC, 2023). These policies promote the right to information by requiring mandatory labelling of essential information, including ingredients, nutritional content, allergens and origin (EAC Secretariat, 2023, EAC Standard EAS 38:2014). This information empowers consumers to make informed choices about their food, promoting the right to adequate food and other interrelated rights (Perumal et al., 2022).

Food labelling policies in the EAC region also promote healthy diets by requiring clear labelling of nutritional content and encouraging truthful and evidence-based health claims, which contribute to promoting the right to health as required by the EAC Code of Practice on Food Labelling. However, there is still room for improvement. One of the most significant gaps in the current EAC food labelling policies is the lack of mandatory front-of-package warning labels (FOPWL) on unhealthy food products (Rusobya et al., 2024). By mandating FOPWL, EAC-PS can significantly improve consumers' ability to interpret food labels effectively and make informed diet choices, ultimately promoting the right to adequate food and health (Constantin et al., 2021).

The EAC food labelling policies play a significant role in protecting consumer rights, promoting healthy diets, and ensuring the realisation of the right to adequate food in the EAC region (Booth et al., 2021). However, consumer awareness and understanding of food labelling information, particularly regarding nutritional content and health claims, remains low (Akullo, 2023). This presents an opportunity for improvement. Comprehensive consumer education campaigns could significantly improve label interpretation and informed choices, thus promoting food rights (Bollinger et al., 2022). This education can empower consumers to increase their knowledge regarding nutritional content and health claims, including using clear front-of-package labelling (FOPL), with warning labels, to empower informed food choices and improve individual and public health.

FOPL, with clear warning labels, is crucial for realising the human rights to food and health (Shrestha, 2022). Readily understandable nutritional information empowers consumers to make informed dietary choices, supporting the right to adequate food by ensuring access to sufficient and nutritious food. (Bera & SM, 2021). This directly impacts the right to health by enabling individuals to reduce their risk of diet-related diseases through conscious food selection (Shrestha, 2022). The accessibility of this information through FOPL

is vital, bridging the gap between access to food and achieving optimal health outcomes (Bera & SM, 2021).

Further, there is a lack of specific regulations for emerging issues. The EAC policies may not adequately address emerging issues related to food labelling, such as the labelling of genetically modified foods and novel food ingredients (Yadav et al., 2024). Updating the policies to incorporate regulations for these emerging areas is essential to ensure continued alignment with international standards and consumer health protection.

Legal Feasibility for EAC to Harmonise Trade Rules on Food Labelling

The EAC is a regional organisation that seeks to promote economic and political integration among its Partner States (PS). One of its primary objectives is to harmonise the policies and strategies that PS adopt (EAC Treaty, Art. 5(1)). In line with this objective, the EAC has made strides towards harmonising regional food safety regulations (Dahir, 2021). The EAC has a sturdy legal framework that supports harmonising laws and regulations related to trade and consumer protection. Article 5(3)(a) of the EAC Treaty unequivocally states that one of the primary objectives of the EAC is to harmonise policies and strategies that partner states adopt. Furthermore, Articles 75 and 76 of the Treaty provide for establishing a customs union and common market, which includes harmonising laws and regulations related to trade and consumer protection. The EAC aims to synchronise healthcare policies to prevent and manage diseases. The Regional East African Community Health-Policy Initiative facilitates collaboration between health researchers, policymakers, and other stakeholders for evidence-based healthcare policies (African Union, 2009). This legal framework provides a solid foundation for harmonising regional food labelling regulations and underscores the EAC's commitment to fostering a unified and prosperous EAC.

However, of the six EAC Standards on food labelling, only three are in the Catalogue of East Africa Standards for adoption by Partner States (EAC Secretariat, 2023). And, for instance, Tanzania adopts only two standards: TZS 481: 2015(E) Nutrition labelling — Requirements and TZS 538: 2015(E) Pre-packaging and labelling of foods — General requirements. In addition, Tanzania has TZS 116:2020(E) Food Additives — Labelling (Tanzania Bureau of Standards, 2023). Kenya has the DKS 2955:2022 Front of the Pack Nutrition Labelling Requirement, which is still being drafted (KEBS, 2024). This standard is intended to advance and supplement the existing compulsory standards adopted in Kenya, the KS EAS 38, Labelling of Pre-packaged foods — General Requirements; KS EAS 803, Nutrition Labelling — Requirements; KS EAS 804, Claims — Requirements and KS EAS 805, Nutrition and Health Claims —

Requirements (KEBS, 2024).⁵

Harmonising trade rules on food labelling at the regional level presents significant challenges within the EAC, stemming from diverse legal systems, economic development levels and varying interpretations of what constitutes adequate food labelling. For instance, some PS may require more detailed information on food labels than others (Golan et al., 2001). A “one-size-fits-all” approach risks a “race to the bottom,” where harmonisation results in minimally acceptable standards insufficient for robust public health protection, particularly NCD prevention (Holzinger & Sommerer, 2011). These differences may create trade barriers that hinder the region’s free flow of goods and services. Therefore, the paper recommends a phased, tiered approach prioritising core elements crucial for consumer health and safety. Initially, the EAC should focus on harmonising the labelling of allergens, basic nutrition information, and country of origin (Allen et al., 2014). While these elements are important, the primary focus for NCD prevention must be on FOPL. Unlike the nutrition facts panel, FOPL’s strength lies in its readily accessible and easily understandable format, directly addressing the issue of consumer engagement with nutritional information (Cowburn & Stockley, 2005). Crucially, the evidence overwhelmingly supports the effectiveness of FOPWL (Su & Canavari, 2018) in discouraging the consumption of unhealthy products, aligning with the UN Special Rapporteur’s emphasis on their role in realising the right to health (Pūras, UN Special Rapporteur on Health, 2020). This focus on FOPWL, the most effective intervention for NCD prevention, should be central to the harmonisation process (UN-OHCHR, 2023). Subsequent phases can address more detailed labelling requirements.

It is also crucial for the EAC to collaborate with international organisations such as the WHO and the Food and Agriculture Organization (FAO). Collaborating with these organisations will ensure that the harmonised regulations align with international standards, enhancing the EAC’s credibility and commitment to food safety and the promotion of healthy diets (Golan et al., 2001). These organisations are experienced experts in developing food labelling regulations and can assist EAC in developing harmonised regulations.

Harmonising economic laws and commercial practices has long been recognised as necessary for regional economic integration (Ndulo, 1993). The EAC’s efforts towards legal harmonisation, including harmonising trade rules on food labelling at the regional level, will not only foster and support intra-regional trade and investment but also significantly improve the quality of life of East Africa’s people. Through prioritising important elements of food labelling, such as nutrition labelling, allergen labelling and country of origin labelling, the EAC will achieve a harmonised food labelling system that ensures food safety and promotes trade in the region.

Potential Benefits and Challenges of Harmonising Food Labelling Regulation and Policies in the EAC

As previously noted, regional integration requires aligning trade laws and commercial practices. This is crucial to achieving meaningful economic integration (Ndulo, 1996). Harmonising food labelling policies and regulations in the EAC region is not a matter of convenience but a crucial step towards promoting trade, protecting consumer health and reducing business costs (Kraef et al., 2020). The current situation, with different national regulations, cultural differences, linguistic differences and enforcement challenges, hinders these goals. The consumer’s understanding across the region is another complex situation that needs harmonisation. Agreeing on a common set of standards is a complex and time-consuming task, but the benefits it can bring are worth the effort. Additionally, enforcing these harmonised trade rules would require adequate resources and capacity (Messerlin & Zarrouk, 2000).

Despite challenges, harmonising EAC food labelling regulations and policies offers benefits. Harmonised standards promote the free movement of goods, reduce repetitive testing and eliminate trade barriers (Krstic, 2012). This allows manufacturers to meet diverse market requirements, expanding their reach to meet new markets and customers. Also, adopting harmonised standards reduces costs and enhances efficiency by obviating the need for multiple tests and certifications for the same product (Singh et al., 2023). It is sufficient to say that harmonised standards serve as a potent mechanism for promoting international trade and streamlining the movement of goods across borders (Awasola & Reader-Harris, 2014). This inspires commitment to consistent food labelling, making it easier for consumers to compare products to improve well-being and public health. Harmonised trade rules create fair competition and innovation.

To achieve these benefits, the EAC must adopt a collaborative approach. This involves carefully considering the challenges, developing a feasible and effective harmonisation strategy, and balancing the interests of all stakeholders, including governments, businesses, and consumers (Schwab, 2021). The EAC should also prioritise building capacity and awareness among national authorities and businesses to ensure effective enforcement of harmonised trade rules.

Harmonising food labelling regulations and implementing adequate food labelling policies in the EAC region is necessary. It would promote trade, protect consumers and reduce business costs. While there are challenges in achieving this, the potential benefits outweigh them. Therefore, the EAC should work proactively towards developing a feasible and effective harmonisation strategy to achieve these benefits.

5 TZS 481:2015 Sets mandatory requirements for disclosing nutritional information (e.g., calories, fat, sugar) on food labels to inform consumer choices.
TZS 538:2015 Covers broader labelling aspects beyond nutrition, including ingredients, weight, manufacturer details, and warnings.
TZS 116:2020 Addresses the labelling of food additives crucial for consumers with allergies or sensitivities.
KS EAS 38 Establishes general labelling rules for pre-packaged foods, ensuring basic information is provided.
KS EAS 803 Details the specific nutritional information required on food labels, promoting transparency.
KS EAS 804 & 805 Regulate the use of claims (e.g., “low fat,” “high in fibre”) to prevent misleading marketing.
DKS 2955:2022 (Draft) Aim to simplify nutritional information on the front of the packaging for easier consumer comprehension, likely using visual cues.

CONCLUSION AND RECOMMENDATIONS

In conclusion, the EAC's role in combating the pressing issue of unhealthy diets and the resultant surge in diet-related NCDs is paramount. This research underscores the alarming fact that unhealthy food consumption is a pivotal driver of NCDs' rise, with trade exacerbating the problem. The potential of food labelling to address the escalating unhealthy diet crisis has come to the fore.

The research findings reveal that the EAC is legally responsible for regulating trade and promoting healthy diets through food labelling. However, the rapidly evolving food environments have led to a surge in the availability of unhealthy food products, necessitating a more conducive environment for promoting healthy diets. Hence, the EAC must fortify its legal and institutional framework and implement robust food labelling policies to promote healthy diets and prevent food-related NCDs.

In order to attain its objective, the EAC should take into account several recommendations. We strongly recommend prioritising the development of adequate mandatory FOPL, particularly the implementation of warning labels. The purpose of food labelling must be clearly defined to prevent NCD and discourage unhealthy product consumption; the evidence overwhelmingly supports FOPL warning labels as the most effective approach. EAC should work towards standardising food labelling regulations across all EAC countries to promote consistency and facilitate regional trade. EAC should develop and implement robust food labelling policies that offer consumers accurate and easy-to-understand information regarding the nutritional content of food products, such as front-of-package warning labels. The regulatory framework for food labelling should be strengthened by creating a regulatory body dedicated to enforcing compliance with food labelling regulations and providing it with adequate resources and authority. Food manufacturers should be encouraged to provide accurate and informative labelling of their products. Lastly, consumer awareness about the importance of healthy eating and the role of food labelling in making informed choices about their diets should be raised.

Although this research has identified critical issues related to food labelling and healthy diets in the EAC, further research could investigate the feasibility of other interventions to complement food labelling policies, such as, for example, taxation of unhealthy foods and beverages and/or marketing restrictions on unhealthy food products. Overall, the EAC has a crucial responsibility to promote healthy diets and prevent diet-related NCDs, and food labelling is an essential tool to achieve this goal.



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Do Food Labelling Standards Guarantee Access to Nutrition Information for Persons with Visual Disabilities in Tanzania?

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Abstract

Food labelling is a useful tool for conveying nutrition information to consumers of pre-packaged food and influencing healthy or unhealthy diet choices among consumers to help prevent non-communicable diseases (NCDs). With such a crucial role in conveying nutrition information, food labelling ought to be governed by laws and regulations that ensure each and every consumer, including persons with visual disabilities, has access to the nutrition details on pre-packaged food labels. Hence, the presentation of nutrition information on food labels should accommodate persons with visual disability. Through documentary research, this paper critically examined laws and regulations pertaining to food labelling standards in Tanzania and assessed the extent to which these legal frameworks adequately address or overlook the accessibility of nutrition information for persons with visual disability. The paper recommends that the laws and regulations be amended to specifically require producers of pre-packaged food to adopt and implement labelling practices that ensure access to nutrition for individuals with visual disabilities, thereby promoting equal enjoyment of the right to health and contributing to the prevention of NCDs.

INTRODUCTION

According to the World Bank, there are more than a billion persons with disabilities globally (World Bank, 2011). In Tanzania, 11.4 per cent of the population lives with a disability of some form, with 3.6 per cent of the total population living with visual disabilities (National Bureau of Statistics Tanzania, 2022). The proportion of the population with such disabilities is also projected to continue to rise as Tanzania's population ages (Hui, 2017). Individuals with disabilities, and specifically those with visual disabilities, experience many challenges in society, challenges made more difficult by the existence of the growing burden of non-communicable diseases (NCDs) (Al-Jawalden & Abbass, 2022), which include cardiovascular diseases, cancers, diabetes, chronic

respiratory diseases and hypertension (World Health Organization, *Non-communicable diseases: key facts*).

In some ways, the growing NCD burden impacts persons with disabilities differently than those without disabilities. Often, persons with disabilities are at a greater risk of developing some NCDs, and the experiences of health consequences of NCDs are greater for them as well (Uromi & Mazagwa, 2014). That being the case, it is imperative for communities and society, particularly persons with visual disabilities, to be well informed about modifiable NCD risk factors, including unhealthy diets, so that they can make better dietary choices and prevent diet-related NCDs.

Several evidence-based legal and regulatory approaches, such as fiscal measures, front-of-package nutrition labelling and unhealthy food marketing restrictions, are recommended to address the burden of NCDs (IDLO, 2023). These approaches have shown promising results against diet-related NCDs globally and in Tanzania specifically (Njiro, 2023). Despite these improvements, however, diet-related NCDs still pose a growing threat to the country's population (Uromi & Mazagwa, 2014; Njiro, 2023), largely on account of high consumption of unhealthy foods high in salt, sugar and fats, and are often ultra-processed, all of which are significant drivers of diet-related NCDs (Scully et al., 2012).

Information that adequately informs consumers about the nutritional content of their food is necessary as part of comprehensive efforts to reduce the consumption of unhealthy products and prevent NCDs. Labelling of packaged food products influences food choices (Dumoitier et al, 2019). Therefore, it is a significant factor that determines healthy or unhealthy diet choices in society (Dumoitier et al, 2019). But, for persons with visual disabilities, the situation is more complex. For them, the issue is not simply whether or not the food product is properly labelled, but also whether or not they can read, access, and understand the information contained in the label (Kostyra et al, 2017). Therefore, it is important that food labels are properly designed to enable such access to nutrition information, including warnings about nutrition

quantity and ingredients, by persons with visual disabilities. Because of their visual impairment, individuals with visual disabilities may be unable to access or comprehend the information on food labels unless it is provided in an accessible format, which can put them at a disadvantage when making informed dietary choices

Through critical examination of the laws and regulations relating to food labelling in Tanzania, this study explores the adequacy of the food labelling regime in ensuring accessibility of nutrition and warning information for persons with visual disabilities. The study argues that food labelling regulations in Tanzania do not guarantee accessibility of health information on food labels for persons with visual disabilities.

Food Labelling in the Sphere of the Right to Health and the Right of Access to Information in International Human Rights Law

Tanzania is a party to a number of international human rights treaties that directly protect the right to health and the right to access to information, generally and specifically for persons with disabilities. These treaties include the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR), the International Covenant on Civil and Political Rights (1966) (ICCPR), and the Convention on the Rights of Persons with Disabilities (2006) (CRPD). Apart from these instruments, there are other international instruments, both soft and binding, that protect the right to health and the right of access to information, including, for example, the Universal Declaration of Human Rights (1948) (UDHR), General Comments of the Committees responsible for interpreting particular international treaties, recommendations and statements of Special Rapporteurs on the rights to health and access to information.⁶

Access to information includes the right to seek, receive and impart information and ideas through any media and regardless of frontiers (UDHR, 1948). Moreover, the ICCPR provides that “everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice” (ICCPR, 1966, art. 19.2). Notably, the definition provided by the ICCPR adds, among other things, what is to be communicated and the modes through which information may be communicated.

In the context of International Human Rights Law, the Human Rights Committee (CCPR), the body of experts who monitor and interpret the implementation of the ICCPR, defined the contours of the right of access to information, as well as State duties in ensuring access to information is a reality (CCPR, General Comment No. 34, 2011, para. 18). According to the CCPR, besides putting in the public domain information that is of public interest, States should make efforts to ensure that access to such information is easy, prompt, effective and practical (CCPR, General

Comment No. 34, 2011, para. 19). Moreover, States are required to enact procedures, either by way of legislation or any other means, to facilitate access to information (CCPR, General Comment 34, 2011). On the same footing, the CRPD specifically requires that States accept and facilitate the use of Braille and all other accessible means of communication for persons with disabilities (CRPD, 2006, art. 21.b)

In the context of health information, the former Special Rapporteur on the right to health has encouraged States to ensure that information contained on the food labels is accurate, available, easily understandable, transparent and comprehensive (Púras, UN Special Rapporteur on Health, 2020). With such duties, governments, through their various organs, should ensure that any information intended to be communicated to the public is accessible.

According to human rights jurisprudence established by the above-mentioned instruments, human rights are by nature interrelated, interdependent and indivisible (Neves-Silva et al., 2019; Rassouli & Rezaeenezhad, 2023). That is, the full enjoyment of the right to health, for example, is dependent on other human rights, but also complements the enjoyment of other human rights as well. The right to health is an inclusive right that extends to its determinants, and includes both entitlements and related freedoms (CESCR, General Comment No. 14, 2000, para. 3). Safe and nutritious food, as well as access to health information, are determinants of health, as interpreted by the Committee on Economic, Social and Cultural Rights (CESCR), the authoritative interpreter of the R (CESCR, General Comment No 14, 2000, para. 11). The CESCR further emphasizes that access to health information is therefore part and parcel of the right to health (CESCR, General Comment No. 14, 2000, para. 11, 12b and 37), besides being a right on its own as provided by the ICCPR (ICCPR, 1966, art. 19.2). Importantly, the CESCR has interpreted the right to health information to entail an obligation for States to disseminate appropriate information relating to healthy lifestyles and nutrition, as well as supporting people in making informed choices about their health (CESCR General Comment 14, 2000, para. 37). The WHO and the former Special Rapporteur on the right to health have encouraged States “to provide accurate, available, easily understandable, transparent and comprehensible information to enable consumers to make informed choices towards healthy diets” (World Health Organization, 2004; Púras, UN Special Rapporteur on Health, 2020).

Given the growing supply of packaged food in both urban and rural Tanzania, access to information, specifically nutrition information, is critical. Indeed, the Special Rapporteur has noted that offering clear and complete nutritional information in a simple manner empowers individuals and encourages them to make informed choices about their diets (Púras, UN Special Rapporteur on Health, 2020). This not only facilitates healthy diet choices among the population, but also fosters the enjoyment of the right to health and prevention and control of diet-related NCDs.

⁶ For example, see CESCR, General Comment No. 14, E/C12/2000/4 and the Statement by the Special Rapporteur on the Right to Health on the adoption of front-of-package warning labelling to tackle NCDs, July 2020.

Normative Regulation of Food Labelling in Tanzania

Normatively, food labelling in Tanzania is regulated by the Constitution and enacted legislation of the country, which has incorporated international treaties pertaining to the right to health and the right of access to information. Additionally, in line with the protection of the right to health and the right of access to information for persons with disabilities, the normative framework on food labelling also includes laws specifically for the protection of the rights of persons with disabilities. Along with the Persons with Disabilities Act, which Tanzania enacted to domesticate the CRPD, other laws providing a normative framework for food labelling are discussed seriatim.

The Constitution of the United Republic of Tanzania, 1977 (as amended from time to time)

The Constitution does not have specific provisions for the protection of the right to health and the governance of food labelling. However, the Constitution, as the mother of all laws, sets the basis for the protection and enforcement of all human rights, whether included in the Bill of Rights or not. These rights include the right to health and the right of access to information. This is evidenced by the recognition by the Constitution of the importance of respecting all human rights with reference to the Universal Declaration of Human Rights (Constitution of Tanzania, 1977, Article 9(f)). Additionally, the Constitution recognises the importance of protecting public health (Constitution of Tanzania, 1977, Article 30 (2)(f)) and the duty of the State in the eradication of poverty and diseases through its policies and programs (Constitution of Tanzania, 1977, art. 9 (i)).

While the Constitution does not specifically protect the right to health, it has specifically protected the right of access to information. According to the Constitution, the right of access to information is for every individual, which extends to persons with visual disability (Constitution of Tanzania, 1977, art. 18 (a)). The right of access to information as protected by the Constitution should be interpreted to extend to information on food labels to be accessed by all, including persons with visual disability. Given the supremacy of the Constitution, the formulation of law or regulation should give regard to every individual's right of access to information, regardless of his or her physical condition. Laws related to food labelling standards should therefore protect access to information for each individual, regardless of the disability that he or she may have.

Moreover, the Constitution requires the government to provide equal opportunity to all in its policies and programs (Constitution of Tanzania, 1977, art. 9(g) and 13 (1)). With such a requirement, policies and regulations related to standards of food labelling should be formulated in a way that benefits each individual regardless of his or her disability condition. The Constitution further provides that all individuals are equal and are entitled to equal protection by the law (Constitution of Tanzania, 1977, art.

12 (1) and 13(1)). Equality and equal protection by the law, as provided by the Constitution, do not mean there should be the same provisions for the protection of all, but they entail equitable protection by the law. This means that the law should not favour one individual or group at the detriment of the other. In this sense, if an individual has specific needs that require protection by the law, then the law should provide such protection to put that particular person on equal footing with others.

2.2 Access to Information Act, No. 6 of 2016

The Access to Information Act, which was enacted in 2016 by the government of Tanzania, defines the scope of the right of access to information by the public. Moreover, the Act aims at promoting transparency and accountability of information holders (Access to Information Act, 2016). By promoting transparency and accountability, the Act not only ensures access to information but also makes it a duty of information holders to divulge information when needed.

To that end, the Act defines information, information holders and their responsibilities, as well as the rights related to access to information. According to the Act, information is defined as *“any material which communicates facts, opinion, data or any other matter relating to the management, administration, operation or decision of the information holder regardless of its form or characteristics.”* In as far as this definition is concerned, and for the topic at hand, the question is; “are food labels information?” To answer this question, one should ascertain whether or not food labels communicate facts, opinion, data or any other matter relating to the management, administration, operation or decision of the information holder.

Ultimately, food labels communicate facts and data relating to the content of the packaged food, which naturally fall under the scope and requirements of the law. Food labels are communicating to the public what the information holder, who in this case is the producer of the packaged product, has been required by the law to convey on their product (FAO, 2016). Through the food label, the information holder communicates to the consumers the nutritional content and or nutritional warnings that are vital to the health of the consumer. The content and components of the packaged product may be communicated in a number of ways, including ingredient lists, nutritional content, and percentages per serving size.

Given the nature and purpose of the Access to Information Act, the provision concerning information access is more specific than that found in the Constitution. Under the Act, the right to access information is granted to every citizen of the United Republic of Tanzania. Accordingly, citizens with visual disabilities are equally entitled to this right. This is in line with the Constitution of the United Republic of Tanzania, which underscores the importance of eliminating all forms of discrimination.

The Act also provides that information may be presented in whichever form or characteristics (Access to Information Act, 2016, s. 3). The Act does not restrict the means through which information can be communicated. Food labels, provided they are

designed in line with the law, are a proper means through which nutrition information is communicated.

The Act also considers the accessibility of information by persons with visual disability. Under section 17(1) (e), information must be provided in a format accessible to persons with sensory disability.⁷ This rule does not distinguish between the types of information to be accessed by persons with visual disability. This not only ensures protection of the right of access to information by persons with visual disability, but also upholds the principle of non-discrimination as provided by the Constitution (art. 13(2), (4)) and international human rights instruments. According to the Act, the format of information delivery may be audio or written, so long as it is delivered in a manner that is accessible to the person with visual disability. Food labels as a means of information communication must therefore be designed in a format that accommodates persons with visual disabilities.

The Standards Act, No. 2 of 2009

The Standards Act is the main legislation that, among other commercial activities, regulates food labelling standards in Tanzania. Namely, the Act establishes the Tanzania Bureau of Standards (TBS), an agency mandated to set requirements for food labelling in the country. It is important to note that before 2019, this mandate was under the Tanzania Food, Drugs and Cosmetics Authority (TFDA). During the time of TFDA authority, the regulation which governed food labelling matters was the Tanzania Food, Drugs and Cosmetics (Food Labelling) Regulations of 2006. The mandate of regulating food labelling was shifted to the TBS by the Finance Act, 2019, which amended the TFDA Act and shifted all functions related to food and cosmetics regulation to the TBS. The TBS inherited the Tanzania Food, Drugs and Cosmetics (Food Labelling) Regulation of 2006 and applied it before adopting updated regulations. To date, TBS has published several guidelines, which are “standards” of food labelling, including what is to be included on a food label and the manner through which the information on a food label is communicated.

However, as part of its common market obligations as a member of the East African Community, Tanzania has undergone a process of harmonisation of its laws and regulations governing various matters involving trade within the region. The food labelling regulations have also been affected by this harmonisation process. The harmonised version of food labelling guidelines, which are now applicable and binding, includes: EAS 803 on Nutrition Labelling, EAS 804 on Claims Requirements, EAS 805 on Use of Nutrition and Health Claims, and EAS 538 Labelling of Pre-packaged Food-General Requirements, examined below.

1. EAS 538 Labelling of Pre-packaged Food- General Requirement Standards

EAS 538 is the standard that provides, *inter alia*, requirements for the packaging and labelling of pre-packaged foods. These standards also stipulate the mode through which the information on a food label may be presented. Like other food labelling standards, it does not provide specific requirements for the presentation of information that is suitable for persons with visual disabilities. The requirement on the presentation of information, which is also the global standard as provided by the Codex Alimentarius Commission is that information on a food label which maybe in words, pictorial or any other device shall be clear, prominent, indelible, and readily legible by the consumer under normal conditions of purchase and use (Codex Alimentarius, 1985 R.E 2024, para. 8.1.2; TBS EAS 538). With such a requirement, it cannot be said with certainty that the needs for persons with disability have been covered, as there is no specific obligation to provide information on food labels in a manner accessible to persons with visual disability.

In that regard, due to the non-provision of a particular way of presentation of information on pre-packaged food labels that is accessible for them, persons with visual disabilities are at a further disadvantage when it comes to making food choices for their health.

2. EAS 803 Nutrition Labelling Standard

The Nutrition Labelling Standards sets requirements for manufacturers of food products on what nutritional information should be included on packaged food labels, and how such information is to be presented for accessibility (TBS EAS 803). Under the standards, food labels should break down the amount of carbohydrates, vitamins, protein, and other nutrients that are contained in a particular size pack of the packaged food product.

Since nutrition information is vital to foster healthy food choices and prevent diet-related NCDs, it is imperative that information related to nutrition content is presented in a manner that is easily accessible and understandable by all consumers.

However, while nutrition labelling standards require such information to be presented in words, pictures or other devices (Codex Alimentarius, 1985 R.E 2024), this requirement does not anticipate that persons with visual disabilities may fail to access such information. While the wording “other devices” may leave space to include disability-friendly presentation technologies, such as Braille, shapes of packages or narrative labels, the law does not require such accommodations, nor does it ensure that visually-disability appropriate adjustments are made on a mandatory basis. It is up to manufacturers of food products to decide on the presentation of information, leaving persons with visual disability without access to information on nutrition and warning labels, and prone to failure to make informed diet choices. Therefore, the standards violate the right of access to information for persons with visual disability, negatively impacting their abilities to receive information to help them make informed decisions about their nutrition.

⁷ Sensory disability as used by the Act implies person's inability to see clearly whether partial or permanent. With such meaning, sensory disability means visual disability as used throughout the paper.

3. *EAS 804 Claims Requirements and EAS 805 Use of Nutrition and Health Claims Standards*

Nutritional statements, or claims, in food labelling and marketing are used to notify the consumer that a particular food product contains a certain nutrient or health benefit (Miklavc et al, 2021). Claims are normally divided into three groups (Williams, 2005): (1) claims that declare the nutritional value of the food product. For example, “vitamin C is important for the body's immune system” (Williams, 2005); (2) claims that declare that a certain content of food product reduces or increases risks for a particular disease (Williams, 2005). They normally take the form of “fruits reduce risks for cancer,” (3) claims that declare that a certain content of the food product enhances something in the body of the consumer. For instance, “calcium improves bone strength” (Williams, 2005).

In Tanzania, nutrition and health claims are regulated by the Claims Requirement Standards and Use of Nutrition and Health Claims Standard, issued by the Tanzania Bureau of Standards. Like Nutrition Labelling Standards, these standards also require that presentation of information on a package of a food product be in either English or Kiswahili, without specifying the type of technology that may accommodate persons with visual disabilities (TBS EAS 804). Again, the lack of inclusion or specificity hampers the enjoyment of the right to access to information by persons with visual disability and therefore impedes their ability to make healthy diet choices.

4. *Persons with Disabilities Act, Act No. 9 of 2010*

Apart from general laws relating to the protection of the right of access to information and food labelling, there is the Persons with Disabilities Act, which specifically protects the rights of persons with disabilities. The Act was enacted to make provisions for, *inter alia*, health and promotion of basic rights for persons with disabilities. Section 26 of the Act provides for the right to health for persons with disabilities. The Act stresses that access to health information is another entitlement that goes with the right to health for persons with disabilities (Persons with Disabilities Act, 2010, s. 26(6)). This provision protects the right to health information for persons with disabilities under the laws of Tanzania. To this end, nutrition information contained on the food label, which aims at protecting the health of the consumer, should therefore be interpreted in line with health information as provided by the Act. To avoid doubt and misconceptions, the Act defines accessibility when it comes to information to be received by persons with visual disability. It provides that persons with disabilities should have access directly or indirectly to, among other things, information and communication (Persons with Disabilities Act, 2010, s. 3). It further provides for means through which information for persons with visual disability can be accessed. It provides that audio tapes, Braille, large prints, and low vision facilities should be used to convey information for persons with visual disabilities (Persons with Disabilities Act, 2010, s. 3).

Bearing the nature of persons with visual disabilities, the CRPD together with the Persons with Disabilities Act, provide that, if


the information to be communicated in written text, it should be provided in such a means appropriate for persons with visual disability to access it, in order to avail an opportunity for them to enjoy their right to information (CRPD, 2006, art. 21(a); Persons with Disabilities Act, 2010, s. 38(1)(b)). In this regard, the person or entity giving out the information must make sure that such information is accessible to persons with visual disabilities. This includes packaged food labels, which should be designed in such a way that provides information to every individual, including persons with visual disabilities.

Access to Information on food labels and healthy diet choice by persons with visual disability: concluding remarks

As developed throughout this paper, unhealthy diets are modifiable risk factors for NCDs (Hernandez-Fernandez et al., 2021), which are influenced by systematic factors, including corporations in the business of unhealthy foods. However, it is possible to encourage healthy diet choices and behaviours if the laws are designed in such a manner that allows individuals to know exactly what they are up against before making a diet choice. Hence, socio-economic, cultural and legal environments need to be facilitative of the society change of behaviour on diet choices. One such enabling method is food labelling, which is a means of communication between manufacturers and consumers of packaged food products. As noted above, food labels can influence the diet choice of a person with visual disability. However, that is possible only when the food label is accessible to them. Having access to information on the content of food is vital for influencing the diet choices of persons with visual disabilities (Araya et al., 2022). It is therefore important for them to have access to information so that they can make informed diet choices, which will ultimately help to prevent developing NCDs.

That being the case, food labelling must be accessible to everyone, including those living with disabilities. Tanzania currently has various regulations in the form of principal and subsidiary legislations that set standards for food labelling in the country. These regulations provide the meaning of information, rules on how information may be communicated, and obligations of information holders. Moreover, regulations have provided the means under which food labels are presented. However, this paper has shown that the current labelling framework does not include the needs of persons with visual disabilities, as it does not include provisions to address the specific needs of this population. This renders it difficult for persons with visual or sensory disabilities to enjoy their right of access to health information contained on the food labels. This exclusion of the needs of persons with visual disability hinders their opportunity to make healthy diet choices and violates their full enjoyment of rights such as the right to health and to access information.

Bearing such shortcomings in the standards of food labelling pertaining to access to information by persons with disabilities, it is recommended that standards be amended to include details on the modes of presentation of information on food labels that will be accessed by persons with visual disabilities. Some modes that have been proposed include the use of Braille, shapes of packages, and narrative labels technology, such as NaviLens (De Vivo, 2024). Such proposals will enable persons with visual disabilities to access information on packaged food labels and enable them to make informed, healthy diet choices.



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Assessing the Viability of Legal and Regulatory Measures to Promote Healthy Diets in Ghana: Sugar Sweetened Beverage Tax in Focus

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Abstract

The prevalence of non-communicable diseases (NCDs) is on the rise in Africa, and Ghana is no exception. Studies have shown that the consumption of sugar sweetened beverages (SSBs) can lead to unhealthy weight gain and increase the risk of dental diseases, obesity and other NCDs. As a result, the World Health Organization (WHO) has recommended a number of measures aimed at reducing the consumption of SSBs. One such recommendation is the imposition of taxes on SSBs. Ghana's efforts at enacting laws and using other regulatory approaches to improve the food environment and thus reduce consumption of health-harming foods, such as imposition of taxes or introduction of subsidies, are nascent. This paper critically examines the feasibility of using legal and regulatory approaches to promote healthy diets in Ghana, with a focus on SSB taxes. It explores legal pathways for introducing or strengthening SSB tax laws and argues that the existing taxes on SSBs in Ghana are not sufficiently robust to serve as effective measures for preventing NCDs. The paper concludes that it is legally feasible to adopt a standalone health-promoting SSB tax law in Ghana.

INTRODUCTION

Over the years, the increase in the consumption of sugar sweetened beverages (SSBs) has become a matter of public concern. This is primarily due to its association with adverse health outcomes such as obesity, type-2 diabetes, cardiovascular diseases, dental caries and other diet-related non-communicable diseases (NCDs) (Dake et al., 2016).

Specifically, studies show that in lower-middle-income countries (LMICs) like Ghana, the sale and consumption of SSBs (which is on the rise) may have a direct association with an increase in NCDs (Popkin & Hawkes, 2016). Indeed, NCDs are projected to become the commonest cause of death in sub-Saharan Africa by the year 2030 (Dalal et al., 2011). In Ghana, the Ministry of Health notes that NCDs are a major cause of disabilities and deaths. This includes stroke, hypertension and diabetes. The Ministry of Health has identified tobacco, harmful use of alcohol, unhealthy diet and physical inactivity as the major risk factors for NCDs (Ministry of Health, Ghana, 2012).

In response to this global health concern, the World Health Organization (WHO) published Guidelines on Sugar Intake for Adults and Children in 2015. The Guidelines recommended a reduction in the intake of free sugars to less than 10% of total energy intake (WHO, 2015; WHO 2014; Hardy et al., 2018). The WHO has also endorsed health-promoting taxes as part of evidence-based strategies for the prevention and control of NCDs (Hardy et al., 2018). Focused mainly on the four key risk factors for NCDs (tobacco, harmful use of alcohol, unhealthy diet and physical inactivity), some of these strategies have been described as "Best Buys" (WHO, 2017), due to their cost-effectiveness and feasibility for combating NCDs in low- and lower-middle-income countries. Reducing sugar consumption through effective taxation of SSBs, although not a Best Buy, is widely considered an effective intervention for preventing NCDs (WHO, 2022; WHO, 2017). As a result, the WHO recommends SSB taxation as a major action for NCD prevention, recommending a price increase of at least 20% to effect a reduction in the consumption of sugary drinks (WHO, 2017).

Many countries are also employing diverse policy interventions to control the consumption of unhealthy foods and beverages (and also other unhealthy commodities, including alcoholic drinks and tobacco) that are identified as high-risk factors for NCDs (Lachat et al., 2013). The interventions include the implementation of mandatory front-of-pack nutrition labelling (Mandle et al., 2015), promotions to increase awareness about healthy diets, display of nutrient contents on labels, regulation of the marketing of unhealthy food products and taxation of SSBs (Mandle et al., 2015), among others.

Ghana has also expressed concern over the rise of NCDs and adopted a strategy for the management, prevention and control of NCDs in 2012 (updated in 2022), containing certain measures to achieve healthy diets and reduce NCDs (Cornelsen et al., 2015). The idea of introducing and implementing the SSB tax was mooted by the Ministry of Health in 2012 as one of the means for the prevention and control of NCDs in Ghana, in response to the disturbing rate of increase in the prevalence of NCDs. (Ministry of Health, Ghana, 2012). Since then, various civil society organisations, academia and various stakeholders are creating awareness on SSB taxes and are mounting pressure on the government to implement SSB taxes.

Presently, in Ghana, excise duties are imposed as *ad valorem* taxes on the importation of goods at the various ports and certain manufactured goods produced or imported into the country. The affected products include all cigarettes and other tobacco products, alcoholic beverages, non-alcoholic carbonated beverages, and bottled water, among others. (Government of Ghana, 2013). However, current taxes on SSBs are not designed with the explicit objective of reducing SSB consumption and are not robust enough in terms of rate or other design traits to serve as NCD prevention policies.

Therefore, whilst there are some forms of taxes imposed on some SSBs in Ghana, the issue remains whether the existing taxes are specific and robust enough to dissuade people from consuming these products and whether the scope of products is wide enough. Equally, a fundamental question remains as to whether the existing taxes are implemented effectively within the existing national infrastructure, as well as whether consumers, stakeholders and/or industry players will embrace any attempt by the Government of Ghana to introduce a standalone SSB tax law in Ghana.

In 2022, a national survey involving 7,794 residents in Ghana showed that 33% of Ghanaians drink SSBs multiple times a week; more than 10% of the respondents indicated drinking SSBs multiple times a day; and nearly 30% of them drink two or more 330mL cans of SSBs at a go (Laar et al., 2022).

Against this backdrop, this paper seeks to determine probable legal pathways for introducing or strengthening existing SSB tax laws in Ghana. The paper argues that the existing tax legislations bordering on the SSB tax in Ghana are not robust enough to combat NCDs. Secondly, the existing laws in Ghana make it legally feasible to adopt a standalone SSB tax law in Ghana with the aim of combating NCDs.

CONTEXTUALISING FISCAL MEASURES FOR HEALTHY DIETS

Taxation is amongst the many initiatives outlined by the WHO to reduce the consumption of products that are high in nutrients or food components of public health concern (salt, sugars and fats). According to the WHO, the main purpose of such taxes is to disincentivise the excessive consumption of such products, including SSBs. The rationale behind the imposition of these taxes is that taxes will increase the price of SSBs and consumers will be discouraged from purchasing or consuming these products (see Figure 1).

Proponents for the introduction of the SSB tax argue in favour of its imposition for two primary reasons: health reasons and financial reasons. First, the proponents argue that the imposition of a tax on SSBs can reduce consumption of SSBs due to the sensitivity of people to increases in the price of goods.

An equally compelling argument in favour of the imposition of SSB tax, especially during post-COVID times, is that it will contribute to an increase in the revenue of the Government, providing development opportunities. Also, revenues collected from the imposition of SSB taxes may ultimately be utilised to fund prevention and treatment programs for NCDs (Allcott et al., 2019). In essence, while the imposition of these taxes will discourage consumers from consuming these SSBs, revenues generated from the imposition of the tax can be channelled towards funding sector prevention and treatment programs from the adverse effects of the consumption of SSBs.

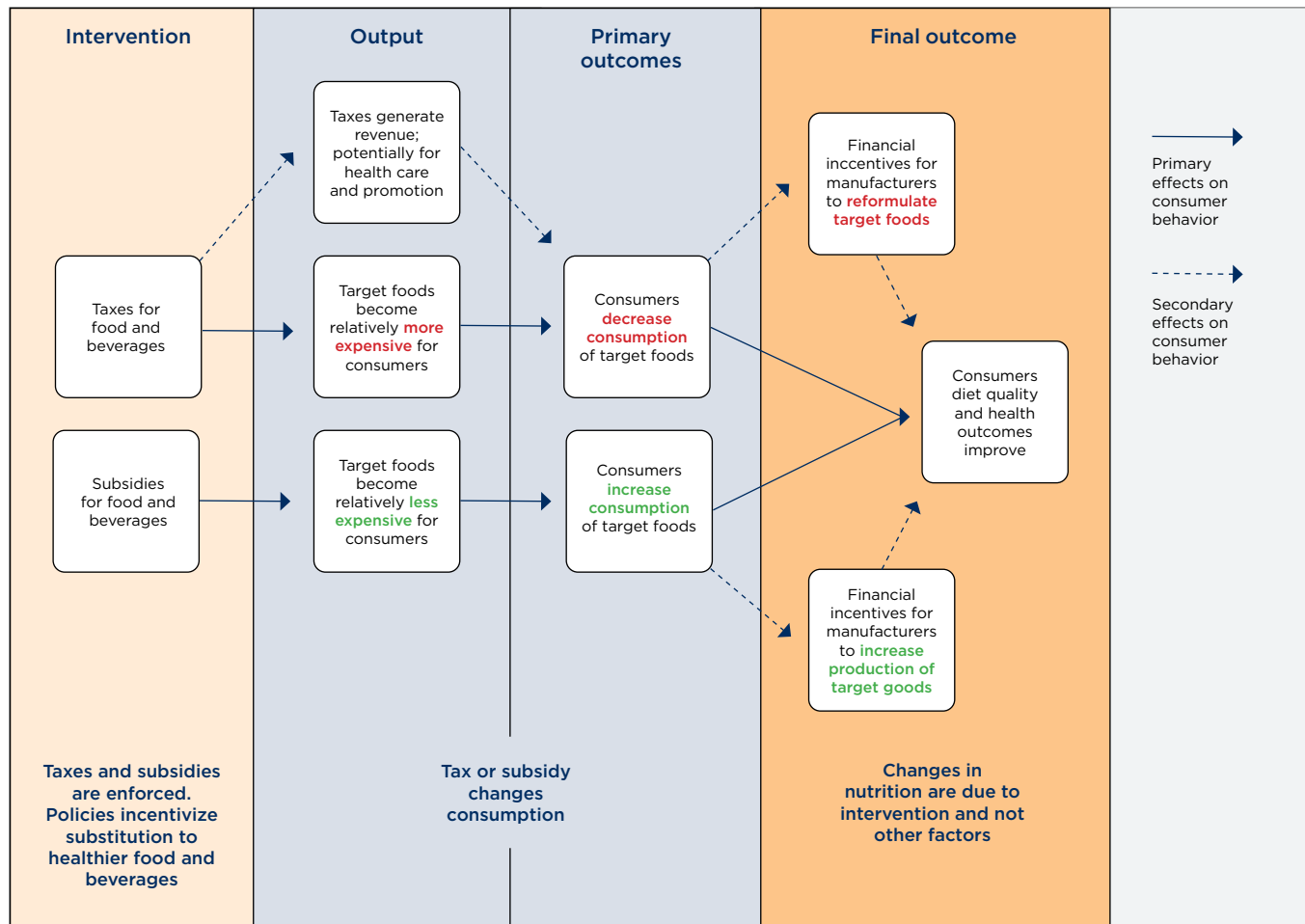
Others also argue that the imposition of taxes on SSBs, when properly structured, may trigger producers and industry players to voluntarily reformulate their harmful products (Thow et al., 2018). In sum, SSB taxes have been identified as one of the most cost-effective legal interventions to control the rising burden of the inimical effects of the consumption of SSBs in sub-Saharan Africa (WHO, 2016).

Admittedly, the imposition of the SSB tax is also not without criticisms. Critics argue that SSB taxes are a clog against the individual's freedom to consume that which they desire (Cornelsen et al., 2015). They also argue that taxing SSBs would only promote consumption of other equally unhealthy or unhealthier food items (Cornelsen et al., 2015). They further argue that these taxes are often difficult to enforce, especially for the informal sector vendors and do not undergo routine health inspections (Fletcher, 2011).

Whatever the argument may be, recent data show that many countries are embracing and using taxes as a measure to control SSBs consumption among their citizens. As of May 2022, more than 85 countries (at national or subnational levels) have levied taxes that apply to SSBs (WHO, 2022). However, implementation of the policy is particularly sparse in Africa (Booth et al., 2021). The 2020 WHO Global NCD Progress Monitor reported limited government effort in implementing the policies in Africa (WHO, 2020).

In 2016, South Africa became the first African country to implement the tax, (Myers et al., 2017) showing promising results. As of April 2021, evidence from South Africa shows there was a

Figure 1. Postulated Fiscal Policy Theory of Change



Source: WHO, 2016

large reduction in purchases of taxable SSBs in terms of their volume and sugar quantities, while there was no significant change for non-taxable beverages (Hofman, 2021). Further, the tax structure in South Africa provided an incentive for manufacturers to reformulate their products in order to reduce the amount of added sugar, leading to reduced sugar consumption (Stacey et al., 2019).

Other African countries have also introduced SSB taxes. In 2021, Botswana and Nigeria passed their SSB tax law. However, industry opposition has hampered further progress in the region. Morocco also introduced an SSB tax, but repealed it in 2018 prior to its implementation in 2019 in response to pressures from the agri-food industry (Bazza, 2018). Similar tensions have been observed in other African countries as potential barriers to SSB tax implementation. Ahaibwe et al. (2021) suggest that in Uganda, the Ministry of Health promote SSB taxation to generate revenue rather than reduce SSB consumption. In Kenya, it was recently argued that SSBs cannot be “criminalised” by imposing a tax on them as was the case for tobacco, because SSBs are “food” (Wanjohi et al., 2021). Some Ghanaian traders have argued that an SSB tax will throw them out of business;

they prefer the implementation of a policy aimed at reducing the sugar content instead (Ntiamoah, 2016).

The enablers of such policy bottlenecks include not only the economic, but also the power dynamics between public health and private interests (Walls et al., 2021). Relatedly, Laar (2021) warns that the peculiar heterogeneity of the African food environment and its variegated political economies need to be recognised and addressed in the formulation and implementation of such policies. Facing a syndemic of undernutrition, obesity and other diet-related NCDs, enforcing policies that disincentivise consumption of unhealthy/calorie-dense foods, but also those that avail healthy/nutrient-rich foods, simultaneous implementation of multiple “carrot and stick” policies (preferably double-duty policies aimed at combating malnutrition in all its forms) is needed (Laar, 2021).

METHODOLOGY

The study is, primarily, legal research with information obtained from sources including statutes, case laws, international conventions, scholarly legal articles, relevant journal articles and key informant interviews. The interviews were conducted between March 2022 and November 2022. The documentary analysis was updated to include the recent Excise Duty Amendment Act of April 2023. The overarching legal anchorage is based mainly on the Constitution of Ghana, statutory provisions and well-settled legal principles.

We analysed the Ghanaian legal and policy framework to ascertain whether it could facilitate the promulgation of a standalone SSB tax law in Ghana or whether there were legal barriers to the promulgation and adoption of a standalone SSB tax law in Ghana.

In analysing the justiciability of the right to food and health in Ghana, we referred to and discussed certain Supreme Court case laws on the subject of right to health and food. We also referred to certain common law cases which are of persuasive effect on the courts in Ghana. Our decision to refer to the decisions of other common law jurisdictions is predicated on the fact that, usually, where there is a dearth of judicial precedent on a legal subject, the courts in Ghana usually refer to the laws, conventions and sometimes the practices in other common law jurisdictions.

Various laws of other countries, legal and scholarly articles, books and publications on the subject of SSB tax were also resorted to ascertain whether Ghana's existing legal and policy framework for SSB tax is robust compared to best practices in other countries.

Human Rights as Grounds to Support SSB Taxes in Ghana

The rights to health and food are protected by one of the most fundamental human rights instruments, the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 11 of ICESCR provides that: "The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

Relatedly, Article 12 of the ICESCR recognises the right to health, which has been interpreted to be an inclusive right extending not only to timely and appropriate health care, but also to the underlying determinants of health, such as an adequate supply of safe food and nutrition. States' obligations, therefore, include ensuring equal access for all to nutritious, safe food as an underlying determinant of health (Committee on Economic, Social and Cultural Rights, 2000).

The right to health is also expressly guaranteed under Articles 34(2) and 36(10) of the 1992 Constitution of Ghana, which require the State to safeguard the health, safety and welfare of all persons. This is a basic right necessary for the enjoyment of all other rights, regardless of their classification as social, economic, political, or other rights.

It is noteworthy that the 1992 Constitution makes no mention of

the right to food. However, it can be argued that the right to food is justiciable and guaranteed in Ghana by virtue of Article 33(5), which gives effect to rights that are not specifically mentioned in the Constitution but which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man. For ease of reference, Article 33(5) states that:

The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.

Speaking on this provision in *Mensah v Mensah* Justice Jones Dotse (JSC) stated that:

The provision enjoins the courts in Ghana to look at other rights not specifically mentioned but which are considered to be part and parcel of an emerging democratic state intended to secure the freedom and dignity of man, and this includes the opposite, woman. (Mensah v Mensah, 2012)

Under the framework of the right to health enshrined in Ghana's 1992 Constitution (Article 30) and reinforced by Articles 11 and 12 of the ICESCR, Ghana is obligated to adopt measures to address NCDs and its risk factors, including unhealthy diets and its drivers. This obligation arises from the State's duty to fulfil the right to health by preventing disease under Article 12(b) of the ICESCR and addressing the social, commercial and other determinants of health, including unhealthy diets, which are recognised as key drivers of NCDs. Therefore, interventions that seek to discourage products that are risk factors for disease, like SSBs, align with Ghana's duty of progressive realisation of health and human rights, and are in accordance with the country's international human rights obligations.

NATIONAL POLICIES ON SUGAR SWEETENED BEVERAGES AND NON-COMMUNICABLE DISEASES

In reviewing 34 health policies issued by the Government of Ghana, three key policies are particularly relevant to the regulation of SSBs.

The National Policy for the Prevention and Control of Chronic Non-Communicable Diseases (NCDs), introduced in August 2012, sets Ghana's strategic direction for preventing and controlling NCDs, recognising unhealthy lifestyles as a major contributing factor. The policy identifies key measures to promote healthy diets, including raising public awareness about nutrition, increasing the availability of healthier food options, and implementing pricing controls to discourage the consumption of unhealthy foods. Additionally, it calls for stricter regulations on the advertisement of unhealthy food and beverages, particularly those targeting children,

and mandates that manufacturers display food content labels and adhere to defined health standards. In this policy, the Ministry of Health advocates for pricing controls on both alcoholic and non-alcoholic beverages and recommends that a portion of taxes on alcohol, as well as fines from drink-driving offences, be allocated to alcohol control programs. The Ministry of Health also emphasises the introduction of fiscal measures to make healthier foods and drinks more affordable than their unhealthy counterparts (Ministry of Health, Ghana, 2012).

Revised in March 2022, the current NCD policy (Ministry of Health, Ghana, 2022) builds upon the 2012 framework by aligning Ghana's NCD prevention efforts with global health strategies, including the United Nations Sustainable Development Goals (SDGs) and the WHO's Global Action Plan for NCD Prevention (UN 2015, WHO, 2013). The Ministry of Finance expressed its support for working with the Ministry of Health to implement the policy. While largely maintaining the objectives of the previous policy, the revised version places a stronger emphasis on strengthening legal frameworks to regulate the sale and advertisement of foods and drinks, including SSBs, as part of a broader effort to prevent NCDs. It further underscores the importance of multi-sectoral collaboration and recommends the formulation, strengthening, and enforcement of legislation and guidelines to support NCD prevention and control in Ghana (Ministry of Health, Ghana, 2022).

The National Health Policy, introduced in 2020, is Ghana's most recent health sector-wide policy and aims to encourage healthier lifestyles while ensuring sustainable healthcare financing. The policy identifies diet as a significant factor in the increasing prevalence of NCDs and stresses the need to empower individuals to adopt healthier eating habits. It recognises that financing healthcare and related interventions across various sectors is crucial to improving public health and, as a response, recommends increased domestic resource mobilisation and accountability through the development of institutional mechanisms to support health and well-being. As of the time of December 2022, when the field research (interviews) was conducted, no specific policy targeting SSB taxes had been developed or implemented, despite growing pressure from scholars and stakeholders advocating for such a tax due to its potential health benefits. (Akoloh, 2019).

THE EXISTING TAX REGIME ON SSBS IN GHANA

The Ghanaian legal framework on the taxation of SSBs is critically examined below.

Taxes in Ghana can be classified as direct or indirect taxes. Direct taxes (e.g., income tax) are paid directly by individuals or businesses to the government, while indirect taxes (e.g., sales tax on sugary drinks) are collected by intermediaries (e.g., retailers), but are ultimately paid by consumers through higher prices. Such taxes can take several forms:

- a. Taxes on income;
- b. Taxes on capital, which includes a capital gains tax on individuals and companies, property tax on land, amongst others; and
- c. Taxes on expenditure, such as consumption or production. Taxes on expenditure (e.g., consumption taxes like VAT or production taxes like excise duties) are levied on goods and services when they are purchased or produced. These taxes shift the financial burden to consumers through higher prices (e.g., taxes on sugary drinks) or to producers based on output (e.g., taxes on tobacco manufacturing).

Under Ghanaian laws, although there are certain legislations which impose taxes on the manufacturing, importation and ultimately, the consumption of certain SSBs in Ghana, these legislations are, comparatively, not comprehensive and do not specifically address the WHO's guidelines on reducing the consumption of SSBs. In other words, the legislation is not robust enough to deter manufacturers and consumers from manufacturing, importing, advertising, labelling, distributing, selling, buying and consuming SSBs. The salient provisions of these legislations are discussed *seriatim*.

Customs and Excise Duties

Under Ghanaian law, excise duties are imposed as an *ad valorem* tax on the importation of certain products, including certain SSBs, at the port of entry, as well as certain SSBs produced or imported into the country (Excise Duty Act, 2014). Excise duty is a single-stage tax, and it is paid by the manufacturer or importer when the goods are removed, loaded onto a conveyance at the factory gate in Ghana or at the point of entry.

Introduced in April 2023, the Excise Duty (Amendment) Act, 2023 – Act 1093 or 1103 (as amended) imposes an excise duty of 20 per centum of the ex-factory price on SSBs, including fruit juices, but this is still not robust. This omnibus law also imposes taxes on alcohol, tobacco, plastics, as well as water. Therefore, it does not raise the standalone price of SSBs in relation to other healthier alternatives (e.g., water). Thus, a standalone SSB tax law is necessary to prioritise its critical public health goals, establish additional measures tailored to reduce SSB consumption (e.g., targeted pricing, public awareness campaigns, sugar content), and avoid the fragmented focus that occurs when SSB taxation is lumped into broader omnibus laws with unrelated taxes. For example, defining the appropriate tax structure to be adopted, strategically designing the scope and tax base of products affected by the law to discourage their consumption, adopting specialised enforcement mechanisms and agents, earmarking revenue, among others.

As an enforcement mechanism, Ghana introduced the Excise Tax Stamp in 2013. Under this regime, SSBs subject to excise taxes — whether imported or locally manufactured — are required to be affixed with tax stamps specified and supplied by the Ghana Revenue Authority before they are delivered ex-factory, cleared from any port of entry or sold at any commercial level

(Government of Ghana, 2013). The excise tax stamp affects all alcoholic and non-alcoholic carbonated beverages, whether bottled, canned or packaged in any form (Government of Ghana, 2013). Under the law,⁸ the excisable SSBs which are required to be affixed with stamps are: wines, fruit juices, sweetened and flavoured water and non-alcoholic beverages, beer, cider, Perry, mead, opaque beer, mixture of fermented beverages with non-alcoholic beverages.

The excise tax stamp is not, strictly speaking, in itself a tax, but a mechanism to enforce excise tax in Ghana. In this context, the excise tax stamp is implemented to help enforce taxes imposed on the categories of SSBs taxable in Ghana. The purpose of the excise tax stamp is to control the importation and local production of excisable goods (products) for revenue purposes; check illicit trading, smuggling and counterfeiting of excisable products; check the declaration of goods and protect and increase tax revenue (Government of Ghana, 2013).

Special Import Levies

The law imposes a special import levy of 2% on the cost, insurance and freight (CIF) value of imported goods, including SSBs (Special Import Levy Act, 2013). It is important to note that this levy is not specifically targeted at SSBs. Therefore, in strict terms, it cannot be considered a health-promoting SSB tax.

Value Added Tax, National Health Insurance Levy and GETFund Levy

Apart from the income tax, taxes such as Value Added Tax (VAT) (Value Added Tax Act, 2013), National Health Insurance Levy (NHIL) (National Health Insurance Act, 2012) and Ghana Education Trust Fund Levy (GETFL) (Ghana Education Trust Fund (Amendment) Act, 2018) is imposed on the supply of goods and services made in Ghana (including SSBs) and the import of goods and/or services into Ghana (with some exemptions) (Value Added Tax Act, 2013). Except for zero-rated goods or goods subjected to the flat rate of 3% (for wholesalers and retailers of goods), the standard rate for the VAT is 12.5%, the NHIL is 2.5%, and the GETFL is also 2.5% (National Health Insurance Act, 2012).

It is important to note that these taxes are imposed on the supply of all goods and not only SSBs.

African Union Import Levy

Besides the taxes listed above, there is an African Union Import Levy of 0.2% of the value of goods (including SSBs) imported from a non-AU country into Ghana for consumption (African Union Import Levy Act, 2017). Primarily, this levy is to provide a source of funding for AU and some of its specialised agencies and does not pursue health-promoting goals (African Union Import Levy Act, 2017).

ECOWAS Levy

A levy of 0.5% is also imposed on the CIF value of goods, including sugar sweetened products imported from non-members of the Economic Community of West African States (ECOWAS) into Ghana. All funds raised through the imposition of this levy are used to finance the activities of ECOWAS communities and community institutions.

Again, this tax is not specifically targeted towards SSBs. The tax applies to all imported goods.

THE ADEQUACY OF THE SUGAR SWEETENED BEVERAGE TAX LAWS IN GHANA

Flowing from the above exposition of the tax regime in Ghana, it is evident that there is no specific, standalone and robust tax legislation on SSBs in Ghana. While general tax laws (e.g., VAT or import duties) apply to SSBs, these taxes apply broadly to many goods and do not meaningfully increase the price of SSBs relative to healthier alternatives, undermining their effectiveness as NCD prevention tools. Thus, the existing SSB tax regime is not robust enough to discourage citizens from consuming SSBs for NCD prevention. Critically, none of these taxes were designed with public health objectives in mind; their primary purpose is revenue generation, which explains why their structure prioritises fiscal goals over reducing SSB consumption. Instead of health promotion, they are mainly intended to generate revenue and, in some instances, to discourage the importation of SSBs while encouraging local manufacturing.

An analysis of the SSB tax laws of the countries that apply them reveals that the intent of their tax laws is geared towards dissuading their citizens from consuming these beverages. The UK, for instance, has adopted a tiered sugar-content-based SSB tax model. Thus, in the UK, the amount of tax payable in respect of any SSB product is dependent on the amount of sugar content of the beverage (Bissett, 2021).

Equally, in South Africa, a tax of 2.21 ZAR for every gram of sugar above 4 grams/100 ml is imposed on any SSB, which has led to reduced consumption of sugar from SSBs (Stacey et al., 2019).

Again, Colombia has imposed an excise tax on ultra-processed SSBs, tiered according to sugar content. Unlike Ghana, where our Value Added Tax is imposed on all goods except those exempted, Colombia has specifically imposed excise taxes on SSBs in an attempt to reduce the consumption of SSBs in Colombia.

Again, Botswana introduced an SSB tax of 2 thebe (Cents) per gram of sugar on 1 April, 2021 (Deloitte, 2021).

In Mexico, the government added a 1 peso per litre excise tax on any non-alcoholic beverage with added sugar, which translates to about a 10% increase in price for the consumer. This move by the

8 Excise Duty Act, 2015, s 45; Excisable Goods Management System Regulations, 2017.

Government of Mexico caused a reduction in purchases of sugary drinks by 11.7% within a period of 2 years after implementing the tax on sugars (WHO, 2017).

Similarly, the Nigerian Government adopted the SSB tax in 2021. The tax adds 10 Naira to each litre (US\$ 0.02/litre) of all non-alcoholic and SSBs. It is suggested that this would cause the sugar industry to decrease the sugar content of sugar sweetened products to avoid being taxed (NCD Alliance, 2022).

THE CASE FOR THE INTRODUCTION OF A STANDALONE SSB TAX IN GHANA

Some people hold the view that Ghana has many separate ineffective legislations, so what is needed is the enforcement of the already existing legislation bordering on SSB and not the promulgation of separate ones.

As outlined above, the critical distinction lies in the regulatory intent: unlike Ghana's broad revenue-focused taxes, the SSB taxes in the UK, South Africa, Colombia, Botswana, Mexico, and Nigeria are designed specifically to reduce consumption through targeted measures like tiered sugar-content pricing, differential VAT rates, or volumetric excise duties. These examples demonstrate how health-driven tax design directly discourages SSB intake by raising costs proportionally to harm (e.g., sugar content). In contrast, Ghana's existing taxes on SSBs — embedded in general VAT or import duty frameworks — do not differentiate SSBs as uniquely harmful products, nor do they prioritise public health outcomes. A standalone SSB tax law, tailored to Ghana's NCD crisis, could replicate the successes seen globally by directly linking tax rates to sugar content, incentivising reformulation, and reducing affordability.

Given this evidence, Ghana's current tax regime fails to align with global best practices for SSB taxation. Its lack of health-oriented design — prioritising revenue over consumption reduction — renders it ineffective for combating NCDs. A dedicated SSB tax law, modelled on international examples, is urgently needed to address this gap.

Therefore, a standalone SSB tax should be promulgated to specifically deal with SSB tax. This will provide government with the opportunity to make provisions for the wide range of issues bordering SSB taxes, such as the appropriate tax structure to be adopted, the scope and definition of products that are subject to the tax versus exempted products, earmarking of funds generated from the imposition of the SSB tax, setting the parameters for monitoring and enforcement of the law and adopting accountability mechanisms, including penalties for non-compliance.

LEGAL BARRIERS AND FACILITATORS TO ENACTING A STANDALONE SSB TAX LAW IN GHANA

The 1992 Constitution gives the Parliament of Ghana the right and authority to pass legislation imposing taxes on the citizens of Ghana (Constitution of the Republic of Ghana, 1992). Accordingly, Parliament can pass a standalone law on SSBs in Ghana. The only law that may limit Parliament from passing any law on SSBs is the Constitution itself (Constitution of the Republic of Ghana, 1992). It is material to point out that there is no provision in the constitution barring or limiting the power of Parliament from passing a standalone SSB tax law. Rather, the 1992 Constitution mandates Parliament to enact laws, including tax laws, provided the said law is not inimical to the interest of the State (Constitution of the Republic of Ghana, 1992). Thus, to the extent that SSB tax laws are aimed at preventing the consumption of SSBs in order to prevent diet-related NCDs, there are no legal barriers to the promulgation of such laws in Ghana. Indeed, existing excise tax laws give a positive indication about the legal feasibility of adopting the SSB tax in Ghana.

In sum, there are no legal barriers to the adoption of SSB Tax laws in Ghana, except that any tax law must necessarily have the sponsorship or support of the Executive Arm of Government (Constitution of the Republic of Ghana, 1992).

In Ghana, all tax laws are laid before Parliament by the President or under his authority. In practice, it is the Government of Ghana, through the Ministry of Finance, that facilitates the passage and implementation of tax laws. Sometimes, certain specific Ministries, like the Ministry of Health in this case, play a major role in the drafting of bills and memoranda to facilitate the adoption and implementation of tax laws affecting specific sectors bordering on issues of health, economic matters, education, etc.

Furthermore, considering the recent economic recession in Ghana (Kwakye, 2020) and the quest by the government to generate revenue⁹ for, amongst others, sustainable financing for health, SSB taxes will present a fine opportunity for the Government of Ghana to raise the much-needed revenue. As such, it is highly possible that the Ministry of Health and the Ministry of Finance will be willing to facilitate the adoption and implementation of a standalone SSB tax statute in Ghana.

Significantly, moreover, both international law and Ghana's constitutional framework place a positive obligation on the State to protect and promote public health. Under Article 36(10) of the 1992 Constitution, the State is required to ensure the realization of the right to good health through policies that promote health and prevent disease. Furthermore, international instruments such as the WHO Global Action Plan for the Prevention and Control of NCDs (2013–2020), to which Ghana is a party, call on governments to

9 Ernst & Young, 'Ghana issues 2021 Budget Statement and Economic Policy: Tax Highlights' (18 March 2021) retrieved from <https://www.ey.com/en_gl/tax-alerts/ghana-issues-2021-budget-statement-and-economic-policy-tax-highlights> accessed 21 February 2022

implement evidence-based fiscal measures — including SSB taxation — to reduce the consumption of unhealthy foods and prevent diet-related NCDs. Thus, beyond permissibility, the law serves as a facilitator and driver of action, mandating proactive measures such as the enactment of a standalone SSB tax law.

However, it must be emphasized that, in order for the implementation of an SSB tax statute in Ghana to be a success, it is imperative to sensitise the public, including industry players, on the goal of the SSB tax statute as this could limit any potential suits or resistance to the passage of SSB tax law. In view of this, the authors recommend that a nationwide consultation with various stakeholders, as well as the public, be considered and coupled with radio and television campaigns on the goal of the SSB tax. This could greatly contribute to ensuring the successful implementation of the SSB tax in Ghana.

INDUSTRY INTERFERENCE IN SSB TAXES AND RELATED POLICIES

Beyond procedural and legal considerations, one of the most persistent challenges to the enactment and implementation of SSB tax policies in Ghana, as seen globally, is interference by the food and beverage industry. Evidence from multiple countries demonstrates that major SSB manufacturers and their affiliates often mobilise coordinated strategies to resist fiscal measures aimed at reducing sugar consumption. These strategies include lobbying against legislation, promoting economic arguments such as job losses and consumer burden, funding counter-narratives through biased research, and attempting to co-opt public health discourse by portraying themselves as part of the solution (Pedroza-Tobias et al., 2021; Lacy-Nichols & Williams, 2021; Mialon & Gomes, 2022).

In Ghana, similar forms of industry interference have been observed in the context of other health-related fiscal policies, including taxes on tobacco and alcohol, where lobbying efforts sought to dilute legislative impact (Laar et al., 2023). The World Bank (2020) has highlighted that many of these arguments — though frequently repeated — lack empirical support and are designed to delay or derail policy adoption. These dynamics are particularly relevant in low- and middle-income countries where regulatory frameworks and political processes may be more susceptible to commercial influence.

To ensure the successful adoption and implementation of an SSB tax in Ghana, it is imperative to anticipate and actively counter these forms of opposition. This includes building broad-based coalitions that include civil society, academia, and the media; ensuring transparency in the legislative process; and conducting proactive public education campaigns that clarify the health and economic rationale behind the tax. A strong foundation of political will, guided by public interest and grounded in evidence, is essential to withstand pressure from vested interests and to place public health at the centre of national policymaking (Laar et al., 2023; Pedroza-Tobias et al., 2021; Lacy-Nichols & Williams, 2021; Mialon & Gomes, 2022).

CONCLUSION

In conclusion, the introduction of a specific, standalone law governing the taxation of SSBs in Ghana is not only feasible but also supported by Ghana's existing tax experience. Historical evidence suggests that such a law could be effectively implemented and enforced. Such a law is urgently needed, given that the existing tax regulations applicable to SSBs are insufficient to significantly reduce consumption and mitigate the associated risks of diet-related NCDs in Ghana. A more robust and targeted legislative approach is required to achieve meaningful public health outcomes.

This analysis also reveals evidence of political will and institutional support for the introduction of a standalone SSB tax law in Ghana. At the writing of this paper, the Ghanaian government had already commenced initiatives aimed at formulating comprehensive policies to promote healthy diets. These initiatives include front-of-pack labelling, marketing regulations, and other food-related fiscal policies. The government's commitment to reducing diet-related NCDs and its interest in generating additional revenue to support the health sector strongly indicate that a standalone SSB tax law would receive substantial backing.

Importantly, Ghana, as a signatory to international human rights instruments and global health declarations, has a legal and moral obligation to take proactive measures, including fiscal policies like SSB taxation, to protect its population from preventable NCDs. The legal and political landscape in Ghana is ripe for the introduction of a dedicated SSB tax law, which could serve as a critical tool in the fight against NCDs while also bolstering the country's health sector financing.

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Restriction of the Advertisement of Unhealthy Food Products to Children in Kenya Through Public Interest Litigation

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Abstract

Non-communicable diseases (NCDs), including cardiovascular diseases, some cancers and diabetes, are the leading cause of death and disability worldwide. Unhealthy diets are one of the most important modifiable risk factors for NCDs. The consumption of unhealthy foods is largely influenced by the presence of unhealthy food environments, characterised by an overabundance of cheaper low-nutritional-value and ultra-processed food products that are made more appealing by aggressive advertising, which in turn affects preferences, requests and eating habits, especially, but not exclusively, of children. Regulation of food environments is necessary to protect children and promote healthy food choices. This includes restricting the advertisement of unhealthy foods and beverages to children. The Kenyan government has made significant progress in developing and implementing various legal and policy strategies aimed at addressing the advertisement of unhealthy foods and beverages to children. However, further progress is needed to build robust protections for children. Experience in Kenya demonstrates that public interest litigation (PIL) can be an effective tool for holding public and private entities accountable. Therefore, this paper argues that PIL can contribute to strengthening State regulation on the advertisement of unhealthy food to children, as well as holding private players accountable, and suggests ways in which this can be pursued further in Kenya.

INTRODUCTION

Non-communicable diseases (NCDs), including cardiovascular diseases, some cancers and diabetes, are the leading cause of death and disability worldwide, and present a serious global and national public health challenge (WHO, 2022). NCDs also adversely affect

national growth and development by reducing human capital and expending huge budgets (Mensah et al., 2020). Equally, NCDs mandate the diversion of critical resources to the care of patients and often lead to serious mental health complications in individuals (Mensah et al., 2020). Notably, NCDs are largely preventable. Unhealthy diets that are high in salt, sugar and fat are one of the most important modifiable NCDs risk factors (WHO, 2022). In turn, NCDs and their associated costs can be significantly reduced with cost-effective preventive measures, including those that tackle unhealthy diets (Budreviciute et al., 2020).

Unhealthy diets leading to disease are largely shaped by food environments, especially those where unhealthy foods and beverages are broadly available, affordable and heavily advertised, particularly to children (UNICEF, 2024). Consumption of unhealthy foods by children is largely influenced by the presence of such food environments, characterised by an overabundance of cheap unhealthy foods that are made more appealing by aggressive advertising (UNICEF, 2024). An abundance of evidence shows that the advertisement of unhealthy foods to children affects their food preferences, requests and eating habits (Boyland & Halford, 2013). In turn, food manufacturers use various platforms that entice children to consume their products, including television, product packaging, digital media, outdoor advertisement, advergames and celebrity endorsements (UNICEF, 2018; Handsley & Reeve, 2018). Significantly, most food and beverage marketing to children promotes unhealthy products, as shown, for instance, in a study conducted by Green et al. that showed that 48.3% of such food and beverage advertisements were for sugar-sweetened beverages (Green et al., 2020).

Teaching healthy habits during childhood is key for the prevention of NCDs, since habits developed during childhood often persist into adulthood (Akseer et al., 2020). Unfortunately, most children's

food environments, including schools, neighbourhoods, sports clubs and even homes, are replete with unhealthy foods and beverages (Fleming & Harris, 2020). Consequently, the number of overweight and obese children at the global level is increasing at an alarming rate, with 70 million children projected to be obese in 2025 (UNICEF, 2018). In Kenya, 5% of children below 5 years of age are overweight (Mulu & Neupane, 2023), and 11% of adolescents aged 10–19 years are either overweight or obese (Kenya Adolescent Health Survey 2019/20).

Restricting access to unhealthy diets to children has immense economic and public health benefits, accruing from a healthy, productive population and less spending on NCDs. However, efforts aimed at restricting the advertisement of unhealthy foods to children have mainly been unsuccessful, particularly in developing countries (Fisher et al., 2021). Experience has shown that industry players use a variety of tactics to avoid strict government regulation (McHardy, 2021; Roache et al., 2018). These tactics include lobbying lawmakers against passing effective regulations, challenging regulations through complex litigation and bribery attempts to weaken the adoption or implementation of regulations (McHardy, 2021; Roache et al., 2018). Food industry players also fund research whose findings divert public attention from the serious adverse effects of their products (Fabbri, Holland & Bero, 2018). Such research often portrays industry players as the solution as opposed to being the cause of the problem.

Self-regulation of advertising of unhealthy foods to children advocated by food industry players has also been found to be ineffective (Fleming & Harris, 2020). Advertising of unhealthy foods to children is often legitimised by industry players on the basis of economic rights or commercial speech rights, which are falsely portrayed as barring regulation (Fleming & Harris, 2020). Relatedly, policymakers often prioritise economic considerations over public health and are therefore reluctant to enact health-promoting policies that they fear may hurt taxes and job creation (McHardy, 2021). As a result, regulation of unhealthy foods frequently ranks lower as a priority compared to the perceived economic benefits of the food industry (McHardy, 2021).

The failure of both State and self-regulation in adequately restricting the advertisement of unhealthy foods to children calls for concerted efforts. Public interest litigation (PIL), which entails instituting suits for and on behalf of the public, can contribute to strengthening State regulation on the advertisement of unhealthy food to children and holding private players accountable. Experiences from the tobacco industry litigation illustrate that PIL against unhealthy foods can yield various benefits (Freeman & Rabin, 2021; Roache et al., 2018; Alderman & Daynard, 2006). Foremost, the media publicity of cases can draw public attention towards unhealthy diets. Equally, PIL can be used to defend claims instituted by food manufacturers and expose hidden industry practices through the disclosure of evidence. Moreover, PIL may be used to challenge industry practices regarding unhealthy diets, hence enhancing transparency on the part of food manufacturers. PIL can also establish legal precedents necessary for the development of law and regulations around advertisement

restrictions on unhealthy foods. Relatedly, PIL cases can provide evidence to counter narratives advanced by partisan industry players, as well as spur private and political action to curb the advertisement of unhealthy food products to children.

This paper argues that PIL can be a complementary tool for strengthening State regulation, as well as for demanding accountability on the part of food industry players in Kenya. It shows how PIL can successfully be applied in restricting advertisements to children in Kenya, as shown by experience in other cases in the country. It further contends that winning the PIL cases is not necessarily the only successful outcome, since PIL can achieve broader objectives, such as creating awareness and contributing to public education.

The paper is organised into three sections. Section 1 highlights the existing legal and policy frameworks in Kenya that have a bearing on the advertisement of unhealthy foods and beverages to children. After that, Section 2 entails a review of how PIL has been applied in some selected scenarios related to the advertisement of unhealthy foods and beverages. Finally, the paper ends in Section 3 with a conclusion recommending PIL to complement and fortify the efforts in regulating the advertisement of unhealthy foods to children.

LEGAL AND POLICY STRATEGIES ON ADVERTISEMENT OF UNHEALTHY FOODS AND BEVERAGES TO CHILDREN

The advertisement of unhealthy foods to children violates children's rights enshrined in various legal instruments, including the Convention of the Right of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC) as well as various local legal instruments (UNICEF, 2023; Handsley & Reeve, 2018). Firstly, such advertisement violates children's right to the highest attainable standard of health, considering the linkage between unhealthy diets and NCDs. Young children have not yet attained full cognitive capacity to comprehend advertising and its commercial intent, hence are more vulnerable to marketing messages. Furthermore, the collection of personal data from children without proper legal authorisation through digital platforms violates their right to privacy. This is because most digital platforms (websites, apps, social media) permit the collection of behavioural data through tracking cookies and algorithms. As a result, children are bombarded with advertisements, including those on unhealthy foods and beverages, which prompt the children to desire them. Moreover, obese children may experience discrimination and mental health challenges. Deceptive strategies used to advertise unhealthy foods equally violate children's right to information. Relatedly, advertising of unhealthy foods to children impedes the children's best interest principle envisaged in children's rights instruments, since food manufacturers put profits before children's health.

In Kenya, advertising of unhealthy foods and drinks to children has been noted as a serious challenge that needs to be addressed (Ministry of Health, 2022). The Kenyan government has made significant progress in developing and implementing various legal and policy strategies aimed at addressing the advertisement of unhealthy foods and beverages to children. The following is a summary of legal and policy frameworks that have a bearing on the advertisement of unhealthy foods to children in Kenya:

Law/Policy	Provision	Relevance
Constitution of Kenya 2010	Article 21 (1) mandates the State to observe, respect, protect, promote and fulfil human rights.	The State is obligated to ensure that children's rights are not violated by State agencies and non-State actors. Equally, the State is mandated to empower rights holders to realise their rights. Finally, the State should take legislative, policy and other measures to progressively realise socio-economic rights, taking into particular consideration the rights of vulnerable members of society, such as children.
	Article 24 provides for the limitation of rights.	A right may only be limited under the law, and such limitation must only be reasonable and justifiable. Limitations of rights should consider such factors as the purpose of the limitation, as well as the need to strike a balance among competing rights. Article 24 can be used to justify regulations that restrict advertising of unhealthy diets to children as against the commercial speech interests and commercial interests held by businesses.
	Article 22 provides for the enforcement of the Bill of Rights.	PIL is justified under Article 22, which grants any person the right to institute court proceedings whenever human rights are threatened, violated or infringed. This provision expands the right to litigation against persons who may not be directly affected by the issue at hand. The article allows for the institution of suits for and on behalf of vulnerable members of society, including children.
	Article 23 provides for the authority of courts to uphold and enforce the Bill of Rights.	Courts are obligated to offer remedies for violations, threats or infringement of human rights (Constitution of Kenya, 2010, Art. 23). These remedies include, among others, declarations of rights, injunctions, conservatory orders and compensation.
	Article 43 provides for the right of every person to the highest attainable standard of health, as well as the right to food of acceptable quality.	This provision imposes an obligation on the State to ensure that children's health is protected. Given the linkage between unhealthy diets and NCDs, this article may be invoked to justify restrictions on advertisements of unhealthy food products to children.
	Article 46 provides for consumer protection rights.	Article 46 guarantees consumers the right to access information necessary to gain the full benefit of the products they consume. Further, the provision protects consumers from misleading information about products. This article may be used to justify State regulation of the advertisement of commodities offered to children. The article also empowers rights holders to sue in order to enforce this right.
	Article 53 outlines the rights of children, including the right to basic nutrition.	This article justifies the State's obligation to restrict the advertisement of unhealthy diets in order to protect children's nutrition.
The Consumer Protection Act, Cap 501, Laws of Kenya	This law guarantees consumers quality goods and services. Section 12 prohibits the use of false, misleading and deceptive representations. Section 13 prohibits unconscionable representation where the consumer is not reasonably able to protect their interests. Section 11 prohibits advertisements of gaming sites.	Although the Act does not specifically address the advertisement of unhealthy foods to children, its provisions can be applied to offer the much-needed protection. Section 12 is relevant when countering false nutritional claims propagated by food industry players when advertising unhealthy diets. Section 13 can be used to justify restrictions on the advertising of unhealthy diets to children, given their vulnerability. The prohibition of advertisements on gaming sites provided in Section 11 of the Act can be used to counter the advertising of unhealthy diets on gaming sites.

The Food, Drugs and Chemical Substances Act, Chapter 254, Laws of Kenya	This Act prohibits, among other issues, the sale of unwholesome food. The use of deceptive and misleading information about the nature, character, value, substance, quality, composition, merit or safety of food is prohibited. Section 5 prohibits the labelling, packaging and selling of food that does not conform to existing set standards in a manner likely to be mistaken for the food of the prescribed standard. Equally, Section 4 of the Act criminalises the labelling, packaging, treatment, selling and advertising of food that is in contravention of existing regulations.	The Act plays a significant role in addressing the regulation of food products, including the advertisement of unhealthy foods. This ensures that the food items sold are safe, of quality and properly labelled. Proper labelling helps consumers, especially parents, to make informed decisions about the food they provide to children, particularly in the face of misleading or aggressive advertising. Further, the Act can contribute to broader policy initiatives aimed at reducing the exposure of children to unhealthy foods and beverages, hence aligning with global efforts to tackle childhood obesity and other diet-related diseases.
Breast Milk Substitutes (Regulation and Control) Act, 2012	The Regulation provides for the appropriate marketing and distribution of breast milk substitutes to provide for safe and adequate nutrition for infants.	The Act promotes exclusive breastfeeding for the first six months of a child's life, hence protecting children from the negative effects of harmful food marketing, as it establishes strict guidelines to prevent the misleading promotion of infant formula and other substitutes.
National Maternal, Infant and Young Child Nutrition Policy Guidelines, 2013	Guideline 3.2.2 discourages the promotion and marketing of unhealthy foods and drinks to children.	One of the aims of the policy is to protect children from the negative effects of inappropriate food marketing, thus contributing to reduced exposure of children to the advertisements and promotion of unhealthy foods and beverages.
Kenya School Health Policy 2018	The necessity of ensuring food quality and promoting a healthy food environment is reaffirmed in Chapter 3 .	Implementation of this policy will contribute towards fostering a healthy eating environment and the provision of quality food to children in schools.

ADOPTING PUBLIC INTEREST LITIGATION FOR THE REGULATION OF ADVERTISEMENTS OF UNHEALTHY FOODS TO CHILDREN IN KENYA

Public Interest Litigation (PIL) is a legal action initiated with the aim of addressing issues that affect the general public or a class of society (Black's Law Dictionary, 10th Edition). Such litigation often seeks *to advance the cause of minority or disadvantaged groups or individuals, or advance cases which raise issues of broad public concern* (Okiya Omtatah Okoiti v Energy & Petroleum Regulatory Authority, 2021). In many jurisdictions, the practice of PIL was hindered by the strict adherence to old English legal rules, which limited the capacity to institute legal proceedings before a court of law, commonly referred to as “*locus standi*” or “standing,” to those who had suffered a legal injury (Bari et al., 2013). This position also ruled in Kenya before the promulgation of the Constitution of Kenya 2010, as captured in various historic court cases (Law Society of Kenya v Commissioner of Lands & 2 others, 2001; Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others, 2014). In this sense, persons who neither suffered a wrong nor experienced direct personal interest in a matter were barred from instituting cases in court for the purpose of seeking justice.

However, the above-stated position was altered by the Constitution of Kenya 2010. Since then, “*locus standi*” has been broadened for

purposes of protecting the rights of special interest groups and persons. Article 22 permits any person to approach the courts and seek judicial redress for threats, violations or infringement of constitutional rights, both on their own behalf or on behalf of others who cannot act in their own name, as well as representing a group, the public interest or an association. In such circumstances, the public-spirited individual is not required to prove their own personal injury or personal interest as a precondition to institute a court proceeding (Priscilla Nyokabi Kanyua v Attorney General & Another, 2010).

The Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013 further simplifies the process of instituting suits in defence of constitutional rights in Kenya. The Rules discourage the application of strict procedural technicalities expected in conventional litigation. Rule 4 (2) thereof provides for the commencement of suits on behalf of others, as well as on public interest grounds. Rule 10 (3) encourages courts to accept oral applications, as well as letters addressed to the court, as acceptable ways of petitions. Further, Rule 12 provides for the courts' assistance in reducing oral applications into formal court documentation for applicants. These Rules make it possible for persons without legal training to approach courts for the purpose of instituting PIL.

PIL is seen as a transformative tool that enables an individual or group to institute suits that transcend personal interest, and thus bringing about social transformation by facilitating remedies against public wrongs and maladies (Swanpole, 2016). PIL has been described as

an unparalleled and unique phenomenon in constitutional law that is critical to bringing social justice for the common man (Brian Asin & 2 others v Wafula W. Chebukati & 9 others, 2017).

Children are one of the most vulnerable groups of society, lacking the requisite capabilities to defend themselves from the health risks posed by unhealthy foods (Smith et al., 2019). This makes them one of the “disadvantaged groups,” which PIL seeks to protect (Okoti v Cabinet Secretary, Industry, Trade and Cooperatives & 13 others, 2022). As was held by the High Court of Kenya, “Public Interest Litigation is intended to vindicate and effectuate public interest by prevention of violation of the rights, constitutional or statutory or sizeable segments of the society who, owing to poverty, ignorance, social and economic disadvantages cannot themselves assert and quite often are not even aware of those rights” (TWW V KJH & 2 others (Constitutional Petition E267 of 2021), 2023),

Since PIL cases are instituted as constitutional petitions, the High Court has extensive original jurisdiction to hear and determine such matters and fashion appropriate remedies (Constitution of Kenya, 2010, Arts. 23 and 165). Original jurisdiction refers to the court’s authority to hear and decide on cases first hand, instead of reviewing on appeal from other lower courts. The Supreme Court of Kenya observed that in instances where claims instituted in the interest of the public are threatened by, among others, administrative action, to the detriment of constitutional interpretation and application, the Court has discretion on a case-by-case basis to evaluate the terms and public nature of the matter vis-à-vis the status of the parties before it. This discretion is drawn from Article 259 of the Constitution, that mandates that constitutional interpretation should promote the values and purposes of the Constitution, advance the rule of law, advance human rights and fundamental freedoms, as well as permit the development of the law (Constitution of Kenya, 2010, Art. 259; Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 others, 2014).

Given the globally recognised and entrenched best interest of the child principle, which commands that the interest of the child takes paramountcy and precedence in any matter, courts should issue favourable, effective reliefs in cases relating to the advertisement of unhealthy foods targeting children. The power to issue reliefs by courts against human rights infractions is unlimited pursuant to Article 23(3) of the Constitution of Kenya as this provision grants the High Court unrestricted opportunities to grant “appropriate relief” depending on the circumstances of the case and the applicable law (Secretary Isiolo County Assembly & 2 others v Speaker (Mohammed Tubi) Isiolo County Assembly, 2014). This was enunciated by the Court of Appeal of Kenya where it was determined that appropriate relief is, in essence, the relief that is required to protect and enforce the Constitution. Depending on the circumstances of each case, the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. Courts may order compensation for violations of the right to health by food companies and issue rules restricting further marketing of unhealthy foods to children. The government may equally be directed to put in place enforcement measures that will

prevent further violations of the right to health as a result of the unchecked marketing and distribution of unhealthy foods.

The Kenyan experience with public interest litigation demonstrates that, regardless of the case’s outcome, courts hesitate to award heavy costs of litigation against either of the litigants in a case. In this way, any person, including public interest groups or individuals seeking social justice, can institute court proceedings on behalf of children without fearing heavy costs in the event of losing the case. The Supreme Court of Kenya has been emphatic on this position, determined first in *Okoti & 2 others v Attorney General & 14 others*, in 2023:

Public interest litigation aims to address genuine public wrongs where legal action is initiated for the enforcement and advancement of constitutional justice and public interest and the law requires that costs award not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well-endowed or indigent (...). The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.

PIL has already been used as a means to promote industry accountability and support more robust rights-based regulation in Kenya. Two cases, Mark Ndumia and British American Tobacco Kenya PLC, which illustrate such efforts, are showcased below. In Mark Ndumia, plaintiffs challenged a sugar-sweetened beverage company’s failure to capture nutritional information on some of its products (Mark Ndumia Ndung’u v Nairobi Bottlers Ltd & another, 2018) while in British American Tobacco Kenya PLC, the tobacco industry challenged the lawfulness of regulations mandating the inclusion of warning labels on cigarettes, as well as the introduction of a solatium compensation contribution. Both cases illustrate some tactics used by industry players to avoid accountability for their contribution to NCDs (British American Tobacco Kenya v Cabinet Secretary for the Ministry of Health & 2 others, 2019). The cases also present important precedents for possible PIL cases seeking to restrict the advertisement of unhealthy food products to children.

One of the tactics utilised by health-harming product companies has been challenging petitioners’ legal capacity to institute a suit on behalf of the public, on account of petitioners’ alleged lack of a direct injury. This was the position in the *Mark Ndumia* decision, where the petitioner approached the High Court on his own behalf and on behalf of other consumers of *Coca-Cola* products. He maintained that, as a consumer of *Coca-Cola* products, his right to information had been infringed by the respondents, who had failed

to include nutrition information on their glass bottles. He argued that providing nutritional information on packages is essential for consumers, since it helps them determine the benefits (and harms) derived from such products. Further, the petitioner contended that providing such information on only plastic bottles amounted to discrimination, as poor people were more likely to purchase beverages in glass bottles on account of pricing.

The respondents argued that the petitioner lacked standing to sue on account that he was not a consumer of *Coca-Cola* products. However, the Court reasoned that the Constitution of Kenya, 2010, had radically transformed constitutional litigation in Kenya and stressed that Article 22 of the Constitution gave practically every person an unlimited right to sue in constitutional matters. Accordingly, the petitioner did not need to be a consumer of *Coca-Cola* beverages to qualify to institute a suit against the respondents. On the contrary, the Court found that the petitioner had legal standing to institute the petition, as he had demonstrated sufficient interest to seek the remedies he had sought. This decision is an important precedent and offers support to litigants pursuing PIL cases seeking to regulate the advertisement of unhealthy food products to children.

Relatedly, experience from the tobacco industry demonstrates that firms rely heavily on litigation to avoid regulation of their harmful products (McHardy, 2021). This tactic was applied in *British American Tobacco Kenya PLC*, where cigarette manufacturers challenged the constitutionality and lawfulness of the Tobacco Control Regulations 2014. In that case, the petitioners argued that packaging and labelling requirements applied to tobacco products to protect public health would violate their intellectual property rights. Moreover, they alleged that the regulations at hand were introduced without a regulatory impact assessment despite the likelihood that such regulations would result in significant financial costs on the tobacco industry. Lastly, the plaintiffs protested the introduction of a solatium compensatory contribution, arguing that it was a form of unlawful and discriminatory tax, since other industry players in different sectors were not subjected to the same contribution.

Both the Supreme Court and the Courts below it (the Court of Appeal and the High Court) adopted a purposive interpretation of the Constitution in resolving the matter. In finding that the tobacco regulations were justified, the High Court held as follows:

Tobacco is now irrefutably accepted as highly addictive and, as such, imposing huge personal and social costs. We now know that half of all smokers will die of tobacco-related diseases and that the costs to the public health system are enormous. We also know that tobacco is one of the hardest addictions to conquer ... Confronted with such a product and need to balance health interests and the right of the public against the commercial interests of the petitions and

others in the tobacco industry, the choice is fairly obvious. (British American Tobacco Kenya v Cabinet Secretary for the Ministry of Health & 2 others, 2019, para. 110)

The Court of Appeal upheld the High Court's decision, indicating that the petitioners did not deny negative effects of the tobacco products on both smokers and those exposed to second-hand smoke. Therefore, the Court reasoned that there was a need to balance public health needs with the petitioners' private business interests, in line with Article 24 of the Constitution. Thus, the Court determined that requirements of information disclosure on tobacco packaging were justified for the purpose of protecting public health. As such, the limitations established by the regulations at hand were neither unlawful nor unconstitutional. These findings were affirmed by the Supreme Court, which emphasised the need to protect the public from the harmful effects of tobacco.

Courts have also taken judicial notice of the linkages between NCDs and their associated risk factors. In both the *Mark Ndumia* decision and the *British American Tobacco Kenya PLC* decision, the Courts appreciated that NCDs were a serious problem and that the proprietary rights of the firms could not triumph over the public health rights of the larger populations. In the *Mark Ndumia* decision, the Court took judicial notice of NCDs and diet-related diseases, including malnourishment and obesity, as leading health concerns in Kenya (*Mark Ndumia Ndung'u v Nairobi Bottlers Ltd & another*, 2018, para. 69). To this end, the Court noted that in *Mark Ndumia*, that the highest attainable standard of health under Article 12 (1) of the ICESCR and Article 43 of the Kenyan Constitution can be attained if all people, especially children, have sufficient safe and nutritious food all year round.

Further, the Court warned about the issue of deceptive information, and held that:

...providing information to consumers, on ingredients, nutrition claims and declaration of potential allergens, as well as nutrition or health claims, food warnings and labels, informs consumption by enabling consumers to make informed decisions. Under Article 46, nutritional information provided on labels should be truthful and must not mislead consumers. No food should be described or presented in a manner that is false, misleading or deceptive. This obligation is replicated in the Consumer Protection Act (Mark Ndumia Ndung'u v Nairobi Bottlers Ltd & another, 2018, para. 68).

This decision sets a precedent towards curbing representations of unhealthy foods as being healthy. PIL on unhealthy food can rely on this decision to protect children, particularly where unhealthy foods are presented as healthy.

Kenyan courts' appreciation of the linkages between unhealthy foods and their contribution to NCDs was jurisprudentially progressive in terms of curbing the spread of NCDs and their attendant effects. More importantly, the courts applied an array of legal sources, including the Constitution, statutes and even international law, to protect public health interests. This decision gives hope to potential petitioners on matters relating to unhealthy diets and marketing to children. The reasoning of the courts can be borrowed to advance arguments in favour of limiting the advertising of unhealthy foods to children. Moreover, the Supreme Court's findings on the lawful limitation of personal and business interests in favour of public health are binding on all lower courts on account of Kenya's rule of precedent.

Litigation against the tobacco industry has demonstrated that firms producing and advertising harmful products raise various claims for their legal defence. Some such tactics are illustrated by the cases showcased above. Yet, others have been documented by research. For example, industry often attempts to prolong litigation by invoking the doctrine of exhaustion of local remedies (Miura, Daynard & Samet, 2006). This tactic involves questioning the Court's jurisdiction to hear and determine the matter, arguing that other mandatory legal avenues were not invoked in resolving the dispute. Notably, this tactic was employed in the *Mark Ndumia* decision, where respondents argued that the petitioner had not exhausted all the available remedies. In resolving the issue, the Court reasoned that a respondent could only rely on the doctrine of exhaustion of remedies if such a respondent could prove the availability of such a remedy. The Court defined an effective remedy as one that a petitioner can pursue without impediment and determined that a remedy that is not evidently available cannot be invoked to the detriment of a petitioner. The Court also held that a question of rights violation could not be resolved by the statutory provisions, as argued by the respondents. Notably, the Court appreciated that the Constitution should not be interpreted in a manner that does not give effect to consumer rights, and that courts are charged with the responsibility of developing the law through purposive interpretation. In making its finding in favour of the petitioner, the Court took judicial notice of increasing diet-related diseases, including NCDs, malnourishment and obesity as leading health concerns in Kenya (*Mark Ndumia Ndung'u v Nairobi Bottlers Ltd & another*, 2018).

The above suggests openness by the courts regarding PIL on matters that concern the health and safety of the public, both on substantive and procedural matters (including non-exhaustion of local remedies, which is often a hurdle for litigation). Remarkably, the purposive interpretation adopted in the case can be extended to PIL challenging the advertisement of unhealthy diets to children.

CONCLUSION

This paper has laid out the relevance of unhealthy diets as risk factors for NCDs among children, as well as the for-profit industry's role in the rising consumption of unhealthy foods and beverages. The paper stresses how consumption of unhealthy products responds, to a large extent, to aggressive industry advertising, as well as how children's evolving cognitive capabilities make them easily swayed by sophisticated advertisements. This, in turn, increases children's demand for such unhealthy commodities. Ineffective regulation of such advertisements has increased children's exposure to unhealthy food, hence violating children's right to health, among other rights. This paper identifies PIL as one of the tools that has been successfully deployed to counter NCD-related issues in Kenya, and one that could be employed to complement and fortify the efforts in regulating the advertisement of unhealthy foods to children. PIL is a powerful weapon in the armoury of justice, effective in redressing genuine public wrong or public injury, such as the marketing of unhealthy foods that are NCD risk factors. Every individual, in Kenya, may institute such litigation to protect the rights of the public at large, get swift justice and, in the event of losing a case, be shielded from high costs of litigation on account of the court's precedent of each party bearing their own costs (unlike in other cases where the losing party may be ordered to pay the winning party). For these and other reasons, PIL offers an opportunity to push for better regulation of unhealthy foods and beverages to children and should be explored as a promising tool to promote NCD prevention regulation.

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Promoting Healthy Diets in School Environments in Uganda from a Human Rights-Based Approach

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INTRODUCTION

Children in Uganda are currently facing a triple burden of malnutrition: undernutrition, overweight and obesity, as well as a rising prevalence of diet-related non-communicable diseases (NCDs) (EPRC, 2023, p.17). Unhealthy diets leading to overweight, obesity and diet-related NCDs are rising in Uganda, particularly amongst children (Sserwanja et al, 2021, p.3).

Evidence shows that food environments are major drivers of unhealthy dietary practices (EPRC, 2023). The availability of affordable, healthy food in retail or food service outlets allows a population to make healthier food choices (EPRC, 2023). On the contrary, environments where healthy foods are unavailable, unaffordable or undesirable make healthy choices less likely, leading to a higher consumption of foods high in compounds of public health concern (including sugar, fats, and salt), and are often ultra-processed products, all of which are major risk factors for developing NCDs (WHO, 2024).

Marketing of such products plays a significant role in the creation of unhealthy food environments (WHO, 2024). This is particularly concerning in relation to the dietary environment of children, who are more vulnerable to marketing messages and whose consumption habits and personal preferences are influenceable and still developing (WHO, 2024). School environments are especially relevant in this regard, as they are spaces that children rely on for education and where they spend significant amounts of their time (WHO, 2024).

Against this backdrop, this paper argues that Uganda must adopt measures to reform school food environments, including unhealthy food and beverage marketing restrictions, as a critical step in combating the rising prevalence of NCDs among children in the country. It further explores the State of Uganda's international and constitutional obligations to tackle the marketing of unhealthy foods and beverages in schools, whereby the use of human rights principles or a human rights-based approach can improve education outcomes and promote the realisation of children's

rights. It equally portrays how these efforts can, and should, be in accordance with human rights principles, as described by the United Nations Food and Agriculture Organization (FAO) PANTHER principles (FAO, 2014).

The paper is divided into four sections. After providing some background, Section One describes how regulating and restricting unhealthy food marketing in schools is imperative on account of its implications for children's rights, stemming from both international human rights law and Uganda's Constitutional and legal framework. Section Two discusses human rights PANTHER principles that should be considered when adopting and implementing unhealthy food and beverage marketing restrictions in schools. Section Three discusses the relevance of local governance as well as the legal obligations and authority emerging from the constitution and other legal frameworks for the protection of children. Equally, this section discusses potential consequences of non-compliance. Finally, Section Four offers a preliminary conclusion and suggestions for a way forward.

BACKGROUND

At the global level, the World Health Organization (WHO) has warned that childhood obesity is one of the most significant global public health challenges of the 21st century, affecting every country in the world (WHO, 2010, WHA 63.14). In just 40 years, the number of school-age children and adolescents with obesity has risen more than 10-fold, from 11 million to 124 million (2016 estimates) (WHO, 2010, WHA 63.14).

While the prevalence of infant, childhood, and adolescent obesity is rising worldwide, it is increasing even more rapidly in low- and middle-income countries (WHO, 2016). This is concerning on account of the negative implications of overweight, obesity and diet-related NCDs on children's health, educational attainment and quality of life. Significantly, children with obesity are very likely to remain obese as adults and are at risk of chronic illness (WHO, 2010, WHA 63.14). This hampers their opportunities for physical,

social and economic well-being, both during childhood and into adulthood (WHO, 2016).

NCDs also negatively affect the economic development of individuals and communities (WHO, Factsheet, n.d.). For example, the rise in NCDs is predicted to impede poverty reduction initiatives in low-income countries, due to increased costs associated with NCD treatment and health care (WHO, Factsheet, n.d.).

In this context, Member States of the WHO (including Uganda) have agreed to adopt and implement strategies to tackle childhood obesity and diet-related NCDs (WHO, 2017, WHA 70.19). As part of these commitments, countries have agreed to tackle the obesogenic environment and address vital elements in the life course of children through coordinated, multisectoral action that is held to account (WHO, 2016; WHO, 2017, WHA 70.19).

Relatedly, Member States of the WHO endorsed recommendations to restrict marketing of foods and non-alcoholic beverages to children during its 63rd World Health Assembly, whereby all Member States must take steps to adopt and ensure an enabling policy and legal framework that adheres to human rights principles and implements these recommendations (WHO, 2010, WHA 63.14).

Significantly, overweight and obesity should be targeted with a comprehensive approach that offers an adequate response and creates healthy environments that can support individuals in making healthy choices; choices that are grounded on knowledge and skills related to health and nutrition (WHO, 2016).

School environments are key settings to protect and promote children's rights, since children spend much of their critical early growth years in school (pre-primary, primary, secondary school and tertiary institutions) spanning a minimum of 10 years. Therefore, violations of rights during childhood and within school environments can have long-lasting consequences that are often perpetuated into adulthood (UNICEF, 2019).

Unhealthy food environments violate children's rights, since they foster the consumption of products that harm children's health and negatively affect their cognitive capacities (WHO, 2016). Food environments are critical for the right to education also because early life exposure to unhealthy diets may affect education outcomes (WHO, 2016). On the contrary, a healthy diet optimises physical, mental, and social wellbeing, including that of children. Their optimal cognitive function, broadly defined as the ability to learn, remember, and deploy attention, is essential to mental wellbeing and functioning in daily life (Dalile et al., 2022).

The Ugandan Ministry of Health has acknowledged the need to promote healthy diets and restrict the consumption of products that are high in compounds of public health concern, including those that are high in sugars, salts, and fat, and that can lead to overweight, obesity, tooth decay, diabetes and heart diseases, amongst other NCDs (Uganda Ministry of Health, 2019). As part of these efforts, the Ministry of Health has adopted guidelines recommending the consumption of specific foods, including those that are high in iron, calcium, fibre, whole grains, and fruits and vegetables. The new dietary guidelines also note concerns about

the rise of unhealthy diets, highlighting that a quarter of the adult population is hypertensive and nearly a quarter is overweight/obese, leading to these and other diet-related NCDs (Uganda Ministry of Health, 2019).

The Government of Uganda has also devised other interventions, like the Human Capital Development Program, under the National Development Plan III, where it highlights that well-educated and healthy human resources are essential to facilitate development (Uganda Planning Authority, 2020). Uganda's human capital is currently characterised by low labour productivity (38 per cent low human development at 0.516) (Uganda Planning Authority, 2020). Therefore, this program promotes the availability of appropriate and suitable human capital that facilitates production, productivity and technological growth. This is relevant in the context of NCDs on account of the negative impacts that NCDs have on individual and societal development.

Uganda is also implementing several programs, including Universal Primary and Secondary education, establishing vocational and technical institutions, and youth Livelihood Programs. These interventions in health, education and economic affairs would be leveraged to respond to the rise in diet-related NCDs. However, these programs are currently not achieving that result on account of a lack of investment in children's and youths' healthy food environments. Significantly, there is still no policy, guideline or regulation restricting the marketing of unhealthy foods to children, whether inside schools or in the school vicinity. This gap enables the food industry (producing ultra-processed foods and beverages) to promote their products and advertise them to children, including in schools. The marketing of unhealthy foods and beverages promotes their consumption and influences children's consumption habits (WHO, 2010, WHA 63.14). Therefore, the unrestricted marketing of these products in schools violates children's rights, as is developed in the next sections.

Section One

CHILDREN'S RIGHT TO PROTECTION FROM UNHEALTHY FOOD ENVIRONMENTS: THE INTERNATIONAL AND NATIONAL FRAMEWORKS

The International Basis

Uganda, a member of the United Nations, signed and ratified the Convention on the Rights of the Child (CRC) in November 1990, along with other international and regional agreements such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child, and the African Youth Charter. These agreements mandate that children's rights must be respected, protected, and fulfilled,

imposing specific obligations on the State of Uganda, including those related to the prevention of non-communicable diseases (NCDs).

The Universal Declaration of Human Rights (UDHR) protects the rights to health and adequate food under Article 25, whereby everyone has the right to a standard of living adequate for health and wellbeing. Motherhood and childhood are also specifically protected. They are entitled to special care and help. Article 26 protects the right to education, making primary school education a right for all (UDHR, 1948, Article 25). Significantly, although the UDHR is formally non-binding, it is broadly accepted as mandatory as part of international customary law.

The ICESCR, on the other hand, was the first international treaty to enshrine the rights to health and adequate food with binding nature, whereby Member States are under the obligation to take appropriate steps to progressively ensure the realization of the rights enshrined by the Covenant (ICESCR, Art. 2). Under Article 11, the ICESCR protects the right of every person to an adequate standard of living, including adequate food. The right to health is also enshrined under ICESCR Article 12, which provides that state parties recognise the right of everyone to the highest attainable standard of physical and mental health. This right has been interpreted to encompass the determinants of health, including access to adequate food and nutrition (Committee on Economic, Social and Cultural Rights (CESCR), General Comment 14, 2000, Para. 4). The right to health therefore encompasses conditions that hamper – or promote – healthy choices, such as school environments. In this context, the unrestricted broadcasting, marketing and advertisement of unhealthy foods in schools can hamper the right to health as defined in international law.

The CRC is equally relevant for the purposes of this paper, as it seeks to protect and promote the rights of children in particular. Article 24 of the CRC guarantees the right to nutrition and the right of the child to the enjoyment of the highest attainable standard of health; and countries like Uganda must use a human rights-based approach to protect these rights, including by restricting marketing in school environments of foods and beverages that are harmful to health. Under Article 24, children have the right to the best health care possible, clean water to drink, healthy food and a clean and safe environment to live in. All adults and children should have information about how to stay safe and healthy. Relatedly, Article 27 protects children's right to food, clothing and a safe place to live so they can develop in the best possible way.

Significantly, also, Article 28 of the CRC protects every child's right to an education. Primary education should be free. This, therefore, suggests that the critical underlying determinant – adequate food – must be part of this free education to enable learning. This is because, under the provisions of the Covenant, children should be encouraged to go to school to the highest level

possible. To do so requires the availability of adequate food and ensuring the environments in and around schools are adequate to facilitate the realisation of this right (CRC, 1989, Article 28).

Significantly, the Committee on the Rights of the Child, the authoritative interpreter of the CRC, developed its interpretation on Article 24 on the Right to Health for Children in its General Comment No. 15, where it recognises that children's right to health is affected by a variety of factors, like non-communicable diseases. Paragraph 12 of General Comment No. 15 states that the best interest of the child principle must be observed in all health-related decisions concerning individual children or as a group (CRC General Comment 15, 2013, Para. 12). Therefore, the Committee urges States to place children's best interests at the centre of all decisions affecting their health and development. Based on these developments, the failure to protect the best interests and health of the child in broadcasting and advertising of unhealthy foods can be considered a violation of children's right to health.

Relatedly, General Comment No. 16 on the State Obligations Regarding the Impact of the Business Sector on Children's Rights, in paragraph 5, provides that states parties to the CRC are to ensure that activities and operations of business enterprises do not adversely impact children's rights (CRC General Comment 16, 2013, para. 12). This undoubtedly includes and reaches the marketing of unhealthy foods in school environments.

More recently, the United Nations Special Rapporteur on the right to health issued a statement on the adoption of front-of-package warning labelling to tackle NCDs. They emphasised that States have legal obligations as part of their right-to-health duties to address preventable risk factors for diet-related NCDs and promote frameworks whereby the food and beverage industry convey accurate, easily understandable, transparent and comprehensible information on their products (Püras, UN Special Rapporteur on Health, 2020).

The Ugandan Constitutional Basis.

Uganda's Constitutional and legal frameworks also protect the rights of children in ways that align with the international framework described above. Under Article 287 of the Constitution of Uganda, all covenants that were signed by Uganda before the coming into force of the Constitution in 1995 were reserved and still have force of law even in the Constitution after 1995. So, as Uganda had ratified all the above international covenants, they apply to Uganda and mandate an obligation to protect children from unhealthy food environments.

In Uganda, the Constitution is the supreme law.¹⁰ Any law or regulation must conform with the Constitution. All power and authority of the Government and its organs derive from the Constitution, which in turn has authority from the people who consent to be governed by this Constitution.¹¹ The supremacy

¹⁰ See Article 2 of the Constitution of the Republic of Uganda

¹¹ See Article 2 and 3 of the Constitution of the Republic of Uganda

of the Constitution (Constitution, 1995, Article 2) is the cardinal basis of the protection of children from unhealthy food environments. The Constitution in Uganda is the supreme law and has binding force on all authorities and persons throughout Uganda; therefore, laws or customs that contradict it shall be void.

Children are specifically protected in the Constitution. Under Article 34, children are entitled to be protected from social or economic exploitation and every child is entitled to basic education, which shall be the responsibility of the State and the parents of the child (Constitution, 1995, Article 34(2)).

Children have a constitutional protection when it comes to nutrition and their education. Free and compulsory basic education is a right of every child in Uganda (Constitution, 1995, Objective XVIII), whereby the State is under a Constitutional obligation to promote this right. The State shall therefore take appropriate measures to afford every citizen equal opportunity to attain the highest educational standard possible, including by promoting proper growth and conditions proper for cognitive development. The promotion of healthy environments and the restriction of unhealthy food marketing are indispensable in this regard. This not only relates to access to education, but also to nutrition and food security.

The Ugandan Constitution also creates a protection against economic exploitation. The food industry must never be allowed to exploit the credulity of children by promoting and marketing unhealthy products, like sodas and other foods that hamper their health. This entails an obligation of the State to protect children against these food industry practices, including through regulation, to prevent schools from becoming avenues of economic exploitation for children.

Relatedly, the Constitution recognises other relevant rights through its Objectives. Objective XXII recognises the right to adequate food and other economic, social and cultural rights and has committed, as a matter of directive principle of State policy, to ensure proper nutrition through mass education and other appropriate means in order to build a healthy country (Constitution, 1995, Objective XXII).¹²

Significantly, Constitutional objectives have been interpreted in Uganda as law having full force of law (Case of Amooti Godfrey Nyakaana v. Nema and 6 Others Constitutional Appeal No. 5, 2011) as well as given additional weight by Article 8A of the Constitution, which provides that *“(1) Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directives principles of State policy.”*

Hence, Constitutional objectives and principles are a very powerful basis for the protection of children from unhealthy food environments because their provision is set in mandatory language. They shall guide all organs and agencies of the State, all citizens, organisations and other bodies and persons in applying

or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society (Constitution, 1995, Objective 1). The President of the Republic of Uganda is also mandated to report to Parliament and the nation at least once a year, all steps taken to ensure the realisation of these policy objectives and principles (Constitution, 1995, Objective 1(ii)).

Relatedly, under objective V, the government is under a constitutional obligation to guarantee and respect human rights. This, of course, includes children's right to adequate food, which can be interpreted to also encompass healthy food environments. Under this provision, the state also has the obligation to ensure that institutions charged with the responsibility of protecting and promoting human rights are provided with adequate resources to function effectively, and guarantee the respect of human rights.

Children's right to healthy food environments can also be grounded under Objective XIV, which provides that the State shall endeavour to fulfil the fundamental rights of all Ugandans (including children) to social justice and economic development and shall ensure that — (a) all developmental efforts are directed at ensuring the maximum social and cultural well-being of the people; and (b) all Ugandans enjoy rights, opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits.

The above can be interpreted as encompassing children's food environments, insofar as they have an impact on children's food choices, therefore affecting their right to health, to adequate food, and other interrelated rights, including their right to education. The Government of Uganda has already acknowledged the risks that emanate from eating foods and beverages that are high in sugar, salt and fats (Uganda Ministry of Health, 2019, p.29). Therefore, the State must ensure that third parties, including the food industry, are not allowed to market and advertise their unhealthy products unchecked.

Article 20 of the Uganda Constitution provides for fundamental and other human rights and freedoms. These are inherent and not granted by the State. The children's right to safety and nutrition is inherent and shall be protected, respected and promoted by all organs and agencies of Government and by all persons. Relatedly, Article 21 of the Uganda Constitution prohibits discrimination in all forms. Children from all social groups must be treated equally and protected from adverse commercial activities that threaten their lives as children and their future lives.

Also relevant is Article 33 of the Constitution of Uganda, which protects the rights of women. This constitutional provision is critical for the protection of children, especially young girls and women, during her life journey through school. Her food environment must be safe. Under Article 33(3), the State is under a binding constitutional mandate to protect women and their

12 “XXII. Food security and nutrition

The State shall—

(a) take appropriate steps to encourage people to grow and store adequate food;

(b) establish national food reserves; and

(c) encourage and promote proper nutrition through mass education and other appropriate means in order to build a healthy State.”

rights, taking into account their unique status and natural maternal functions in society. This means that female youth should be particularly protected against exposure to foods that can harm their health. The Ministry of Health in Uganda has ably elucidated that the nutrition requirements of girls, adolescents and young women are different and must be given particular attention. This means that the State has a legal and constitutional obligation to protect the school-aged girls from unrestricted marketing of foods and beverages that are high in salt, sugar and fat and which are likely to endanger their health in general and their maternal health, as per Article 33(3) of the Constitution. The State, therefore, shall provide the facilities and opportunities necessary to enhance the welfare of young girls to enable them to realise their full potential and advancement as a constitutional obligation.

The above provisions illustrate how the Ugandan Constitution supports the State's obligation to protect children's rights, including within the school environment. Given the well-documented influence of unhealthy food marketing on children's dietary choices, this obligation extends to promoting healthy school food environments and restricting unhealthy food marketing. In this context, the failure to protect children from unhealthy food marketing is inconsistent with the Constitution, which guarantees children's rights, as well as with Uganda's obligations under international law.

The national legal framework also supports the above. In particular, the Children's Act Chapter 59 (as amended) provides under section 4(1), that children shall have the right to exercise, in addition to all the rights stated in this Act, the rights set out in the United Nations Convention on the Rights of the Child and the Organization of African Charter on the Rights and Welfare of the Child, with appropriate modifications to suit circumstances in Uganda that are not specifically mentioned in this Act.

Section Two

PROTECTING CHILDREN FROM UNHEALTHY FOOD ENVIRONMENTS AND RESTRICTING THE MARKETING OF UNHEALTHY FOODS AND BEVERAGES IN SCHOOLS IN ACCORDANCE WITH HUMAN RIGHTS PRINCIPLES

There is not one commonly agreed-upon definition of a human rights-based approach (HRBA). However, several UN agencies have defined the contours and basic elements. According to UNICEF a human rights-based approach for children begins with four basic premises: (a) children are rights holders, distinct from their parents or legal guardians, and governments are the corresponding duty bearers; (b) the standards and principles of international human rights treaties should guide all policies and practices that can have impacts on children; (c) government

agencies and other stakeholders should strengthen children's capacities to understand and claim their rights, and develop the capacities of governments to understand and meet their obligations; and (d) children should know about and have easy access to remedies that are designed for their situation and be given fair, prompt responses (UNICEF, 2019).

Stemming from these broad concepts, this paper will rely on the human rights principles provided by the UN-FAO "PANTHER" Principles (Participation, Accountability, Non-discrimination, Transparency, Humanity, Empowerment and Rule of Law), to develop key elements applicable to rights-compliant and rights-promoting initiatives to restrict the marketing of unhealthy foods and beverages in schools (FAO, 2014).

Under the rule of law, the government must enforce the law and must also make sure that comprehensive legal and regulatory frameworks are developed to protect children from unhealthy food environments, as per the constitutional and international legal obligations. These obligations were already discussed in the section above. In addition, the aforementioned rights have equally been discussed in the Ugandan and common law jurisprudence.

In the East African Court of Justice, the right to food in Uganda was discussed and acknowledged in the case of the *Centre for Food and Adequate Living Rights Vs Attorney General* (Miscellaneous application No. 75 of 2020). On that occasion, Honourable Lady Justice Ester Nambayo recognised that, while the right to food may not directly catered for under a Constitutional provision, it is implied under the right to livelihood. She also agreed with counsel for the applicant that while the right is not expressly provided under the constitution, it is justifiable by virtue of the provisions of Article 8a and Article 45, which recognise rights and freedoms not expressly provided by the Constitution. Because Uganda is a Commonwealth country, cases decided in other Commonwealth countries are relevant to its jurisprudence. On this topic, India and other Commonwealth countries have decided food rights cases which are relevant to Uganda. For example, in the Indian Case of *The People's Union for Civil Liberties v Union of India*, 2003 [Writ Petition (Civil) No 196 of 2001 and Interim Order of 2 May 2003], the Indian Supreme Court adjudicated the right to food in the country. Through interim orders, the Court transformed the government food schemes in question into legal entitlements provided by a constitutionally protected right to food and the beneficiaries of these programs into "stakeholders of justiciable rights."

The right to adequate food is a fundamental right to be enjoyed by children and is interlinked to the right to survival and development of children. The Convention on the Rights of the Child was domesticated in Uganda by the Children's Act, and Article 6 provides that states parties shall ensure, to the maximum extent possible, the survival and development of the child. Therefore, the unrestricted marketing and advertisement of unhealthy foods constitutes a violation of children's right to health.

As such, the duty bearer must come up with measures to ensure that the activities of the unhealthy/junk foods industry are regulated and restricted to protect the right to food and the right

to health of children. The different marketing techniques, especially on television, should be subject to legal and regulatory scrutiny. Under the rule of law as a principle under a human rights-based approach, promotion of unhealthy foods in schools must be restricted because of the concern that children are exposed to advertising on school buses, product-based sponsorships for essay/quiz/sports competitions and are directed at teens.

To support the rule of law principle, duty bearers like the Ugandan government ought to follow WHO guidelines. The WHO has stated that food marketing negatively affects children's behaviour and therefore global action is needed on the marketing of unhealthy food to children (WHO, 2006). It has gone on to state that swift and aggressive action should be taken to address food marketing if there is any hope of curtailing poor nutrition and obesity, including by implementing restrictions on their marketing and promotion (WHO, 2006).

The absence of standards and restrictions on the marketing of unhealthy foods to children, particularly in schools, is a huge omission on the part of the Ugandan government. This omission violates and threatens the right to food and the right to health of children in Uganda, violating international human rights law, as well as Objectives XIV(b) and XXII(c) of the National Objectives and Directive principles of the State policy, and Articles 20, 22, 24, 8A, 45, 33 and 34 of the Constitution as amended.

The second element of the PANTHER principles is participation. In Uganda, participation is a right. Under Articles 17 and 38 of the Constitution, all citizens, including children, have a right to effective participation in not only their affairs, but also those of the State. In this respect, children, teachers, caregivers and parents must be enabled to participate in food-related school policies, including those restricting marketing. Participation implies that all stakeholders, particularly the social groups and local communities most affected, can participate in the assessment, decision-making, implementation and monitoring of strategies, policies, programs and projects that are relevant for food and nutrition in schools.

Accountability is another principle of human rights that seeks to ensure that States are held responsible for any human rights violations. Effective remedies must be set in place in the case of rights violations, including for vulnerable individuals and communities. In Uganda, this accountability is also recognised at the Constitutional level, whereby Article 50 (1) of the Constitution provides that any person who claims that a fundamental right has been infringed or is threatened is entitled to apply to a competent court for redress. To operationalise Article 50 and enforce the rights provided under Chapter 4 of the Constitution, Parliament enacted the Human Rights (Enforcement) Act 2019, Section 3(1). This act grants any person or organisation who claims that a fundamental or other right or freedom guaranteed under the constitution has been infringed or threatened the right to apply for redress to a competent court, without prejudice to any other action with respect to the same matter that is lawfully available. Third parties who advertise, market and promote unhealthy foods and create unhealthy food environments for children and who take undue advantage of children could be held accountable under this

legal framework. The same should be true for State actors who violate their constitutional obligations.

A further principle of the PANTHER framework, non-discrimination, can be equally useful to deter the marketing of unhealthy diets to children. Discrimination on grounds such as race, language, religion or sex is prohibited under international human rights law (ICESCR, Art. 2) and Article 21 of the Uganda Constitution. For children, the ground is age. Although in adult settings, people know and can discern the commercial intent, children are still a vulnerable age group that the food industry takes undue advantage of because of their credulity (WHO, 2010, WHA 63.14). It is therefore important that the government looks at and takes into account the principle of non-discrimination as it is designing its policies.

On another note, transparency means that the actors, especially children, caregivers, parents and school administrators, have the right to receive all information from the State related to decision-making processes about policies, programs and projects that might have positive or negative effects on the realisation of their right to adequate food. The government should therefore, under Objective XX of the Constitution, create a general awareness of nutrition and the hidden ingredients of concern in the products sold to children (Constitution, 1995, Objective XX). Local governments must then pass regulations ensure these regulations are implemented.

According to FAO, empowerment is the process of increasing the capacities of rights holders, especially those most affected by hunger and malnutrition, to effectively demand and exercise their rights, to participate in decision-making processes and to hold duty bearers accountable (FAO, 2005). Schools' administrators, teachers, caregivers and school children must be taught and trained in all dimensions and aspects of nutrition. They must also be supported to understand the meaning of food environments. The linkages between food and health, and the nutritional implications of what a human being eats, should be made a foundation of empowerment.

Children must therefore be engaged as critical agents of change. They need to understand and be part of their future from the outset. However, for all this to happen, there needs to be a governance structure, as discussed in the section below

Section Three

THE LEVELS OF GOVERNANCE STRUCTURES FOR THE PROTECTION OF CHILDREN'S RIGHTS IN UGANDA.

Human rights can only be fully realised with appropriate governance structures. In Uganda, the governance of schools, especially primary and secondary schools, are under the management of local governments. Therefore, it is local governments that have jurisdiction to mandate and implement marketing restrictions in schools (Local Government Act, 1997,

Part IV). Uganda operates a decentralised system of governance called the local government system (Constitution, 1995, Article 176). This system is created by law, with very clear legal principles, laws and structures of accountability.

This system can therefore serve as an enabler of the protection of children from unhealthy food environments for the following reasons:

- a. The system is based on the district as a unit, under which there are other lower local government and administrative units that are very close to people, including children. This may make follow-up easier and foster better direct accountability. Equally, education and awareness on nutrition and the dangers of marketing to children may be tailored to the community more robustly.
- b. More to that, a stand-alone law, the Local Governments Act, was enacted to promote these principles, and indeed under the second schedule part B, education and nutrition services in any local government are mandated in their jurisdiction.

CONCLUSION

The quest for a child's thriving is beyond just survival. Rather, it is an intentional, well-structured program that allows children to enjoy their human rights and develop to their highest potential. The State of Uganda has a constitutional mandate to promote social justice and, together with parents, to build a future for all children by ensuring that their rights are fully realised. These rights include access to education, health, adequate food, and nutrition, among others. Notably, Uganda must promote free and compulsory basic education and take appropriate measures to ensure that every child has an equal opportunity to attain the highest possible educational standard. Every child has a right to basic education, proper growth, and cognitive development, and the provision of basic education is a mandatory responsibility of both the State and the child's parents.

School food environments threaten children's rights by promoting unhealthy food choices, hampering their health and their ability to be educated and develop to their fullest potential. The State of Uganda is under a constitutional obligation to take measures to ensure that all children enjoy healthy diets in schools as an indispensable component of access to education, the right to health and adequate food. This includes restricting the marketing of unhealthy foods and beverages, as well as taking other measures to promote access to healthy diets.

In turn, a robust protection of human rights can only be achieved, as discussed above, if the State fulfils its obligations to protect children's food environments by putting in place a robust enabling legal and policy frameworks that encourage empowerment, accountability, dignity, transparency and the rule of law.

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Harnessing Public Food Procurement as a Tool for Diet-Related Non-Communicable Disease Prevention in Public Health Facilities in South Africa

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Abstract

As diet-related non-communicable diseases (NCDs) continue to rise in South Africa, there is an urgent need for interventions that not only discourage the consumption of unhealthy foods but also foster healthier food environments. This paper explores the potential of public food procurement (PFP) as a strategic tool for NCD prevention within South Africa's public health facilities. Grounded in a rights-based framework, it analyses the country's legal and policy landscape to identify opportunities for integrating nutritional standards, sustainability principles, and local economic empowerment into procurement practices. Drawing on lessons from the National School Nutrition Programme, the paper underscores the importance of standardising and reforming procurement systems to promote healthy diets, reduce healthcare costs, and enhance public health outcomes. Given the State's role as the largest purchaser of goods and services, aligning food procurement with nutrition and health goals could significantly improve the availability and accessibility of healthy food in public institutions. The paper concludes by outlining key opportunities within the existing procurement framework to adopt a rights-based, health-promoting PFP approach, which could serve as a critical lever for transforming food systems and advancing social justice in South Africa.

INTRODUCTION

Diet-related non-communicable diseases (NCDs) account for more than 51 per cent of South Africa's annual deaths (WHO, 2023). Despite this, NCD prevention has not received priority attention

in public health policies and programmes in line with the disease burden (Luna and Luyckx, 2020, pp.6-7). The rising mortality rate indicates a need to act swiftly to prevent further loss of life and to improve quality of life. The World Health Organization (WHO) has identified a range of "Best Buys" and other interventions aimed at the prevention and control of NCDs (WHO, 2017). It identifies unhealthy diets as a major risk factor, recommending the creation of health-promoting environments, including in public institutions such as hospitals and schools. Public food procurement (PFP), in particular, is a largely underexplored policy tool that has the potential to be an effective driver for sustainable development. It has been identified as one of the priority areas aimed at promoting healthy diets, by improving the nutritional quality of food along the food value chain, positively impacting health outcomes and reducing costs associated with malnutrition, including diet-related NCDs (WHO, 2021).

In response to the growing NCD burden, this article assesses the public procurement (PP) framework in South Africa and explores the potential of PFP¹³ in public health facilities in South Africa (FAO, 2018) as a tool for diet-related NCD prevention. It contextualises PP within the human rights framework, highlighting how PFP within public health facilities can be used as a tool for human rights realisation. The article then determines whether and how PFP can be used as a tool to realise the rights to adequate food and to health. While there is no disaggregated national data on the prevalence of NCDs among people who use public health facilities in South Africa, roughly 84 per cent of the population relies on the public health sector, highlighting the far-reaching potential that PFP policies, which incentivise

13 PFP refers to initiatives that aim to provide a market channel to smallholder farmers by removing key barriers to entry in PFP markets.

healthy diets, could have (Office of The Presidency, 2024). Through ensuring that healthy diets are provided to those within public health facilities, the State not only discharges its constitutional obligations but also has the opportunity to model healthy food behaviours. Importantly, the majority of people receiving food in public health facilities are often health-compromised or vulnerable themselves, with little decision-making power over food availability, and are thus entitled to a heightened duty of care by the State. This duty includes ensuring that the food provided in such facilities does not further jeopardise their health. The article also briefly analyses the National School Nutrition Programme (NSNP), South Africa's most established food programme, to determine whether any lessons can be emulated for PFP in public health facilities. Finally, it highlights persistent challenges and possible opportunities for harnessing PFP as a policy tool in South Africa.

CONTEXTUALISING PUBLIC PROCUREMENT WITHIN THE HUMAN RIGHTS FRAMEWORK

PP refers to the goods, services, and works purchased by states and State-owned enterprises (OECD, n.d). The scope of goods and services bought by public authorities ranges widely, from large-scale infrastructure projects to the acquisition of food and medicines, as well as the commissioning of essential public services for health and social care (OECD, n.d.). Given the significant sums of public money spent, robust and comprehensive legal rules are often developed to ensure fairness and accountability with regard to the allocation of public contracts. Moreover, over the past decade, PP has increasingly been recognised as a means for States to fulfil their human rights obligations, consider their socio-economic objectives, and as a means of realising sustainable development (Danish Institute for Human Rights, 2020). PP has been identified as having a crucial role in States' obligations to protect, respect, and fulfil human rights, particularly those that require the purchasing of goods and services, such as the right to food and the right to health (Danish Institute for Human Rights, 2017; WHO, 2021). PP in the context of the right to food means that measures that advance this right must be introduced in the design of procurement requirements. These measures should not only address issues of fairness and non-discrimination in the award of contracts but must ensure that the type of food procured does not have adverse effects or result in a violation of the rights to food and to health.

The right to adequate food is broadly recognised in international human rights law (IHRL).¹⁴ In addition to being a stand-alone human right, the right to adequate food is also interdependent and interrelated with the enjoyment of other fundamental rights (CESCR, 1999, para. 4) and extends to access to safe food, nutrition, and clean water, for example.

In General Comment 12, the United Nations Committee on

Economic, Social and Cultural Rights (CESCR), the authoritative interpreter of the International Covenant on Economic, Social and Cultural Rights (ICESCR) determined that the right to adequate food is realised when "everyone has physical and economic access at all times to adequate food or means for its procurement" (CESCR, 1999). All persons must have access to food in a quantity and quality sufficient to satisfy their dietary needs, that is free from adverse substances, and acceptable within a given culture (CESCR, 1999). Importantly, access to food and nutrition is crucial for the enjoyment of other human rights such as the rights to life, health, non-discrimination, and equality (CESCR, 1999, para. 4). The right to food has a direct nexus to diet-related NCD prevention. Diet-related NCDs are caused by unhealthy diets made up of foods high in sugar, salt and fats (WHO, 2024). In General Comment 12, the CESCR determined that food must be available in a quantity and quality sufficient to meet the nutritional needs of individuals. It also provides that measures must be taken to maintain, adapt and strengthen dietary diversity and appropriate consumption and feeding patterns (CESCR; 1999, paras. 8-9). The presence of excess salt, sugar and fats, coupled with inappropriate consumption patterns fuelled by the addictive nature, aggressive marketing and affordability of unhealthy foods, thus undermines the right to food. Whilst the right has to be progressively realised, States have minimum core obligations to mitigate and alleviate hunger (CESCR, 1999, para. 6). One way through which States realise the right to adequate food is through the procurement of food for vulnerable groups of people, such as those in public health facilities and children.

Under IHRL, States have three types of obligations: to respect, protect and fulfil human rights (CESCR, 2000, para. 15). The obligation to protect requires states to adopt legislative and other measures to protect against the violation of human rights by non-State parties (CESCR, 2000, para. 35). In the context of PP, this includes regulating private entities to ensure that their conduct does not violate fundamental human rights. The obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, and other measures to ensure the realisation of human rights (CESCR, 2000, para. 36). The obligation to respect human rights means that States must not directly or indirectly deny or limit equal enjoyment of fundamental rights (CESCR, 2000, para. 34). In relation to PP, this means that States must refrain from interfering with or curtailing the enjoyment of human rights through procurement activities and establishing contract conditions with suppliers oriented to prevent future human rights abuses (Mokofeng, UN Special Rapporteur on Health, 2023, para. 82). Therefore, in the context of food, the State will violate its obligation to respect when it enacts policies that deny citizens access to food. Where the provision of food is privatised, the government would be in violation of its obligation to respect if it allows private companies to supply food that will harm the health of the consumers. General Comment 14 on the right to the

14 The Universal Declaration of Human Rights 1948, Article 25; International Covenant on Economic, Social, and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 Arts. 11-12; Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13, Article 12; and Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 Articles 24(c) and 27.

highest attainable standard of health states that it is a violation of the right to health for the State to fail to take into account its legal obligations regarding this right when entering into bilateral or multilateral agreements with other nations, international organisations and other entities, such as multinational corporations (CESCR, 2000, para. 50). It would therefore be the State's responsibility to ensure that, when outsourcing public functions, the contracting conditions are such that private entities do not violate fundamental rights. This is because "private actors exercising the functions of the State would be held liable for human rights violations...[and] would be responsible to bear the relevant socio-economic rights obligations that the State would have borne" (Chirwa, 2002, p.61). Where a private actor is supplying a public service, it would be required to carry out the same obligations imposed on the State with regard to the implicated human rights, the State being liable if those obligations are breached.

Similarly, the United Nations Guiding Principles on Business and Human Rights were developed to guide both State and non-State actors on the relationship between business and human rights. These non-binding principles state that businesses have a responsibility to respect human rights by not causing or contributing to adverse human rights impacts through their activities. States should set out the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations (OHCHR, 2011, p.3).

Relatedly, in 2015, the United Nations General Assembly unanimously adopted the 2030 Agenda for Sustainable Development (the 2030 Agenda) as "a plan of action for people, planet and prosperity" (UN, 2015). The potential of PP as a driver for human rights is highlighted in SDG 12, Target 12.7 calls on all states to "[p]romote public procurement practices that are sustainable, in accordance with national policies and priorities" (UN, 2015). This means that States need not only to procure from suppliers that deliver the cheapest product but should also consider factors such as social and environmental impacts. Although these provisions are also non-binding, they portray the international community's intention to prioritise sustainable PP practices. Despite this, international PP frameworks such as the United Nations Commission on International Trade Law Model Law on Public Procurement and the World Trade Organization Government Procurement Agreement are built upon global corporate interests and neoliberal trade rules that do not prioritise human rights but rather promote a "free trade market", whose primary function is to procure goods, services, and infrastructure on the best possible terms (UNCITRAL, 2011 and WTO, 2012).

As a result, PFP practices have historically favoured cheaper, less nutritious food options, driven by cost-saving objectives (FAO, Alliance of Biodiversity International, and CIAT and Editora da UFRGS, 2021, p.5). This practice has been promoted by multinational corporations in the food and beverage industry, which continues to influence government policies in favour of the procurement of profitable, hyperpalatable and convenient, ultra-processed foods (UPFs) instead of healthier, nutrient-rich foods. UPFs are industrially formulated edible substances derived

from natural foods, which contain additives such as preservatives, colourings, and flavourings, and are typically high in sugar, salt, and unhealthy fats (McManus, 2020). Favouring the procurement of UPFs results in large profits for the food and beverage industry players, with dire consequences on health outcomes, especially the rise of diet-related NCDs (Mokofeng, UN Special Rapporteur on Health, 2023). Therefore, attention must be given to how to better align PP with human rights, such as the rights to food and to health, to ensure that they become core considerations in PFP policies and practices. The Special Rapporteur on the Right to Food has stated that "when sourcing food for schools, hospitals, and public administrations, Governments have a rare opportunity to support more nutritious diets and more sustainable food systems in 'one fell swoop'" (de Schutter, UN Special Rapporteur on the Right to Food, 2014). This is because of PFP's potential to deliver multiple benefits for multiple beneficiaries through determining the way food is procured, what is procured, and from whom (FAO, Alliance of Biodiversity International, and CIAT and Editora da UFRGS, 2021, p.3).

The WHO Action Framework for Developing and Implementing Public Procurement and Service Policies for a Healthy Diet identifies PFP as an effective intervention to address the increasing burden of NCDs, and relevant to the realisation of both the right to food and the right to health (WHO, 2021). The Framework for Action of the Second International Conference on Nutrition, held in 2014, also provides a set of voluntary policy strategies for States, guiding the implementation of the Rome Declaration on Nutrition (FAO, 2014). Recommendation 16 aims to "establish food or nutrient-based standards to make healthy diets and safe drinking water accessible in public facilities such as hospitals, childcare facilities, workplaces, universities, schools, food and catering services, government offices and prisons" (Framework for Action, 2014). Both these frameworks guide States on drafting healthy food and nutrient-based standards, which can be applied to PFP. The implementation of such policies can thus encourage healthy food to be served and sold in public settings.

The discussion above contextualises PP within the human rights framework, highlighting the international obligations placed upon States and non-State actors, such as food suppliers. This provides a basis upon which to guide efforts on how to assess, strengthen, and evaluate national PP processes and practices in accordance with human rights and evidence-based best practices. The following section will consider these frameworks within the South African context.

FRAMEWORKS SHAPING PUBLIC FOOD PROCUREMENT IN SOUTH AFRICA

Since becoming a democracy in 1994, PP has been recognised as a fundamental part of South Africa's strategy toward achieving an equal, non-racial, society, centred on the advancement of historically disadvantaged individuals and groups. Currently, PP amounts to 22 per cent of South Africa's Gross Domestic Product (GDP), roughly ZAR 1 trillion, which represents a significant portion of the economy and public purchasing power that could be used to achieve broader socio-economic policy objectives (Parliamentary Monitoring Group, 2024).

Being the supreme law, the South African Constitution (the Constitution) forms the bedrock for all laws and policies. The Constitution obliges a horizontal application of its Bill of Rights to non-State actors. Section 8(2) of the Constitution provides that "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of State [and] binds a natural or 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." This provision binds natural and juristic persons, including the private sector. Throughout South Africa, non-State actors are contracted through PP to provide goods and services. Therefore, the actions of both the State and private entities have profound implications on human rights such as the right to food, making it necessary for these entities to comply with their constitutional obligations.

In South Africa, the right to food is protected by several provisions in the Constitution. Section 27(1)(b) enshrines everyone's right to have access to sufficient food. Section 27(2) places an obligation on the State to take reasonable legislative and other steps to ensure the realisation of the right. Section 28(1)(c) of the Constitution also guarantees children the right to basic nutrition, which is not limited by the progressive realisation clause. Arrested, detained, and accused persons are also guaranteed the right to adequate nutrition in section 35(2)(e) of the Constitution. To give effect to these constitutionally guaranteed rights, the State has enacted several legislative frameworks and policy documents to address various aspects of the food system. In addition, Section 27(1)(a) protects the right of everyone to have access to health care services.¹⁵ Whilst this right is narrowly couched within health care services, it extends to health-promoting activities which are recognised in the National Health Promotion Policy and Strategy, 2015–2019, as a tool for comprehensive and equitable health development (National Department of Health, 2014). This is especially relevant in the context of promoting healthy diets for NCD prevention, which, as illustrated throughout, could be achieved through various PFP processes.

The Constitution also mandates the establishment of a procurement framework that guides the allocation of tenders and the economic advancement of historically disadvantaged individuals. Section 217(1) of the Constitution establishes the traditional "primary" procurement objectives and determines that "when an organ of State in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective" (Constitution, 1996). Although this constitutional provision is not necessarily human rights promoting, it reflects the important role that PP plays in the realisation of socio-economic rights such as the rights to food and to health, which are largely resource dependent. As such, the objectives set out in section 217(1) of the Constitution are of direct importance to the realisation of these rights. For instance, the requirement for cost-effectiveness in the context of PFP means value for money not only in terms of quantity and quality, but also that PP should not have adverse health effects that could ultimately cost the State through increased demand for the treatment and decreased economic productivity due to illness. From a cost-efficiency perspective, prevention is more cost-efficient than the treatment of preventable NCDs (Ruthsatz and Candeias, 2020). PFP that prioritises the procurement of nutritious food is therefore a reasonable measure that the State could take to ensure the realisation of the rights to food and to health. It could thus be argued that PFP practices that do not wholly consider the socio-economic implications of unhealthy food procurement are a violation of the right to food, the right to health, and the constitutional provisions on PP.

Additionally, section 217(2) of the Constitution establishes "secondary" or horizontal objectives which encourage organs of State and institutions, to implement procurement policies providing for "categories of preference in the allocation of contracts" and "the protection of advancement of persons, or categories of persons, disadvantaged by unfair discrimination" (Constitution, 1996). This provides an example of how the State has historically used PP for a broader socio-economic objective. This type of pre-condition criteria could also be applicable in the form of preferential healthy food procurement, nutrition standards, and sustainability criteria.

Public Procurement Frameworks

To give effect to the constitutional imperative above, the State passed several pieces of legislation, including the *Preferential Procurement Policy Framework Act (PPPFA) 2000* and the *Procurement Policy Framework Regulations 2001*, which provide a framework for government efforts toward empowering historically disadvantaged individuals through preferential procurement of

¹⁵ The plain language of the constitutional provision falls short of the broader right to health that is guaranteed in the ICESCR. However, the *S v Mhlungu* 1995 (3) SA867 (CC), 1995 (7) BCLR 793 (CC) in the Constitutional Court has held that provisions of the Constitution must be interpreted generously. Section 39(1) of the Constitution also provides that when interpreting the Bill of Rights, international law must be considered. As such, although the Constitutional provision is narrow, a broader interpretation that is informed by the ICESCR means that preventative measures, such as addressing the social and commercial determinants of health must be considered.

goods and services. PP is further guided by the *Public Finance Management Act 1999 (PFMA)*, which governs financial management practices and establishes a regulatory framework for supply chain management (SCM). Similarly, the *Local Government: Municipal Finance Act 2003 (MFMA)* aims to provide a regulatory framework and promote accountability for procurement and SCM within municipalities. Despite these frameworks being developed in accordance with the Constitution, PP has not been explicitly designed to achieve broader human rights beyond preferential procurement and has thus been narrowly implemented as an economic activity. Moreover, the fragmented nature of the PP framework has attracted substantial criticisms and calls for reform (Simone and Balasundharam, 2023, paras 3–5). As a result of this fragmentation, in July 2024, after a lengthy consultative process, the *Public Procurement Act 28 of 2024 (PPA)* was signed into law.

The *PPA* aims to create a single regulatory framework, including a revised preferential procurement framework, for all organs of State. It includes set-aside bids which prioritise tenders for designated population groups such as black people, women, youth, people with disabilities, and former military personnel, with a focus on owners of small enterprises, co-operatives, and local suppliers (PPA, 2024). It further mandates measures to advance sustainable development by prioritising local production and sustainable procurement practices. This provides several opportunities for integrating human rights considerations and improved PFP practices, in line with Section 217(2) of the Constitution. First, this could encourage the procurement of local fresh produce for public institutions. Secondly, this would provide market access for local and small-scale farmers, increasing their economic spending power to purchase better quality, healthier food for their families, further reducing the NCDs burden.

The *PPA* also strengthens transparency and accountability mechanisms through the establishment of a Public Procurement Office, a Public Procurement Tribunal, and access to procurement processes and information (PPA, 2024). It introduces the centralisation of information and communication technology-based procurement systems (PPA, 2024). This provides several opportunities for improved access to recourse mechanisms for local suppliers and can also improve compliance with various pre-condition criteria and standard setting. The *PPA* will come into effect through a proclamation that phases in the respective provisions (for different categories of procuring institutions) as the relevant policies and regulations are developed by the National Treasury. Once in effect, it will repeal and amend in part several frameworks highlighted above. As they will remain in place until such time, this article discusses PFP in line with the current frameworks.

Public Food Procurement for Health Promotion

At the time of the constitutional dispensation, there was a clear need for improved food security and agricultural production. Therefore, the Department of Agriculture was allocated the full

mandate for food security, giving the national and provincial governments concurrent jurisdiction (Constitution, 1996). By extension, all matters relating to food and nutrition security are assumed to fall under the same mandate. Several other departments are involved in addressing different aspects of food and nutrition security, but no specific body is responsible for coordinating these efforts. Rather, various roles and responsibilities which when interpreted together, are responsible for realising the right to food (Department of Agriculture, Forestry and Fisheries, 2014).

Moreover, unlike other socio-economic rights such as education and health, the right to food is the only constitutionally protected socio-economic right that is not yet supported by legislative authority. This is despite the inextricable link between the right to food with other rights, as highlighted by the High Court in *Equal Education v Minister of Basic Education*, which concerned the reinstatement of the National School Nutrition Programme (NSNP) after it had been suspended as part of the COVID-19 pandemic response. The Court affirmed the interrelationship and interdependence of the rights to education, nutrition, and health, noting that “the State intended for the NSNP to contribute to the improvement of education quality by enhancing ... learning capacity, school attendance and punctuality ... [and] general health development by alleviating hunger” (*Equal Education v Minister of Basic Education*, 2021, para. 17). As such, it recognised that the roles and responsibilities of State actors, in relation to this right, are gleaned from various laws that address aspects of the food system as well as other laws and policies. Since the jurisprudence on the right to food is relatively underdeveloped, jurisprudence from related socio-economic rights can be instructive for determining the content of the right.

In the *Republic of South Africa v Grootboom (Grootboom)*, the Constitutional Court considered the nature of a right of access in the context of housing. The Court noted that a *right of access* to housing (as opposed to a right to housing) “suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing” (*Grootboom*, 2001, para. 35). The Court also explained that the nature of the right (and the nature of the State’s duty) will vary according to the individual’s economic position. In relation to the right to have access to sufficient food, this means that the State may have a heightened duty of care towards those in a vulnerable economic position and are unable to independently secure nutritious food for themselves.

In line with Sections 231 and 233 of the Constitution, the State must ensure that its respective food policies align with international human rights standards (Constitution, 1996). In line with the above international obligations, this means that PFP, at a minimum, should not cause any harm, especially to vulnerable populations, and in addition, should be developed to positively protect and promote health outcomes. Despite the absence of national food legislation, there are several

frameworks that provide guidance on aligning PFP with national food and health objectives in order to promote healthy diets, which are explored below.

The National Development Plan 2030 (NDP), adopted in 2012, is the country's long-term development plan, which aims to eradicate poverty, reduce unemployment, and eliminate inequality by 2030 (NPC, 2011). It serves as the blueprint for guiding the distribution of State resources. Chapter 10 of the NDP, on health promotion, in responding to the social determinants of health, states that South Africa should promote a healthy lifestyle incorporating a healthy diet and physical activity, although it does not provide further guidance on implementation (NPC, 2011). Similarly, the National Health Promotion Policy and Strategy 2015–2019 highlights the importance of addressing NCDs through lifestyle and environmental influences.¹⁶ Although it does not specifically mention food procurement, it acknowledges the significant role that unhealthy diets play in the NCDs burden. It outlines several key actions such as policy development to promote healthier eating environments, public awareness to educate the public about healthy dietary choices, community engagement to support healthy eating practices, and collaboration with various stakeholders, focusing on interventions for vulnerable and marginalised populations. All of which could guide the State's efforts to align PFP with national development and health promotion objectives.

The National Policy on Food and Nutrition Security 2013 is the most recent national guiding framework on food and nutrition security in South Africa and is intended to provide a platform for various strategies, including leveraging food procurement to support local and community food production initiatives (Department of Agriculture, Forestry and Fisheries, 2013). It recognises that South Africans do not have sufficient food, nutrient diversity and micro-nutrient intake, which varies among population groups. More recently, the National Food and Nutrition Security Plan 2018–2023 (NFNSP) was designed to address food and nutrition insecurity in South Africa, by ensuring availability and access to nutritious food to meet the dietary needs of the population. Its implementation was guided by 7 strategic objectives, relevant here, to align policies and programmes on food and nutrition security; and to improve access to food through establishing inclusive local food value chains to increase access to nutritious food (NFNSP, 2018–2023).¹⁷ These frameworks could serve as a justification for strengthening nutrition-specific criteria and preferential local procurement for PFP in public institutions.

From a health promotion perspective, the *National Policy on Non-communicable Diseases 2022–2027* is the most comprehensive and recent authority on NCD prevention and control in South Africa. It recognises unhealthy diets as a major risk factor and presents a cascading 90–60–50 strategy for diabetes and hypertension to improve early detection and treatment (National Department of

Health, 2022). However, this clinical “up-stream” approach focuses on treatment rather than prevention, and also overlooks strategic policy interventions such as PFP. It is therefore unlikely to have a major impact on addressing diet-related NCDs. Therefore, research on how to strengthen policy areas to promote healthy eating, such as PFP, could shine a light on future policy integration and reform.

The Strategy for the Prevention and Management of Obesity in South Africa 2023–2028 was developed in line with South Africa's international commitments and national priorities to “reduce the prevalence of obesity and diet-related non-communicable disease in the South African population”, which is compounded by poor socio-economic conditions, commercial determinants driving obesity and limited choices to adopt a healthier lifestyle (National Department of Health, 2023). It estimates that the economic impact of obesity amounts to ZAR 700 billion annually (National Department of Health, 2023, p.12). Therefore, the Strategy emphasises the need for a multisectoral approach to public health promotion and an enabling legislative and policy environment to ensure implementation and accountability. It identifies several objectives, including the development of procurement standards that contribute to an environment in which healthy food is available and easily accessible in government workplaces and in schools. It provides guidance to public institutions where food is provided to vulnerable and marginalised populations, including training food vendors, the improvement of healthy food preparation, the standardisation of menus, and a funding plan for food preparation facilities and equipment (National Department of Health, 2023, pp.35–36).

These frameworks provide several considerations for integrating food and health objectives for PFP within public institutions. It is evident that the State has a duty of care to ensure that the food provided is safe for consumption and meets people's nutritional needs (CESCR, 1999). This is especially true for people in public health facilities, as will be highlighted in the section below.

PUBLIC FOOD PROCUREMENT IN PUBLIC HEALTH FACILITIES

Prior to 1994, South Africa's health system was fragmented, as a result of provinces operating individually within their self-governing territories, with their own policies, processes and guidelines, including for food procurement and service (Koch, 2011). In 1999, the Nutrition Directorate of the National Department of Health (NDoH) appointed a consultant to assess the provision of food services in public service institutions in South Africa, including units in the Department of Health, Correctional Services and Social Development. The assessment was undertaken to adapt existing guidelines, policies and food ration scales in line with the South African Food-based Dietary Guidelines,

¹⁶ The National Health Promotion Policy and Strategy 2015–2019 defines health promotion as ‘the process of enabling people to increase control over their health and its determinants and thereby improve their health’.

¹⁷ Other objectives include expanding social protection measures; scaling up nutrition intervention for women, children, and infants; influencing people across the lifecycle to make informed food and nutrition decisions; ensuring adequate monitoring and evaluation and data-informed decision-making on food and nutrition security; building entrepreneurship and entrepreneurial skills for South Africans to achieve self-sustainability.

which were promulgated in 2003 and amended in 2012. While the guidelines have not been revised in line with recent research findings on diet-related NCDs, they are an underutilised tool toward improving dietary practices and informing nutrition-related priorities (Browne, 2021, pp.Si-Sii).

According to the NDoH (2010), food service within public health facilities aims to provide nutritious, microbiologically safe, and adequate meals in terms of quality and quantity, as well as culturally and religiously acceptable food. However, the assessment found that this was not translating on the ground, suggesting that budget cuts have significantly contributed to the deteriorating quality of food, negatively impacting the nutritional status of patients. It also found that hospital-induced malnutrition is often linked to inappropriate serving of meals, inadequate intake, poor preparation and quality (National Department of Health, 2010).

Ten years after the assessment, the Policy for Food Service Management in Public Health Establishments 2010 was developed and remains the leading authority on PFP in South Africa. In terms of the policy, the NDoH must ensure that all meals, snacks and beverages provided to clients in health establishments, correctional service facilities, welfare facilities and school hostels must be of “good quality, safe, wholesome and nutritious.” Section 4 of the Policy provides 14 general minimum standards in food service units. For purposes of this analysis, one standard is key: that food served must be culturally and religiously acceptable, adequate in quality and quantity, and should meet recommended nutrient goals.¹⁸ This aligns with the right to sufficient food, along with national food and health objectives.

The National Guide for Healthy Meal Provisioning in the Workplace 2016 also provides guidance on healthy food procurement in public health facilities, particularly for staff responsible for planning, purchasing, and preparing food and beverages in the workplace (National Department of Health, 2016). It recognises that unhealthy food environments can influence people’s food and beverage choices and lead to poor nutritional status. While the Guide recommends that UPFs such as carbonated soft drinks, fruit juice blends, cakes, savoury fried pastries, and fried foods should be limited, this has not been enforced on the ground (National Department of Health, 2016, p.20). Poor implementation of the guidelines could perhaps be attributed to the fact that they are non-binding, a lack of sufficient food resources, as well as the lack of effective monitoring and evaluation.

However, there are several opportunities where the NDoH could practically adjust PFP practices to include food and health-related considerations. This could begin with improving nutrition standards and incentivising healthy food procurement through selection and award criteria. For example, procuring foods that are low in unhealthy fats, and including contract performance conditions to ensure compliance with the nutritional standards.

This could inform nutritional guidelines and the revision of menus that align with health objectives such as the reduction of salt, sugar, and unhealthy fats. For patients, these revisions should take into account each patient’s dietary needs and specific requirements (National Department of Health, 2010). They could also prioritise local production and sustainable sourcing to strengthen supply chain efficiency, as encouraged in the aforementioned *Public Procurement Act 28 of 2024*.

Attention should also be given to capacity building, including workshops and training in collaboration with dietitians for procurement officers, kitchen staff, and food handlers, as this will help ensure social and nutritional control. These practices could also consider how to streamline logistical barriers to reduce transportation costs and ensure food freshness. This would assist with ensuring price control, which is especially important in public health facilities where budget constraints often limit food supply (National Department of Health, 2010).

In December 2023, the NDoH announced that it will be conducting a comprehensive assessment, using the Food Service Management Quality (FSMQ) assessment tool at 149 hospitals for a period of 15 months starting 01 January 2024 up to 31 March 2025. This ongoing opportunity could inform further research and future policy priorities to better align with food and health objectives, including diet-related NCD prevention. These findings could further inform the standardisation of PFP across public institutions in South Africa.

LESSONS FROM THE NATIONAL SCHOOL NUTRITION PROGRAMME

Understanding how different procurement modalities are used in the other PFP programmes is important for identifying challenges and successes and drawing lessons that could be applied in other sectors in order to derive the maximum benefit. The NSNP, which is coordinated by the Department of Basic Education, plays an important role in reducing hunger and nutrient deficiencies amongst vulnerable children by providing a meal to 9 million learners in the public school system. Central to the NSNP’s success is the timely, uninterrupted supply of food for the school feeding programme. The delivery of sufficient food to those who are in the care of the State must be done timeously as this has implications not only on their physical health but on their mental health and wellbeing too (Elgar et al. 2021).

The NSNP is linked to the country’s economic transformation goals and is one of the key pillars of South Africa’s food security plans – increasing procurement from local smallholder farmers. The NSNP conditional grant framework states that “provinces must promote local economic empowerment, including procurement of fresh produce from smallholder farmers.” The NFNSP also

¹⁸ Policy for Food Service Management in Public Health Establishments (2010) Other minimum standards include; food service management guidelines should be available and implemented in all health establishments with food service units; skills of food handlers should be improved according to the *Skills Development Act*; quality control tools should be developed and implemented; food service units should have adequate resources and budget; meals should be served at fixed times; all units should have an identified specification for all meal types offered; cycle menu should be displayed; food delivered to hospitals should be of high-quality including specifications for perishable and non-perishable food items; should be kept clean and in good working order; and a kitchen or designated area should be available.

envisions that procurement from local smallholder farmers would be beneficial to the NSNP, stating “if the procurement [f]avours smallholder producers it could benefit both farmers and schools by timeous provision of sufficient vegetables of good quality (Department of Agriculture, Forestry and Fisheries, 2014).” Despite this, the procurement of local produce, particularly from smallholder farmers, is not currently central to the programme. A study by Mafugu noted frustrations from suppliers who are not paid on time due to delayed transfers (Mafugu, 2021). It is also far more detrimental for small local farmers than it is for large, established businesses who may have access to other funds to stay afloat pending payment. This could lead to a deterioration of trust from suppliers and make it difficult for schools to secure suppliers. It can also constitute a significant hindrance to sourcing produce from local suppliers and is thus counter to the transformative objectives. Supplier defaulting for PFP in public health facilities is equally devastating. In order to gain the trust of small-scale suppliers, systems need to be put in place to ensure they are paid on time. Whilst this is a lesson for PP broadly, it is particularly relevant in the PFP context, especially where local small-scale farmers are concerned, and is central to food system transformation.

PUBLIC PROCUREMENT IN SOUTH AFRICA: CHALLENGES AND OPPORTUNITIES

PP in South Africa is not geared toward human rights objectives, despite being considered within the constitutional framework. It appears that PFP, in particular, is also not aligned with national food and nutrition outcomes. While there is recognition of broader food, nutrition, and health objectives, the PP framework is still centred around economic activity, making it challenging to integrate objectives such as NCD prevention.

The absence of national food legislation also makes it difficult to identify State actors responsible for adopting food-related health-promoting activities. For instance, food security is still narrowly perceived and supported as an agricultural function. However, food procurement for public health facilities fits squarely within the Department of Health mandate. According to Mabece, the multiplicity of legislative and policy pieces may make it difficult for procurement officers to know the applicable legislative regime (Mabece, 2019). In relation to PFP for public institutions, the lack of a dedicated department further complicates matters. For instance, when considering the mandate to provide food to persons within their care, the Department of Health which is responsible for PFP within public health facilities, and the Department of Basic Education, which is responsible for PFP within public schools, sets independent criteria for tenders to supply food to their respective institutions, as there is no standardisation in food procurement processes, food sourcing and nutrition criteria, beyond the guidelines highlighted above. Therefore, there is an opportunity for the State to consider how healthy PFP can become standardised within public institutions, in accordance with the new *PPA*, and relevant food and health frameworks.

Furthermore, there is a concern of competing interests between State initiatives. For example, while it is in the Department of Health’s interest in adopting and implementing policies such as increasing the Health Promotion Levy to address diet-related NCDs, this initiative has been heavily resisted by the agricultural industry, which alleges that the Levy irreparably harms the sugar industry and subsequent unemployment (National Treasury, 2024, pp.13–15). There is a need to ensure that the priorities of various departments do not undermine each other; rather, they should be complementary. Additionally, whilst transparency and accountability are constitutionally established principles of PP, there have been minimal efforts to monitor the implementation of the current framework to assess their effectiveness and ensure compliance. In relation to public health facilities, the Department of Health has not monitored the conduct of private actors to ensure that they do not undermine its public health efforts. For instance, in addition to contracted suppliers supplying unhealthy food to public health facilities, several public hospitals faced food shortages with key foods such as chicken, fish, frozen vegetables, bread and milk being unavailable for up to four months, with some hospitals having to borrow from other hospitals in the district (Hendricks, 2023). This highlights the urgent need for improved food supply in public institutions.

CONCLUSION

This article presents several opportunities on how PFP could be used as a tool to improve diet-related NCD prevention, as part of the obligations under the rights to food and to health. International frameworks provide guidance on standard setting that could be integrated into South Africa’s PFP framework. In addition, the new *PPA* presents considerations for improving food procurement within public institutions, especially for vulnerable and marginalised populations, as highlighted in the context of public health facilities.

As the State is the largest buyer of goods and services, integrating food, nutrition and health objectives into PFP practices could have far-reaching impacts on ensuring the availability and accessibility of healthy food in public institutions. This also serves as an example of standard setting within the government itself. Further, it highlights how PFP could also stimulate local food value chains by creating entry points for local food actors to enter the market, which could help address unemployment and inequality (Steytler and de Visser, 2007; IMF 2023). It also highlights how PFP could inform more sustainable consumption and production patterns, where sustainability criteria could also incentivise supply chain actors, including public purchasers. Furthermore, PFP can send a signal about the State’s intentions on future directions for food systems transformation and foster a transition toward a healthy food environment for all.

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Promotion of Physical Activity to Prevent Non-Communicable Diseases within the Affordable Housing Programme in Kenya

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Abstract

Under Kenya Vision 2030, the government of Kenya is implementing the Affordable Housing Programme, which aims to facilitate the production of 200,000 housing units annually through various initiatives. The government has obligations to promote health and prevent noncommunicable diseases (NCDs) are located within the rights to health, a healthy environment, education, rest and leisure, among others. Physical activity, in particular, is effective in preventing NCDs such as hypertension, stroke and coronary heart disease. Therefore, the government's obligations to prevent NCDs under the right to health also extend to promoting physical activity and to ensuring everyone has opportunities to be regularly active. Moreover, residential areas can be designed to promote physical activity through careful consideration of the built environment. The key recommendations of this paper to ensure the promotion of physical activity within Affordable Housing Programme to prevent NCDs are as follows: utilise the Affordable Housing Fund to develop the social infrastructure in line with section 10 of the Affordable Housing Act, 2024; review the Affordable Housing Framework Guidelines to clarify the key design principle of promoting open spaces; utilise the National Land Use Policy of 2017 to restore and reclaim open spaces and parks illegally reallocated or grabbed; develop and adequately govern open spaces through adequate national and county government policy; and draw inspiration from the National Land Commission (NLC) Urban Land Use Planning: Monitoring and Oversight Guidelines on planning for recreational facilities and open spaces.

INTRODUCTION

This paper explores Kenya's efforts to promote physical activity in its Affordable Housing Programmes. It assesses them in light of the country's human rights obligations and legal commitments to promote health and prevent non-communicable diseases (NCDs). International Human Rights Law (IHRL) and Article 43(a) of the Constitution of Kenya enshrine the right to health, which encompasses the prevention of NCDs.¹⁹ The government's goals and obligations to increase physical activity to prevent NCDs can arguably be achieved via the Affordable Housing Programmes under strategic objective three of Kenya's NCD Strategy 2015–2020, on promoting healthy lifestyles and implementing interventions to reduce the modifiable risk factors for NCDs (Ministry of Health, 2012).²⁰

The social pillar section of the Kenya Vision 2030 programme focuses on the population, urbanisation, and housing initiatives and projects, and it commits the government to enable the production of 200,000 housing units annually through various initiatives (Kenya Vision 2030, n.d.). The current Administration has prioritised the Affordable Housing Programme through the Fourth Medium Term Plan 2023–2027: Bottom-Up Economic Transformation Agenda for Inclusive Growth, and efforts are underway to construct 200,000 housing units annually in many parts of the country (The National Treasury and Economic Planning, 2024). According to the Plan, funding for 60,000 units has been apportioned through direct government support, while the remaining 140,000 units will be financed through the National Housing Development Fund (The National Treasury and

19 Although NCD prevention is not mentioned explicitly in International Human Rights Law or in the Constitution of Kenya, 2010, the scope of the right to health includes NCD prevention. For more on how the right to health, *inter alia*, includes obligations regarding NCD prevention, see Part 3 below on the right to health and physical activity section.

20 According to the NCD Strategy 2015–2020, the activities for the promotion of physical activity include '[i]mplementing programmes that promote physical activity in the **community**, private and public institutions, workplaces, health facilities, etc, in the framework of national and county strategic plans and regulations.' (emphasis added)

Economic Planning, 2024). The management of the Affordable Housing Programme occurs via an online platform, which is 'geared towards facilitating the production of decent, safe and affordable housing for citizens of Kenya' (Boma Yangu, n.d.). The target population for the programme are those left behind in the housing sector, particularly people with low incomes and those residing in informal settlements.

Promoting physical activity is a crucial intervention in preventing NCDs. The yet-to-be-updated Kenyan National Action Plan on Physical Activity 2018–2023 defines physical activity as 'any body movement produced by skeletal muscles that requires energy expenditure by the individual, including activities undertaken while working, playing, carrying out household chores, travelling and engaging in recreational pursuits' (Ministry of Health, 2018). Physical activity, when done regularly and adequately, can 'reduce risk of hypertension, coronary heart disease, stroke, diabetes, breast and colon cancer, depression and the risk of falls; improve bone and functional health and is a key determinant of energy expenditure, and thus fundamental to energy balance and weight control' (World Health Organization: Eastern Mediterranean Region, n.d.). Physical inactivity is the fourth leading risk factor for global deaths, causing up to 6% of global deaths and further contributing to breast and colon cancers, diabetes, and ischaemic heart disease burden (World Health Organization: Eastern Mediterranean Region, n.d.). Developing countries bear a disproportionate burden of the global burden of NCDs, with 73% of all deaths attributed to NCDs occurring in low- and middle-income countries (World Health Organization, 2024).

As this paper develops, human rights norms legally bind the Kenyan government to promote physical activity to prevent NCDs (Ministry of Health, 2012). These norms emanate from the right to health, the right to a healthy and safe environment, the right to rest and leisure, and the right to education, which are enshrined in many international human rights instruments²¹ ratified by Kenya and further enshrined in the Constitution of Kenya, 2010²². In addition, the national legal framework in the housing and land sector further supports the promotion of physical activity to promote health and prevent NCDs by integrating open spaces and recreational facilities in domestic legislation including: the Affordable Housing Act of 2024, the Urban Areas and Cities Act of 2011 and the Physical and Land Use Planning Act of 2019.

In this context, this paper analyses how human rights norms legally bind the government of Kenya to promote physical activity to promote health and prevent NCDs. Moreover, it explores the national laws in the land and housing sector, which promote physical activity in the context of Affordable Housing Programmes. First, apart from this introduction, this paper provides an overview of the public health instruments, international and national, supporting the promotion of physical activity in part 2. Then, parts 3 and 4 of this paper discuss the relevant human rights norms

and national laws in the land and housing sector that support promoting physical activity to prevent NCDs in relation to the Affordable Housing Programme. Part 5 outlines some basic features for promoting physical activity within residential areas. The last part contains the conclusion and recommendations of this paper.

PUBLIC HEALTH INSTRUMENTS SUPPORTING THE PROMOTION OF PHYSICAL ACTIVITY

Several public health instruments emphasise the need for governments to set clear targets to increase physical activity to prevent NCDs. The World Health Organization (WHO) has been at the forefront of promoting physical activity by generating several documents including the Global Strategy on Diet, Physical Activity and Health, whose overall goal 'is to promote and protect health by guiding the development of an enabling environment for sustainable actions at individual, community, national and global levels that, when taken together, will lead to reduced disease and death rates related to unhealthy diet and physical inactivity' (World Health Organization, 2004). In September 2011, the United Nations General Assembly (UNGA) adopted Resolution 66/2 Political Declaration of the High-Level Meeting of the General Assembly on the Prevention and Control of NCDs, with a section on reducing NCD risk factors and creating health-promoting environments (World Health Organization, 2012). Specifically, paragraph 43(d) of resolution requires States to:

[a]dvance the implementation of the WHO Global Strategy on Diet, Physical Activity and Health, including, where appropriate, through the introduction of policies and actions aimed at promoting healthy diets and increasing physical activity in the entire population, including in all aspects of daily living, such as giving priority to regular and intense physical education classes in schools; urban planning and re-engineering for active transport; the provision of incentives for work-site healthy-lifestyle programmes; and increased availability of safe environments in public parks.

The holistic approach to promoting physical activity underscores the commitment of United Nations (UN) Member States to increase physical activity in virtually every sector of the built environment, including schools, workplaces, and residential places.

The same approach is found in the 2016 Bangkok Declaration on Physical Activity and Sustainable Development (Bangkok Declaration), which identifies inclusive, safe, resilient and sustainable cities and communities as one of the 'opportunities for urgent prioritisation and implementation that will support and promote reduction in physical inactivity and contribute to achieving specific 2030 Sustainable Development Goals (SDGs) (NCD Alliance, 2016). The commitment under the Bangkok Declaration is on the '[d]evelopment, implementation and monitoring of urban and transport planning policies that

21 See, for example, Article 12 of the International Covenant on Economic, Social and Cultural Rights on the 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health' and its General Comment No. 14. See also Article 13 of the ICESCR on the right to education.

22 See, for example, Article 42 of the Constitution, 2010, on the right to a clean and healthy environment and Article 43(1)(a) on the right to health.

require city and regional designs to provide equitable access to safe, affordable infrastructure for walking and bicycling, as well as public open spaces and recreational facilities.' Lastly, the draft Intersectoral Global Action Plan on Epilepsy and Other Neurological Disorders 2022–2031 tackles the issue of promoting healthy behaviour across the life course. The proposed actions for WHO Member States include '[e]ncourage urban planning that improves access to sport, education, transport and physical activity in leisure/recreation in order to promote physical activity and provide an alternative to a sedentary lifestyle' (World Health Organization, 2022). As the above documents demonstrate, the built environment can contribute to increasing physical activity and reducing physical inactivity, thereby preventing NCDs.

Consequently, specific voluntary targets for increasing physical activity have been proposed progressively. The outdated Global Non-Communicable Diseases Action Plan 2013–2020 set the voluntary global target of a 10% relative reduction in the prevalence of insufficient physical activity (World Health Assembly, 2013). However, this target was revised upwards to 15% according to the WHO Global Action Plan on Physical Activity 2018–2030 (World Health Organization, 2018).

In Kenya, the promotion of physical activities to prevent NCDs has been canvassed in several health policies. To begin with, the National Guideline for Healthy Diets and Physical Activity, 2017, developed by the Ministry of Health through the Nutrition and Dietetics Unit (NDU), commits 'to promote healthy eating and active living as preventive measures that can help reduce the double burden of malnutrition, as well as diet and physical inactivity related to non-communicable disease' (Ministry of Health, 2017). Notably, the guidelines are more inclined to nutrition and diets and only one chapter (chapter six) is dedicated to physical activity for the various age categories without setting a clear target to be met. Therefore, the policy is vague because it lacks clear targets and should be reviewed in line with the WHO's recommendations and human rights norms.

Notwithstanding, the most comprehensive policy document in Kenya on physical activity is the Ministry of Health's National Physical Activity Action Plan 2018–2023, which is currently outdated. This document refers to several national and international standard-setting documents, including, among others, the Global Strategy on Diet, Physical Activity and Health (2004); the Global Action Plan for the Prevention of NCDs 2013–2020; the National Strategy for the Prevention, Control and Management of NCDs 2015–2020; the National Cancer Control Strategy 2017–2022; and the National Healthy Diets and Physical Activity Guidelines 2017, showing the Action Plan's commitment to align with international best practices. However, the outdated Action Plan targets the reduction of physical inactivity by 5% by 2023, which is significantly lower than the target set by the WHO Global Action Plan on Physical Activity 2018–2030, set at 15%. This leaves hope that the new, updated Action Plan will move closer to that global target, aligning with best practices and human rights standards, which will be discussed in the next section.

THE RIGHTS-BASED APPROACH TO PROMOTING PHYSICAL ACTIVITY WITHIN AFFORDABLE HOUSING

Both international human rights law (IHRL) and the Kenyan Constitutional and legal frameworks support the need to promote physical activity to prevent NCDs. This stems from various rights, including health, rest and leisure, education, and non-discrimination (Messing et al., 2023). The right to a healthy environment, which is not autonomously recognised in treaty law but is viewed as a determinant of dignified living and health, is also relevant, considering the correlation between the environment and healthy living (OHCHR, UNEP, UNDP, 2023). This section will analyse the obligations of the State concerning these rights to promote physical activity to prevent NCDs in relation to the Affordable Housing Programmes.

The Right to Health and Physical Activity

The right to health is the most evident human right linked to promoting physical activity. The legal basis of this right can be traced in several legal instruments, including Article 25 of the Universal Declaration of Human Rights, 1948 and Article 12 of the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR). Kenya acceded to the ICESCR on 1 May 1972, and it accepted the obligations created under it, including those related to housing, education, and health. Under a right-to-health framework, States are required to create an environment conducive to the highest attainable standard of health, which includes enacting enabling legislation and policies to facilitate programmes for the promotion of physical activity (Himani, 2024). Concerning promoting physical activity, the WHO, in line with Article 12.2(b) of the ICESCR, recognises that achieving a healthy and sustainable environment is critical for preventing NCDs (World Health Organization, 2017). Specifically, the WHO states that '[t]he urban/built environment...as well as working conditions, may further impact levels of physical activity and sedentary lifestyle. These [risk factors], in turn, are associated with overweight, obesity, cancers and other NCDs' (World Health Organization, 2017). Therefore, disease prevention in the housing/community sector includes better urban planning, access to sports facilities, and school and workplace-based programmes (World Health Organization, 2017). However, a comprehensive report is needed to cover the link between physical activity, NCDs and the right to health. So far, the former UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, has explored the link between unhealthy foods, NCDs and the right to health (Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 2014).

The Committee on Economic, Social and Cultural Rights (CESCR), the authoritative interpreter of the ICESCR, made a remote connection between physical activity and the right to health under Article 12.2b. In this regard, it recognised in its General Comment No. 14 on the right to the Highest Attainable Standard of Physical and Mental Health (General Comment No. 14) paragraph 37 that the State's obligations to fulfil the right to health 'requires States to undertake actions that create, maintain and restore the health of the population' including 'supporting people in making informed choices about their health' (Committee on Economic, Social and Cultural Rights, 2000). Consequently, promoting physical activity in built environments, such as in Affordable Housing Programmes should be interpreted to be consistent with the obligation to 'create, maintain and restore the health of the population' as contended by CESCR in their General Comment No. 14. Moreover, including facilities for the promotion of physical activity in Affordable Housing Programmes can also help in 'supporting people in making informed choices about their health.'

At the regional level, the African Charter on Human and Peoples' Rights (ACHPR) enshrines the right to health under Article 16. However, the African Charter's language refers to the right of every individual to 'enjoy the best attainable state of physical and mental health'. It does not contain similar provisions like those described in Article 12.2(b) of the ICESCR, thereby limiting its scope of use in promoting physical activity to prevent NCDs in the context of Affordable Housing Programmes or built environments. Regardless of this limitation in the text of the treaty, the ACHPR's Guidelines and Principles on Economic, Social and Cultural Rights, which is an authoritative (though not binding) interpretation of the ACHPR, recognises the need to 'ensure that national development plans and programmes are designed towards the realisation of a healthy environment that is conducive to the right to health' (Africa Commission on Human and Peoples' Rights, 2011). This interpretation thus leads us back to the implications of the ICESCR Article 12.2(b) as interpreted by CESCR, which is that the government is required 'to undertake actions that create, maintain, and restore the health of the population' (Committee on Economic, Social and Cultural Rights, 2000). The implications of this have been discussed in the previous paragraph.

Therefore, Affordable Housing Programmes that are properly designed and implemented can be a means to fulfil Kenya's international human rights obligations under the right to health, and in particular, they could 'create, maintain, and restore the health of the population' in regards to the NCDs crisis. In practical terms, Affordable Housing Programmes could be designed and implemented with facilities and infrastructure that support running, walking and playing for all ages, which could include

building a playground, walking and cycling paths, availing open spaces and establishing amenities like social halls within residential areas (World Health Organization, 2017).

The Right to a Healthy Environment

The international right-to-health framework recognises the relevance of a healthy environment, with General Comment No. 14 of the CESCR identifying a 'healthy environment' as one of the underlying determinants of health (OHCHR, UNEP, UNDP, 2023). However, the right to a healthy environment has not been explicitly included in any binding international instrument. Still, it is recognised in many national constitutions and regional instruments catalysed by the Stockholm Declaration of 1971 (Aguila, 2021). At the international level, a non-binding Human Rights Council (HRC) resolution 48/13 adopted in 2021 recognises the right to a clean, healthy and sustainable environment as a human right (HRC, 2021).²³ At the regional level, Article 24 of the African Charter on Human and Peoples' Rights (African Charter) provides that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development.' At the national level, Article 42 of the Constitution of Kenya enshrines the right to a clean and healthy environment as follows: '[e]very person has the right to a clean and healthy environment.'

Significantly, the right to a healthy environment emanating from the UN HRC Resolution 14/13 has been interpreted to include both substantive and procedural elements including 'clean air; a safe and stable climate; access to safe water and adequate sanitation; healthy and sustainably produced food; non-toxic environments in which to live, work, study and play; and healthy biodiversity and ecosystems' (OHCHR, UNEP, UNDP, 2023; HRC, 2019). This right relates to physical activity because a healthy environment affects human behaviour, including the level of physical activity. In real terms, the right to a healthy environment in the context of an Affordable Housing Programme, the government would be required to, among other things, clear dumpsites, control air pollution, supply clean water, construct public toilets, and/or ensure there is adequate and nutritious food in the neighbourhood.

The Right to Non-Discrimination

Kenya's Affordable Housing Programme primarily targets middle and low-income earners. Section 2(2) of the Affordable Housing Act 2024 provides for both 'social housing unit' and 'affordable housing unit', targeting the poor and low-income earners, respectively.²⁴ There are four different affordable housing units, with three focusing on poor and lower-middle-income populations. Consequently, apart from the middle-class housing unit, the rest

23 Paragraph 1 of resolution 48/13 'Recognises the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights[.]'

24 Section 2(2) of the Affordable Housing Act 2024 reads: 'For purposes of this Act, "Affordable Housing Unit" refers to – (a) A social housing unit means a house targeted to a person whose monthly income is below twenty thousand shillings; (b) An affordable housing unit means a house targeted at a person whose monthly income is between twenty thousand and one hundred and forty-nine thousand shillings; and (c) Affordable middle-class housing units means middle to high-income housing targeted at persons whose income is over one hundred and forty-nine thousand shillings; or (d) A rural affordable housing unit means a house under section 42 targeted at a person living in any area which is not an urban area.'

of the targeted population in the Affordable Housing Programme can be categorised as marginalised populations in relation to house ownership. They face marginalisation because the market has failed them in terms of cost or mortgage access. Illustratively, the Centre for Affordable Housing Finance Africa (CAHF) contends that fewer than 15% of the urban population in Africa can purchase houses built by developers, and many other houses built incrementally are financed via business and farming earnings as well as savings and credits from various financial institutions (Habitat for Humanity, 2023).

For the minority who can afford to purchase a house, the developers in the private sector usually integrate the promotion of physical activity in the design and building of their projects as an attraction point. In this regard, these populations and their families may have access to private gyms and other recreational facilities or access to open spaces necessary for promoting physical activities within their neighbourhoods. As such, '[b]uilders are now rethinking and renovating outside areas as high-end homebuyers want a whole new living experience' (Sheth, 2024). The dream to live a better life, and the COVID-19-driven shift that saw many people opting to have amenities readily available within their gated community complex, also saves time in accessing spaces for physical activity and allows residents to have more leisure time spent with family members (Sheth, 2024). In most cases, private firms often guarantee that the security and the amenities are well developed (Sheth, 2024).

Affordable Housing Programmes targeting lower- and middle-income populations or marginalised communities usually do not pay as much attention to integrating amenities or open spaces in housing developments. The urge to build more houses to accommodate more people may lead to ignoring the prioritisation of recreational facilities, open spaces, or adequate amenities and facilities to foster active lifestyles. Indeed, the success of Affordable Housing Programmes is measured mostly on account of the number of houses they can accommodate, with limited media coverage or public scrutiny on their ability to also incorporate spaces and amenities necessary to promote physical activity and prevent NCDs (Kamau, 2024). Illustratively, in 2024, the media announced that 4,888 affordable housing units had been constructed in 17 counties, but the built environment of these newly constructed units was not thoroughly scrutinised or reported (Kamau, 2024). For these units, the notion of promoting physical activity is arguably viewed more as a privilege, not a right. This discrepancy is more pronounced when one considers the injustice in informal settlements, where poor planning and wanton land grabbing are the norm. Accordingly, the violation of rights associated with physical activity often goes unaddressed (The Kenya Institute for Public Policy Research and Analysis, 2024). The lack of basic social amenities in these settlements, such as water and sanitation, coupled with insecurity and inadequate infrastructure, including roads, makes it almost impossible for housing in these communities to meet the standards required for compliance with human rights obligations (The Kenya Institute for Public Policy Research and Analysis, 2024). Ultimately, the result is that physical activity is not prioritised or adequately supported in most informal settlements.

Beyond income levels, targeting residential areas is particularly beneficial to the young, persons living with disabilities and older populations, who are often fragile and may not be able to venture beyond the areas where they live for purposes of exercising or physical activity. Therefore, the right to non-discrimination should be integrated in the assessment of Affordable Housing Programmes as it relates to opportunities to lead a healthy and active lifestyle.

The right to non-discrimination is broadly recognised in IHRL. It is contained under Article 2 of the Universal Declaration of Human Rights. In addition, the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR contain provisions forbidding discrimination. Article 2(1) of the ICCPR prohibits discrimination on several grounds, including 'national or social origin, property, birth or other status.' Article 2(2) of the ICESCR also mirrors the above provision of the ICCPR. Significantly, according to the interpretation of the CESCR in General Comment No. 20 on non-discrimination in Economic, Social and Cultural Rights, 'other status' must be construed flexibly 'to capture other forms of differential treatment that cannot be reasonably and objectively justified' (Committee on Economic, Social and Cultural Rights, 2009). The right to non-discrimination is also enshrined in the ACHPR under Article 2. The text of the ACHPR is similar to those contained at the international level.

Similarly, Article 27(4) of the Kenyan Constitution also enshrines the right to freedom from discrimination stating: '[t]he State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.' Even though the article does not contain the words 'other status', it contains the word 'including', which arguably lends itself to the same interpretation as analysed in the previous paragraph. Consequently, in the absence of a clear inclusion of financial or economic status as a prohibited ground for non-discrimination, the same can be interpreted under the article since the list is non-exhaustive.

Therefore, the principle of non-discrimination is of relevance and requires a special focus on vulnerable and marginalised groups. In fact, potential sources of inequalities related to physical activity include age, gender, cultural background, disability, and financial resources (Messing et al., 2021). As explained previously, the communities living in rich neighbourhoods are already integrating facilities and amenities to improve their lives, including promoting physical activities within their gated communities, which is still unavailable to the poor communities. A rights-based approach to promoting physical activity within Affordable Housing Programmes requires targeting young children, persons living with disabilities and older populations who are most vulnerable to suffering and dying due to NCDs (Asiki et al., 2021). Arguably, the right to non-discrimination, together with the right to health, therefore means that the government should create recreational facilities and open spaces to promote physical activity within the areas where these poor populations live. Taking advantage of the Kenyan Affordable Housing Programme to fulfil this goal, therefore, makes sense.

THE LEGAL FRAMEWORK FOR PROMOTING PHYSICAL ACTIVITY WITHIN THE AFFORDABLE HOUSING PROGRAMME

While the above has provided insight into how the housing programme and physical activity is relevant within the context of the rights to health, healthy environments, and non-discrimination, conceptually, the Affordable Housing Programme is primarily hinged on the right to accessible and adequate housing as enshrined under Article 43(1)(b) of the Kenyan constitution. This is because the primary objective of the programme is to increase homeownership by targeting those excluded by the market.

In the land and housing sector, the laws and guidelines in place not only focus on the adequacy of the house, but also indirectly accommodate the promotion of physical activity to prevent NCDs. In this light, national housing laws also complement human rights norms in relation to the State's obligation to promote physical activity to prevent NCDs.

The government's legislative agenda on affordable housing, as championed by the State Department for Housing and Urban Development (SDHUD), had initially predominantly focused on boosting the Housing Fund under the Housing Act Cap 117 and the Housing Fund Regulations, 2018. The government's strategy changed afterwards, and the idea of a housing levy was introduced to raise funds through taxation in addition to voluntary contributions and savings as contemplated by the 2018 Regulations. The Finance Act, 2023, introduced the Affordable Housing Levy through an amendment to the Employment Act, 2007. However, following the declaration of the Finance Act, 2023 as unconstitutional in *Okoiti & 6 Others v Cabinet Secretary & 3 Others* (Okoiti & 6 others v Cabinet Secretary for the National Treasury and Planning & 3 others, 2023), the government resorted to enact a comprehensive legislation, the Affordable Housing Act in 2024, to, among other things, 'provide a framework for development and access to affordable housing' (Affordable Housing Act, 2024). The new Act also repealed the relevant provisions on housing levy under the Finance Act, 2023 which had been declared unconstitutional.

The Affordable Housing Act, 2024 defines affordable housing as 'housing that is adequate and costs not more than thirty percent of the income of a person per month' (Section 2). Section 4 of the Affordable Housing Act, 2024 establishes the Affordable Housing Levy to facilitate and fund the Affordable Housing Programme.²⁵ Section 10 of the Affordable Housing Act, 2024 further provides that the purpose of the Affordable Housing Fund, established under section 8 of the Act, 'shall be to provide funds for the design, development and maintenance of affordable housing, institutional housing and associated social and physical infrastructure.' Arguably,

the social infrastructure in reference may include open spaces and other facilities for the promotion of physical activity.

At the policy level, the Sessional Paper No. 3 of 2016 on National Housing Policy for Kenya guides the Affordable Housing Programme (Ministry of Land, Housing and Urban Development, 2016). This policy acknowledges that the absence of a 'comprehensive land use planning and management policy has led to development of substandard settlements with inadequate infrastructure, services and open spaces' (Ministry of Land, Housing and Urban Development, 2016). However, the National Land Use Policy of October 2017 commits to mitigating the problems of urban environment through 'establishing green areas and recreational facilities in residential areas as well as restoring and reclaiming open spaces and parks that may have been allocated, back to public ownership to ensure that they revert to the original state' (Ministry of Lands and Physical Planning, 2017). These two policies are therefore crucial in supporting the promotion of open spaces and recreational facilities within the residential areas/communities, which is necessary to reduce physical inactivity. Moreover, promoting open spaces encompassing sports facilities, active spaces, gathering spaces, playgrounds, public realm networks, and pocket parks is one of the key design principles of the Affordable Housing Programme (State Department for Housing and Urban Development, World Bank, 2019). However, the framework guidelines do not provide enough guidance on how to achieve this design principle (Kenya Affordable Housing Programme, 2018). Therefore, these guidelines should be reviewed in due course to fill the existing gaps.

The governance of open spaces and recreational facilities in cities and towns is bestowed upon the board of a city or municipality constituted in accordance with sections 13 and 14 of the Urban Areas and Cities Act, 2011. Section 20(1)(d) of the Act provides that 'the board shall control and use, land sub-division, land development and zoning by public and private sectors for any purpose, including...recreational areas, parks...within the framework of the spatial and master plans for the city or municipality as may be delegated by the county government.' Under section 37, the city and urban area integrated development plan shall be aligned to the development plans and strategies of the county government.

The Urban and Cities Act of 2011 therefore places the boards of each urban area and city at the centre of promoting physical activity through ensuring proper land use and planning strategies are adopted in their respective jurisdictions. In addition, the Physical and Land Use Planning Act, 2019 and its Physical and Land Use Planning (Local Physical and Land Use Development Plan) Regulations, 2021 will go a long way in guiding the relevant counties in terms of local physical and land use development plans at the county level. Section 56(f) of the Physical and Land Use Planning Act, 2019 bestows upon the county governments the

25 The Housing Levy is calculated at the rate of five per cent of: (a) the gross salary of an employee; or (b) the gross income of a person received or accrued which is not subject to the Levy under paragraph (a). Therefore, the applicable legislation in this sector includes both the archaic Housing Act (because it only covers the operations of the National Housing Corporation (NHC)—which is a statutory body established under Cap 11 with the principal mandate being implementing the government's housing policies and programmes) and the Affordable Housing Act, 2024.

power to 'reserve and maintain all the land planned for open spaces, parks, urban forests and green belts following the approved physical and land use development plans[.]'

Physical and Land Use Development Plans: The Missing Centrepiece

The Kenyan government already has a national legal framework that supports promoting physical activity to prevent NCDs, but it has failed to fulfil its duties. To effectively incorporate physical activity in the Affordable Housing Programme, the government should prioritise adopting an appropriate National Physical and Land Use Development Plan, as provided for under section 21 of the Physical and Land Use Planning Act No. 13 of 2019 (Chapter 303). The Plan would be the basis for formulating the national physical and land use development planning policy pursuant to section 22(2)(e) of the Act.

Despite the above shortcomings, some progress has been made, especially at the local level of governance. For instance, the government has already put in place the Physical and Land Use Planning (Local Physical and Land Use Development Plan) Regulations, 2021, for, among other things, aiding in the preparation of the local physical and land use development plan. Regulation 7 of the 2021 measure states as follows: '[t]he preparation of a local physical and land use development plan may be initiated by a county executive committee member[.]'. This provision targets the county government as opposed to the national government.

Regulation 2 of the Physical and Land Use Planning (Local Physical and Land Use Development Plan) Regulations, 2021 defines local physical and land use development plan to mean 'a plan for the area or part thereof of a city, municipality, town or urban centre and includes a plan with reference to any rural area, trading or market centre.' Furthermore, Regulation 11 envisages public participation during the process of coming up with the physical and land use development plan. In urban areas and cities, section 37 of the Urban Areas and Cities Act, 2011 requires that integrated development plans be aligned with development plans and strategies of the county government.

Additionally, some counties in Kenya are leading the way in terms of implementing their physical and land use development plans. Their plans can illustrate how these documents are crucial in safeguarding land meant to promote physical activity. The County Government of Narok has implemented a 10-year plan for the Narok County Physical and Land Use Development Plan 2023-2032. One of the challenges facing the county under urbanisation and human settlement is 'inadequate recreational facilities and open spaces and inadequate land for public utilities' (County Government of Narok, 2023). To remedy the problem, Narok is proposing, under component 5 on infrastructure, to provide adequate playing grounds in education facilities. It plans to construct modern stadiums/sports facilities for recreation and community facilities, and provide sufficient training, sanitation, and parking, as well as stop encroachments and vandalism. Another county that has developed spatial plans is Kisumu's Local Physical

and Land Use Development Plans of 2020 (County Government of Kisumu, 2020).

Lastly, the National Land Commission's (NLC's) Urban Land Use Planning: Monitoring and Oversight Guidelines can provide a useful tool for implementing land use development plans because, among other things, it contains the following: an impression of quality public open and recreational spaces at city-wide scale; impression of quality open spaces at a residential scale; and an impression of good recreational facility to be enjoyed by citizens in urban areas (National Land Commission, 2022).

BASIC FEATURES FOR THE PROMOTION OF PHYSICAL ACTIVITIES WITHIN RESIDENTIAL AREAS


This paper shows that States and private developers can promote physical activity within residential areas or communities to prevent NCDs. Residential areas' design and features are key to successfully promoting physical activity in built environments. As Kenya integrates physical activity promotion into Affordable Housing Programmes, developers should consider some basic features. Some best practices and recommendations are as follows. Firstly, residential areas should include recreational resources such as walking trails, biking trails, parks and open spaces. Secondly, the land use characteristics should consider residential and employment density, land use mix (types of buildings, services and businesses in the community), street connectivity (grid pattern, cul-de-sac and loopholes) and proximity of destinations (shops, employment and services) to residences. Thirdly, the neighbourhood could include the availability of sidewalks and streetlights. Additionally, community environment planning should consider contextual features of the environment, such as aesthetics, cleanliness, traffic, crime safety, and community support or cohesion (Physiopedia, 2022). At some urban affordable housing units, it is possible to further provide for the following: health and wellness amenities (Spa, Yoga and ZUMBA studios, open gyms, and designated jogging tracks); recreational amenities (dance and banquet halls and sports facilities); leisure amenities (cafes and community centres, shopping and retail, landscaped gardens and walking paths) (Sheth, 2024).

CONCLUSION AND RECOMMENDATIONS

The promotion of physical activity can help prevent NCDs. However, Kenya must do this within a sustainable programme. The Kenyan Vision 2030 and the Fourth Medium Term Plan for Bottom-Up Economic Transformation Agenda have prioritised an Affordable Housing Programme, which targets the construction of 200,000 housing units sold to low- and middle-income Kenyans. Consequently, many housing projects have been launched all over the country. Apart from realising the right to adequate housing, the Affordable Housing Programme can also be harnessed to realise,

among others, the right to health by promoting physical activity to combat NCDs. Integrating physical activity within residential areas in Affordable Housing Programmes also helps eliminate discrimination for vulnerable populations, including the old, young and persons living with disabilities who may not be able to access open spaces beyond where they live. The Kenyan land use and physical planning policies and strategies provide a framework that can lead to positive results in promoting physical activity and assist in combating the NCD crisis in the country. It is time for public health professionals to collaborate 'across multiple disciplines such as transportation, urban planning, architecture and public health law (to) help encourage healthy community design' (Physiopedia, 2022).

From the foregoing, this paper provides the following recommendations. First, the Affordable Housing Fund established under section 10 of the Affordable Housing Act, 2024 provides that, among other things, it is for the development of social infrastructure — this can be a perfect vehicle for mobilising adequate resources for the development of open spaces and recreational facilities necessary for the promotion of physical activity. Second, reviewing the Affordable Housing Framework Guidelines will clarify how to achieve the key design principle of promoting open spaces encompassing sports facilities, active spaces, gathering spaces, playgrounds, public realm networks, and pocket parks. Third, implementing the National Land Use Policy of 2017 will help restore and reclaim open spaces and parks that may have been illegally reallocated for other uses or corruptly grabbed by private individuals and entities. Fourth, working with the Boards created under the Urban Areas and Cities Act of 2011, the County Government should ensure proper development and governance of open spaces. Fifth, through its state department for lands and physical planning, the National Government should implement a national physical and land use development plan for Kenya that incorporates adequate open spaces and recreational facilities. Lastly, the county governments should enact their land use development plans, guided by the NLC Urban Land Use Planning: Monitoring and Oversight Guidelines, which, among other documents, provide helpful guidance on recreational facilities and open spaces.



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Building Bridges Between Law and Public Health in Academia: A Case Study of Moi University

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Abstract

Non-communicable diseases (NCDs) continue to have significant negative consequences in low and middle-income countries. Many African countries have been unable to effectively utilise NCD prevention and control policies because their legal and health personnel have often limited knowledge and skills for using relevant legal and policy frameworks in an impactful manner. Law and public health programmes in universities within East Africa rarely tackle legal and regulatory NCD prevention and control measures as part of the necessary interventions against NCDs and their risk factors, including unhealthy diets and physical inactivity. There is often minimal to no inter-faculty academic interaction between law and public health disciplines, leading to a fragmented approach to NCD prevention and control. To address these challenges, a number of academic initiatives have been undertaken in the region to improve multidisciplinary academic engagement on legal approaches to NCD prevention and control. For instance, a multidisciplinary Academic Working Group (AWG) was created within select universities in East Africa with a view to, among others, enhancing the capacity of law and public health academics in East Africa to deliver programmes that integrated legal approaches to NCD prevention and control. A toolkit on regulatory approaches to NCDs in East Africa was developed to provide a resource for the incorporation of law and NCDs in university curricula, and trainings were provided to academics from law and public health departments to enhance their capacity at the intersection between law and public health. This paper uses the experience of Moi University to explore the role of academic institutions in strengthening the capacities of legal and public health graduates to promote physical activity and healthy diets in Africa. It also discusses the potential role of higher education institutions in building bridges between law and public health disciplines in the prevention and control of NCDs.

BACKGROUND OF THE STUDY

Non-communicable diseases (NCDs), including diabetes, cardiovascular disease and certain types of cancers, are on the rise in Kenya (WHO, 2015). This is largely on account of preventable risk factors, including unhealthy diets and physical inactivity, that can be tackled by evidence-based measures recommended by international, regional and national public health and legal experts (IDLO, 2023). Besides technical expertise, the adoption of such measures, which include nutrition labelling, fiscal measures and restrictions to marketing of unhealthy foods to children, requires the adoption of regulatory or legal interventions. Thus, both public health and legal expertise are required to promote effective NCD prevention policies. Universities can play a pivotal role in creating and disseminating such expertise. However, the role that academics in universities can play in promoting, designing and effectively implementing such interventions against NCD risk factors has been given scant attention in Kenya, as will be explored in this paper.

Effective interventions for NCD prevention, including for tackling NCD risk factors like unhealthy diets and physical inactivity, require specialised public health and legal knowledge and skills. Moreover, given that such interventions have been defined in terms of legal and policy obligations frequently calling on respect and observance of human rights standards, legal and public health academics must have an appreciation of the global, regional, and national policy and legal frameworks that address NCDs. Global commitments, including human rights and other international law obligations, that require States to take measures to tackle NCDs and their risk factors, including unhealthy diets and physical inactivity, need to be studied and understood. In addition, existing regional and national legal and policy standards on health that can be used as a regulatory basis for promoting healthy diets and physical activity need to be explored. For instance, the African Charter on Human and Peoples' Rights (AU, 1981) as well as the Treaty Establishing the East African

Community (East African Community, 1999) contain provisions that have a bearing on health-related measures. Domestically, the implications of the constitutional and statutory protection of the right to health on the prevention and control of NCDs need to be equally explored (IDLO, 2023).

Research to date has identified that legal and policy frameworks have not been effectively used to tackle NCDs in Kenya (Juma et al., 2017). This has partly been attributed to the fact that personnel in both government and civil society cannot make effective use of existing and relevant regulatory frameworks stemming either from a lack of resources or a lack of appropriate skills (Garde & Abdool-Karim, 2022).

University academics in Kenya can bridge this gap through their role in preparing students to develop legal and regulatory interventions that address the burden of NCDs (Pandya et al., 2023). Schools of public health prepare professionals to tackle public health problems through training, research, community engagement, and policy development. Specifically, public health academics impart key competencies such as surveillance, monitoring, health protection and promotion, disease prevention, service delivery, communication, and research (Bjegovic-Mikanovic et al., 2015). In turn, legal training imbues critical thinking and problem-solving skills within the context of global, regional, and domestic legal frameworks (Kibugi, 2009). Equally, legal professionals play a pivotal role in defining States' obligations regarding NCD prevention, as well as designing robust legal and regulatory interventions that are in accordance with such obligations and can withstand challenges from interested parties, including the food industry, who has a history of attacking effective regulatory NCD prevention measures that can hamper their economic interests (Magnusson & Patterson, 2014).

Taken together, the two disciplines have the potential to enhance knowledge, communication, teamwork, research, and problem-solving skills in a developing society (Ndulo, 2014). In the context of NCDs, and potentially other public health concerns, an interdisciplinary approach enhances mutual respect between legal and public health professionals (Lerner & Talati, 2014), which in turn improves their ability to identify and implement solutions using applicable legal and policy frameworks and provide guidance and advocacy for reform of law and policy (Magnusson et al., 2020; Ezer et al., 2010).

The Moi University School of Law was established in July 1994 and admitted its first students in 1995 to promote social justice and expand education opportunities for Kenyans (Moi University, 2024). Its main goal is to develop competent advocates committed to social aims of high-quality legal representation, national development, and public service (Moi University, 2024). The school has a Bachelor of Laws program with students from Kenya, East and Central Africa. The Moi University School of Public Health was established in October 1998 as an institute, initially to offer graduate training, with the pioneer class of students, a Master of Public Health (MPH) degree, joining in 1999 (Moi University, n.d.). The school has two undergraduate programmes and four Master's programmes, whose main focus is on Public Health. The

training programmes of the school have been developed to meet the University's mission of producing skilled and practical health professionals who will contribute towards the realisation of the country's national goals and the global Sustainable Development Goals (SDGs). As a public health leader, the school bears a unique responsibility for research that improves the health of populations and informs policy and programming for effective public health interventions. The academic programs aim to instil in students the values of lifelong learning, inquiry, and public service (Moi University, n.d.).

In Moi University, although academic staff in the School of Law and the School of Public Health may be influential in developing critical capacities of future legal and public health personnel in NCDs, this potential has not been fully explored yet. Even at the individual discipline level, there has been little appreciation so far of the roles that each of the schools can play in developing skills and attitudes critical for effective interventions in the area of NCDs, especially those related to unhealthy diets and physical inactivity. Legal interventions to promote healthy diets and physical activity have not been topics taught at the School of Law until recently. The School of Public Health, in turn, has proceeded in the old mould of advancing public health interventions on its own and without cross-cutting contributions from the Law School. This siloed approach to university academic teaching and learning has created a skills and knowledge gap where legal and public health personnel are not used to working together to either utilise existing regulatory frameworks to develop effective interventions against NCDs or craft new ones.

PURPOSE OF THE PAPER

The purpose of this paper is to discuss the experience of Moi University in integrating the teaching of law and NCDs in its School of Law and Public Health curricula, highlighting the potential role of universities in enhancing the capacity of legal and public health graduates to incorporate the law in NCD control and prevention strategies. In its review of the collaboration between the schools of law and public health, the paper appraises the value of an interdisciplinary approach to NCD prevention and control at the academic level. The challenges encountered by Moi University, as well as the progress achieved in the last few years, will provide lessons and hopefully inspiration for developing more robust collaborative efforts within and outside the university. This paper is largely a personal reflection of the authors involved in the integration of law and NCDs in the two mentioned schools.

THE PRE-INTEGRATION CONTEXT

Prior to 2019, neither the school of law nor that of public health mounted a course that tackled the role of law in the prevention and control of NCDs. While this omission was not atypical, it was one that could be attributed to limited appreciation by academia of the centrality of the law in addressing NCDs. This explains why, even though there were many courses in which the discourse on law and NCD could fit, that discussion was never part of the coursework. For example, the Health Law course, a unit undertaken in the second semester of the fourth year of study (Moi University, 2024), could very well accommodate a topic on law and NCDs. This optional course focused on broad issues such as the right to health, healthcare delivery and the attendant legal and policy issues, regulation of healthcare professionals, and the relationships between providers of health services and users. The following key topics were and have been tackled:

- a. The right to health and its implementation in Kenya.
- b. The evolution of medical ethics.
- c. Organisation of healthcare services in Kenya.
- d. Universal health coverage.
- e. Regulating healthcare professionals
- f. Medical practice issues (consent, confidentiality, medical negligence, etc).
- g. Regulating pharmaceutical and medicinal products.
- h. Mental health.
- i. Reproductive health law, including surrogacy.
- j. Legal issues surrounding death.
- k. Medical research and experimentation.

In addition, various other legal courses have broad practical implications for public health and social determinants, including courses such as Human Rights Law, Gender and the Law, Disability Law, International Trade Law and Children and the Law (Moi University, 2024). These courses did not integrate law and NCDs. Other research courses such as Legal Research Methods and Writing (a 1st year course), Law and Contemporary Social Issues (1st year), Research Methods and Communication Skills for Lawyers (3rd year), and Research Paper (4th year), were a good basis for introducing research questions based on law and NCDs. Again, this was not being done. An opportunity that was not explored was the School of Law's clinical component of the curriculum. The School's curriculum is embedded in a clinical legal education approach by which students in their final year of study are given an opportunity to research, write and work on practical legal problems and proffer solutions (Moi University, 2024). Through clinical legal education, the school seeks to impart practical problem-solving

skills by offering opportunities to students to engage with real-life legal problems and propose solutions (Ojienda & Oduor, 2002). The clinical seminars and externships enable students to engage in concentrated, in-depth research on the doctrinal aspect of law as well as tackle real-life legal issues, which might involve working on existing legal problems with real clients. Prior to the integration of law and NCDs, none of the research and work addressed NCDs as an area of discourse.

While courses at the School of Public Health addressed NCDs, none of them addressed the law's role in the prevention and control of NCDs. Whereas Master's of Public Health students study a specific course on NCDs and another on Social Determinants of Health, which touches on aspects of healthy diets and physical activity, they do not have an opportunity to reflect on law as a response to NCDs. There is also a specialisation in Human Nutrition within the same program that, while enabling students to think critically about measures to improve nutrition and health for individuals, communities, and populations, does not engender discussion on the place of the law as part of the interventions. Ironically, while both the undergraduate and postgraduate curricula have a unit on Public Health laws, neither of them specifically explores the role of law in the context of NCDs. It is apparent that whereas postgraduate students study aspects of health policy and planning, this does not include a study on the relationship between law and policy and the implications for NCDs. In short, the curriculum completely disregarded studies on the potential use of the law in the area of NCDs.

In effect, both curricula were oblivious to the potential of an inter-disciplinary approach to training graduates. The teaching of doctrine at the school of law did not create space for viewing the law as a tool with potential implications on public health, especially NCDs. Similarly, the school of public health concentrated, and perhaps still does, on doctrines of public health without allowing room for considering the influence of law in meeting public health objectives. Given the fact that health is now a constitutional right in Kenya, a cocooned approach to course delivery at Moi University poses a drawback that affects the capacity of legal and public health graduates to develop effective NCD prevention and control measures. The lack of meaningful academic collaboration between the schools of law and public health can be overcome by taking advantage of the opportunity that the cross-cutting nature of NCDs represents.

CURRICULUM, TEACHING, AND RESEARCH POST-INTEGRATION

In the year 2019, the School of Law, through its Health Law lecturer (also author of this paper), participated in a series of activities under the auspices of the Global RECAP programme that set the stage for the integration of law and NCDs into the

school's curriculum.¹ These activities included a needs assessment that was conducted in May 2019 in the context of the integration of teaching of law and NCDs into academic legal and public health curricula in East African countries, particularly as applied to the two risk factors of unhealthy diets and physical inactivity. As the School of Law was an early participant in these activities, much of the reflection in this part is from that perspective.

The needs assessment showed that law and NCDs were not incorporated as a topic in the school's curriculum at all, despite the existence of opportunities to do so. Part of the reason for this was that the law's role in limiting unhealthy diets and promoting physical activity was not always appreciated. The fact that resource materials such as textbooks on law and NCDs were not available contributed in no small measure to this failure, as well as limited academic capacity at the intersection between law and public health. The needs assessment also showed a lack of an interdisciplinary approach to addressing NCDs – legal academics did not interact with public health academics, each discipline approaching the teaching of their subjects in a fragmented manner. At Moi University, there did not exist any academic relationship between the School of Public Health and the School of Law. Considering the value of cross-disciplinary collaboration between law and public health in the context of NCDs (Magnusson et al., 2018), the academic silos in Moi University represented a missed opportunity to train graduates who could develop a broad range of effective interventions on NCDs. Similar gaps were also identified in most of the other academic institutions participating in the programme.

To address the main gaps identified by the assessment — namely, limited inter-disciplinary collaboration, lack of multidisciplinary teaching materials and resources, and limited academic engagement at the intersection of law and public health — the programme supported three main activities: i) the establishment of a regional academic working group (AWG) on law and NCDs; ii) the development of a teaching toolkit on law and NCDs; and, iii) multidisciplinary trainings to academics on the integration of legal approaches to NCD prevention and control academic initiatives.

The RECAP East Africa AWG on Law and NCDs was established in 2020, bringing together legal and public health academics initially from eight universities in the three East African Countries (Kenya, Tanzania and Uganda) and subsequently expanded to involve also academics from other institutions and countries in the region. The AWG has been critical in forging an interdisciplinary approach to the prevention and control of NCDs in East Africa. Before AWG, intra-faculty collaboration was limited. For instance, the School of Public Health and the School of Law had never collaborated on any academic programme at Moi University. Likewise, inter-university collaboration across the different disciplines, let alone the same discipline, was limited. One

would be hard-pressed to identify an academic activity jointly run by Jomo Kenyatta University and the University of Nairobi, Makerere University and Uganda Christian University, or the University of Dodoma and Tumaini, etc. Under AWG, it has been possible for Moi University to explore collaboration with the University of Eastern Africa, Baraton, in the delivery of an address to public health students on the use of the law to prevent and control NCDs.

In the context of the AWG, to address the gap identified in available teaching resources and materials, RECAP supported the development of a toolkit on law and NCDs to promote the integration of legal approaches in the teaching of public health challenges (IDLO, 2023). The toolkit, which was developed by the Health Law lecturer at the School of Law of Moi University, offers public health and legal scholars, as well as students, tools and resources that provide guidance on how the law can be used to curb NCDs, especially in the context of unhealthy diets and physical inactivity. Taking an interdisciplinary approach grounded in international human rights law, the toolkit addresses NCDs and regulatory and fiscal responses in Kenya, Uganda and the United Republic of Tanzania (IDLO, 2023). The toolkit was reviewed and validated by the AWG. Using the toolkit, members have tailored their courses to include law and NCDs as one of the offerings in their curricula. The adaptation has largely involved introducing a component of law and NCDs in an already existing course. Uniquely, though, the use of the toolkit has been reported across public health and legal curricula.

Following its publication, the toolkit was incorporated as a core reading material in the Health Law course taught in the 4th year at the School of Law. Some 65 students who enrolled in the course between August 2022 and May 2024 were trained and tested on the application of regulatory frameworks to promote healthy diets and physical activity as a response to NCDs in Kenya. In the same period, up to 6 students have been guided to write research papers on law and NCDs (see Box 1) while others have engaged in practical assignments on the topic (see Box 2).

¹ Global RECAP (2019-2026) is a collaborative project between the International Development Law Organization (IDLO) and the World Health Organization (WHO), in coordination with the International Development Research Centre (IDRC), with financial support by the Swiss Agency for Development and Cooperation, the Opec Fund for International Development and the European Union. The Programme aims to build regulatory and fiscal capacity to support the development, adoption, implementation and monitoring of cost-effective regulatory and fiscal policy interventions to promote healthy diets and physical activity to prevent NCDs through a multistakeholder approach in ten countries in Africa and Asia, namely Bangladesh, Ghana, Indonesia, Kenya, Mauritius, Nepal, Sri Lanka, Tanzania, Thailand and Uganda. Under Global RECAP, IDLO is responsible to promote engagement with universities in RECAP countries with the aim to strengthen academic capacity to integrate legal and regulatory aspects of NCD prevention in public health and legal curricula.

Box 1: Dissertation topics undertaken in the last 2 academic years on law and NCDs

1. Addressing the link between mental health and non-communicable diseases in Kenya: legal and policy framework
2. Implementing the framework convention on tobacco control in Kenya: challenges and prospects
3. Enhancing policy coherence in control and prevention of non-communicable diseases in Kenya: case study of cancer
4. The role of law in the prevention and control of non-communicable diseases in Kenya.
5. Digital rights vis-à-vis the right to health: a case study of the exploitation of the digital arena to promote harmful products and unhealthy foods to children.
6. Unhealthy foods as a major cause of non-communicable diseases: assessing the Kenyan legal safeguards

Box 2: NCD issues addressed in Clinicals and Concentrations in the last 2 academic years

2021/2022 Academic Year

Digital commercial marketing of unhealthy diets in Kenya: a human rights-based approach.

2022/23 Academic Year

Research on industry practice that either:

- (a) is deliberately intended to market foods and non-alcoholic beverages to children in a way that is meant to increase consumption and hence raise profits. OR
- (b) is deliberately intended to either mislead consumers or make it difficult for them to discover the nutritional content of processed foods offered for sale in the country.

Trainings were provided to support academics in the use of this resource and to foster the teaching of legal approaches to NCD prevention at the university level through multidisciplinary approaches. The trainings also underscored the role of university academics in developing graduates who have the skills and capacity to implement regulations and policies that promote public health. As a direct result of these trainings, a topic on law and NCDs was

introduced in the Health Law curriculum at the school of law for the first time in the year 2020. While the ability of academics to integrate law and NCDs into their teaching was emphasised, it was apparent that there were no readily available resource materials to facilitate this.

The School of Public Health became part of the AWG in mid-2023. Through two academic staff members, the school participated in discussions around the dissemination and implementation of the toolkit within its various courses. One Professor used the toolkit in a course called Medical Education, where some 28 students interacted with its contents. Before the School was incorporated into the AWG, there was no inter-faculty dialogue between it and its counterpart, the School of Law. The toolkit has provided a focal point for engagement between the academic staff of the two schools. For one, the academic staff are now engaged in collaborative writing projects of which this paper is an example. Both schools use the clinical education model, where students engage with real problems in society, known in the School of Public Health as Community-based Education and Service Programme (COBES), and, as Clinical Legal Education (CLE) at the School of Law. Plans are underway to team up students from both schools to work on joint community projects that emphasise the role of law in addressing unhealthy diets and physical inactivity in Western Kenya.

The School of Public Health has a wide network of research and academic partners both in Kenya and globally. The School of Law can piggyback on some of these to enhance research capacity within its ranks. For example, the School of Public Health has been involved in the “One Health Network”, which is a global initiative that promotes a multidisciplinary and collaborative approach to addressing health issues at the intersection of human, animal, and environmental health (Machalaba et al., 2021). The School of Public Health is a member of the Africa One Health University Network (AFROHUN), which cultivates interdisciplinary approaches in training the public health workforce. Its goal is to “transform the training environment and approaches in universities, in a bid to develop a workforce without disciplinary barriers.” It enables “students to understand and appreciate the contribution of disciplines outside their own” (AFROHUN, 2025). The Africa Health Collaborative, of which the School of Public Health is part, also focuses on multidisciplinary collaborative efforts geared towards transforming health in Africa by leveraging universities as “sites of knowledge exchange and community collaboration, and nexuses for cross-sector partnerships” (Africa Health Collaborative, 2025). These collaborations can be drawn upon to provide useful entry points for enhancing research in law and public health with a focus on NCDs.

The potential of university academics in enhancing the regulatory capacities for the prevention and control of NCDs is evident from the rising interest in the expertise of Moi University academics. The interdisciplinary approach to strengthening regulatory capacities has extended beyond academia, exemplified by a School of Law faculty member who conducted training sessions for Kenya’s Ministry of Health. As a resource person for the Food

Environment Policy (FEP) Action Project, he delivered multiple trainings to Ministry officers, demonstrating the real-world impact of academic expertise (Africa Population and Health Research Center, 2023).² In Kenya, presentations have been made to support civil society education and advocacy on the regulation of the marketing of unhealthy foods and the law on the labelling of food products (KELIN 2024).³ Beyond borders, the School of Law focal point conducted sessions with civil society organisations in Tanzania, with the Tanzania Women Lawyers Association (TAWLA) on the role of law in addressing NCDs (TAWLA 2023).⁴ Recently, the focal point was also invited to participate in a consultation on the regulation of marketing to children and youth in Africa (PRICELESS SA 2024) by the University of Witwatersrand's School of Public Health.⁵ In effect, the networks established have opened up opportunities to expand the scope of understanding of the role of law in addressing NCDs in Africa.

CHALLENGES AND AREAS OF IMPROVEMENT

Rigid Curriculum Review Procedures

Curricula in Moi University are reviewed in four-year cycles following a long and tedious process. Proposed subject areas are expected to be generated by the various departments within the schools and must be subjected to both internal and external validation mechanisms. For the School of Law, some extra layer of approval must be surmounted — the curriculum must be approved by the statutory regulator known as the Council of Legal Education, which grants a licence conditional on proof of capacity to deliver the curriculum. The School of Public Health similarly has to contend with an external regulator known as the Public Health Officers and Technicians Council. The Council of Legal Education charges KSh. 1,600,000 (about 12,000 US dollars) for accreditation or renewal of a licence to teach law. With the financial crisis currently facing Moi University, the cost of reviewing a curriculum may hinder the choice of doing so.

The Cost of Specialisation

Academic disciplines in Moi University are still siloed – each is cocooned in its own separate space, seeing no need to draw from each other's strengths. Thus, the School of Law operates with limited interactions with the School of Public Health, and vice versa, although progress in inter-disciplinary exchanges has been advanced through RECAP initiatives, as indicated above. Ironically, whereas both the public health and law curricula declare service to the public as part of their ethos, each seeks to do so in its different way, an approach that is often self-defeating because it only deals with social problems in a piecemeal fashion.

Underappreciated Value of Multidisciplinaryism

Limited appreciation of the value of multidisciplinaryism slows down efforts at integration. For instance, it may be difficult to convince university managers that there should be a common course on Law and NCDs in the School of Law and the School of Public Health. While colleagues from both schools can always agree to invite each other to their classes as guest lecturers, institutional-level collaboration requires the stamp of approval of high university organs such as the Committee of Deans, the University Senate or the University Council. While opportunities do exist to develop joint academic programmes, it will require that a vast degree of red tape be surmounted.

Sustainability

Evidently, NCDs do present cross-cutting issues that can be addressed in many courses, at the School of Law, including human rights, fundamental rights and freedoms, social foundations of law, etc. In fact, most of the research and project courses, e.g., a dissertation, can provide opportunities to address law and NCDs. However, the opportunity is often lost due to the notion that law and NCDs only fit in certain courses, such as Health Law and can only be handled by particular faculty. When only certain academic staff are identified with a course, their absence affects sustainability. This can be dealt with by promoting collaborative research and teaching across the staff, continuous training and workshops, as well as joint publications to ensure that as wide a number as possible understands how NCD prevention and control fits within the different courses. For example, a unit on tax law may be a useful place to discuss the utility of taxation of high-fat, high-sugar foods and high-salt foods as a means to control NCDs.

Lack of Incentives

So far, the participation by professors in the effort to integrate law and NCDs has been on an individual basis. While it is true that all of these work with the University, there is no formal recognition of this effort to make the courses they teach responsive to pressing social problems, as it is hard to demonstrate immediate return on investment in their teaching. Inventing a technical gadget that solves an immediately observable problem may be more visible and rewarding to the University. Improving a course, by introducing an interesting nuance to it, such as infusing legal discourse into a public health course, or vice versa, appears to be a mundane contribution not liable to be scored highly in a system that awards higher promotion points for tasks such as publishing journal articles. There may be a need to review promotion criteria to incentivise staff who are innovative in embracing multidisciplinary approaches to their courses.

² Food Environment Policy Action Project, Legal Issues in Policy Design and Implementation, Kenya, 12th to 16th June 2023, Venue: Sawela Lodge

³ KELIN, Multi-stakeholder conversation on FOPL and restrictions on marketing of foods and non-alcoholic beverages to children, 2 – 3 May 2024

⁴ Tanzania Women Lawyers Association, Training of Lawyers and Regulators, September 2023.

⁵ PRICELESS SA, Regional Child Directed Marketing Stakeholder Consultation 4-7th August 2024

Monitoring and Evaluation

It should be fairly straightforward to ascertain the number of students who undertake a course on law and NCDs where records of registration are kept. This also includes the number of students who write research papers or work on law and NCD projects. This data exists for the School of Law but not for the School of Public Health as yet, considering that the latter joined the AWG later. Either way, once students graduate and enter the workforce, data on the use of the knowledge becomes rather scarce. Few alumni maintain contact with the University, and fewer still are willing to participate in tracer studies to establish their professional whereabouts. A robust follow-up mechanism may be established at the school level for a close interaction with alumni, rather than relying on university-wide alumni structures.

CONCLUSIONS AND RECOMMENDATION

This paper demonstrates that academics in university settings can integrate the teaching of law and NCDs in their courses, thereby contributing to enhancing their students' capacities to implement regulatory frameworks to limit unhealthy diets and promote physical activity. Much, however, depends on knowledge of the law's potential in responding to NCDs. Even though opportunities existed to infuse topics on law and NCDs into some courses, say a course on human rights at the School of Law, or a course on NCDs at the School of Public Health, that did not begin to happen until the academic staff were sensitised through training. While training is critical, staff must be equipped with terms of resource materials such as textbooks. The toolkit on regulatory approaches to NCDs is a valuable resource that can be distributed to any institution planning to embark on integrating law and NCDs. To provide a firm basis for integration, it will be critical that law and NCDs are entrenched into curricula, which in turn means that the different institutions have to undertake some form of curriculum review following their own procedures. For purposes of multidisciplinaryism, it will be important if academics from all the relevant schools are involved in such a review. Thus, the School of Law and the School of Public Health can work out a course that can be taught through the joint efforts of academics from both schools. Students can also engage in joint research and community projects to foster collaborative solutions for NCD problems. Finally, it will be important to ascertain the impact of integration, and as such, measures for monitoring and evaluation may have to be implemented. While it is at least possible to do that within a school by for example counting the number of students going through a course on law and NCDs or writing a research paper on the topic, establishing the extent to which legal and public health graduates are using their knowledge on law and NCDs might be difficult. Future research may determine modalities for such evaluation.

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