

BOOK REVIEW

## ***Business and Human Rights Law and Practice in Africa,* Damilola Olawuyi and Oyeniyi Abe (eds) (Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing, 2022)**

Offering a comprehensive presentation of the business and human rights (BHR) landscape in Africa is a challenging task not only because of scant scholarship with such focus but because of the diversity of legal traditions, languages and cultural contexts on the continent. In the edited volume, *Business and Human Rights Law and Practice in Africa*, Olawuyi and Abe commendably attempt this task. The volume brings together contributions from practitioners and scholars within and outside Africa who analyse a range of laws, policies and normative frameworks in multiple countries through a BHR lens and with the United Nations Guiding Principles (UNGPs) as the organizing theme. The countries covered include Cameroon, Kenya, Nigeria, Uganda and South Africa, and the issues discussed include involuntary displacement and resettlement, environmental pollution, climate change, tax governance, extractivist business models, and access to justice.

To tackle these issues, the volume adopts a mixed methodological approach, which blends descriptive legal and policy assessment with a few exploratory accounts. While the field of BHR is interdisciplinary, drawing from law, human rights, business ethics, management, and organisational studies, among others,<sup>1</sup> this current volume is predominantly legal. The volume has two main goals which imbue each of the chapters: (1) to showcase and analyse some of the national and regional legal, policy and institutional frameworks alongside the challenges in Africa that impact or have the potential to impact the promotion of BHR principles and practices, particularly the implementation of the UNGPs; and (2) to present ‘good-fit’ and home-grown approaches to overcome identified barriers.

Organizationally, the book consists of three parts with thirteen chapters. The first part has two chapters: chapter 1 introduces the volume by highlighting the general context and the book’s organizing principles. The second chapter analyses the status of the state duty to protect under the UNGPs prevailing on the continent generally and concludes with a call to states to close the gaps between law and practice if they are to meet their obligations. Specifically, African states must create holistic and effective governance frameworks through adequate regulation and enhance their enforcement and adjudication capacity.

The second part, containing nine chapters, expounds on some existing national laws, policies and regulations that illustrate how states are approaching their obligation to protect human rights. Within these chapters, the contributors explore whether these initiatives incorporate the imperative to overcome the internal barriers facing states in meeting this obligation. Additionally, they question whether these initiatives take an outward focus, with the aim of constraining (and perhaps guiding) businesses to be more rights-respecting. They also evaluate the extent to which national laws and policies align with international human rights standards, including the UNGPs and highlight where the

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<sup>1</sup> Karin Buhmann, Björn Fasterling and Aurora Voiculescu, ‘Business and Human Rights Research Methods’ (2018) 36:4 *Nordic Journal of Human Rights* 323–332.

two diverge, thus revealing where states fall short, which is also where companies need to be doing more to meet their responsibility.

The third part has three chapters and focuses on the state's role in enabling access to remedy for victims of human rights violations by businesses. This section strikes a good balance between discussing well-known barriers and potential solutions. Such solutions exist in innovative legal practice and national case law jurisprudence, which are highlighted throughout the volume. Furthermore, it encourages the use of sub-regional and regional courts as alternative forums for justice. Part four concludes with two chapters. The penultimate chapter presents the draft African Union-level BHR policy initiative, which, if concluded and adopted, will be part of the BHR policy framework, and the final chapter is a call to action.

Generally, many of the contributions illustrate the volume's stated objectives and give a noteworthy overview of the legal and policy landscape and implications for BHR in Africa. For instance, the contributions by Nojeem Amodu, Herbert Kawadaza and Fola Adeleke, all touch on corporate governance in selected countries' company laws and problematize the prevalence of shareholder primacy as a key barrier to corporate accountability for human rights violations. In a similar vein, Muriuki Murungi focuses on corporate accountability for climate change and highlights directors' liability as a potential regulatory response that has not received much scholarly attention.

Similarly, Hope Joyce Otieno and Semie Sama provide a comparative view of key governance gaps in the protection of the rights of Indigenous communities, specifically regarding land tenure rights between Kenya and Cameroon. Otieno explores the implications of foreign direct investments on the rights of indigenous people in Kenya and shows how the protections promised by the legal recognition of community land tenure are impeded by weak implementation and oversight, which is a manifestation of structural injustices that have contributed to their marginalization and vulnerability. Sama, in turn, discusses the inadequacy of existing legislation in Cameroon, which does not recognize Indigenous communities' land ownership rights. Both authors contemplate a role for the UNGPs to fill the gaps in the implementation of the state obligation to protect, for example, through greater state policies alignment with the UNGPs, as well as in the conduct of companies by incorporating the rights of Indigenous people in their due diligence. While the UNGPs can play a complementary role in the protection of marginalized groups, including Indigenous communities and the intersecting inequalities they face, such use would require critical assessment of the UNGPs themselves, particularly the individualistic and state-centric foundations of all the three Pillars.<sup>2</sup>

A distinguishing characteristic of this volume is that it highlights cases from the continent's national, sub-regional and regional judicial and quasi-judicial bodies. Hassan M. Ahmad's contribution presents a comprehensive overview of substantive and procedural challenges to access to justice both in host (African) and home states. The chapter highlights the under-development and under-utilization of tort law (for tort claims by victims of corporate abuse). It also challenges African host states to do more to advance justice for victims by adopting legislations that remove access barriers such as high litigation fees and costs, delay and corruption. This chapter is an engaging exploratory discussion on how African judiciaries, which he describes as the missing forum, can adopt innovative procedural mechanisms and progressive doctrines to promote access to justice. Additionally, Adaeze Okoye advocates for the strengthening of regional and sub-regional courts to serve as alternative justice forums.

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<sup>2</sup> Melisa N Handl, Sara L Seck and Penelope Simons, 'Gender and Intersectionality in Business and Human Rights Scholarship' (2022) 7 *Business and Human Rights Journal*, 8 June 2022, 201–225, <https://doi.org/10.1017/bhj.2022.12>.

The discussion on strengthening African forums further unpacks some of the historical and contemporary reasons for the lack of African forums for victims of corporate abuse. In this regard, Ahmad discusses the setback that results from legal transplantation and how such transplantations do not always reflect the transplanting state's priorities and needs – thus becoming a barrier to access to justice. An additional challenge is that of the duality of legal systems, where formal systems of law transplanted from former colonial rulers compete with African customary norms and practices that local populations still rely on for dispute resolution. This is thought to affect the demand for formal laws, which in turn leads to the under-development of legal doctrines and African judicial systems more generally. One solution to this conflict proposed under the draft regional framework is for states to support traditional justice institutions as part of non-state-based grievance mechanisms, by fostering compliance with international norms. However, this is not the same as integrating customary law into formal legal systems, which leaves the duality of legal systems open.

The chapters by Adekele, Ahmad, Ekhatior, Onyejekwe and Richards discuss some of the ongoing and not fully settled issues in the BHR field that raise unique challenges for the implementation of BHR. For instance, Adekele discusses the recurring issue of the predominance of shareholders' profit maximization as the primary purpose of business and how it is inimical to business respect for human rights. Using Lonmin Mining (commonly referred to as the Marikana Mining case) as a case study, she exposes how this model aggravates inequality. She further contends that corporate social responsibility (CSR) and multistakeholder initiatives (MSIs), typically used by businesses to indicate concern for non-equity holders, mask what needs to change: the structure and purpose of business. As a result, she recommends the need to pursue and adapt alternative business models, with the goal of providing public benefit and promotion of community interests.

Ekhatior, Onyejekwe and Richards's chapter on human rights and taxation uses as its springboard the established rationale that sustainable, well-designed, and efficient tax policies support the realization of human rights. Using Nigeria as an example of what portends many African countries, the authors recommend the enactment of a Taxpayers Bill of Rights as an antidote. The idea of a new area of rights is striking, but unfortunately, no details are provided, particularly regarding how these rights would be implemented in relation to business.

Alongside the above strengths, the volume could have benefited from a nuanced and comprehensive assessment of some subject matters. Given that it aims to assess the application of the 'African perspective on the opportunities and challenges of implementing the UNGPs and other BHR norms' and examine the potential for 'home-grown' implementation approaches,<sup>3</sup> the volume would benefit from defining what an African perspective means. Similarly, engaging with the question of whether the UNGPs are complementary or in harmony with the African perspective and indigenous values such as collective rights, would have been worthwhile for the first Africa-specific BHR edited volume.

Most chapters take the legitimacy of the UNGPs for granted despite well-documented critiques<sup>4</sup>, including by African scholars.<sup>5</sup> None of the contributing authors engage with the critical literature. The majority treat the UNGPs as having a direct effect, with the only

<sup>3</sup> Damilola S Olawuyi and Oyeniya O Abe (eds.), *Business and Human Rights Law and Practice in Africa* (Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing, 2022).

<sup>4</sup> Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013), <https://doi.org/10.1017/CBO9781139568333>; Florian Wettstein, 'Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment' (2015) 14:2 *Journal of Human Rights* 162–182, <https://doi.org/10.1080/14754835.2015.1005733>.

<sup>5</sup> Akinwumi Ogunranti, 'Localizing the UNGPs – An Afrocentric Approach to Interpreting Pillar II' (2023) 8:1 *Business and Human Rights Journal* 66–84.

acknowledged caveat being the slow pace of implementation. Similarly, the editors should have made clear what they mean by 'Business and Human Rights Law'. Left unexplained, it could lead to confusion. Emerging reporting and due diligence laws could be categorized as BHR laws but the universe of BHR is much broader and interdisciplinary. Among others, it cuts across the fields of business ethics, management and law by way of international human rights laws, corporate law, labour laws, and laws regulating specific business activities. The latter seems to be the spirit with which the volume is written.

The volume seems to be disproportionately focused on the common law system, even though the editors try to counterbalance that with contributions that highlight the regional and subregional standards. More contributions from other legal traditions would have rendered it more comprehensive. This is particularly so given that corporate governance approaches under the common law and civil law traditions have key differences. For instance, an empirical study has shown how civil law gives weaker shareholder protection compared with the common law, which extends strong shareholder protection.<sup>6</sup>

Despite these limitations, the volume, as the first of its kind to map out the BHR landscape in Africa, has done a commendable job. It will open readers' eyes to the diverse BHR concerns and emerging trends in the continent from a legal perspective. It is recommended to those looking to expand their understanding and knowledge of the African BHR landscape.

Wangui Kimotho and Kebene Wodajo   
University of St Gallen Institute for Business Ethics  
Switzerland  
[rose.kimotho@unisg.ch](mailto:rose.kimotho@unisg.ch)  
[doi:10.1017/bhj.2024.2](https://doi.org/10.1017/bhj.2024.2)

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<sup>6</sup> Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'Law and Finance' (1998) 106:6, *Journal of Political Economy* 1113–1155.