

BOOK REVIEW

Corruption and Human Rights Law in Africa

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WT Mugadza*



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Author

Willard T Mugadza

Affiliation

North-West University
South Africa

Email

23890363@nwu.ac.za

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Abstract

This contribution reviews the book by Kolawole Olaniyan on corruption and human rights law in Africa. The book, *Corruption and Human Rights Law in Africa*, provides a framework for complementarity between promoting and protecting human rights and combatting corruption in Africa.

Keywords

Corruption; human rights; Africa.

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Review*

This is one of the most recent additions to the Hart Publishing series in Studies in International Law. Hart Publishing (part of Bloomsbury Publishing since 2013) has become synonymous with high quality legal publishing since 1996, and has not disappointed and with this text. The book is a thought-provoking and incisive commentary on the debilitating effects of corruption and the need for innovative measures to combat corruption in Africa. It is single authored by Kolawole Olaniyan, who is a Nigerian Lawyer and a Legal Advisor for the Amnesty International Secretariat. His area of specialisation is human rights. Here he has presented a well written and researched publication on the need for African countries to explore the use of human rights as an alternative measure to enhance the fight against corruption.

The book will be useful not only to academics, as its language is friendly and its schema clear, which will make it easily assimilable by non-academics such as human rights activists and other advocates of anti-corruption and proponents of the rule of law.

Part I is devoted to corruption and human rights law from a historical point of view, and the international dimensions of corruption and money laundering. Olaniyan acknowledges that that it is typical of African countries to have been riddled with corruption in all sectors both during the colonial period and after it. The intensity of corruption in Africa has increased due to a number of factors which Olaniyan identifies (at 54-55) as *inter alia*: the legacy of the weak rule of law and ineffective governance; inadequate checks and balances within the executive branch; the weak observance of human rights; non-democratic regimes; the patronage systems that fill government posts; under-developed civil service and career systems; the lack of independent legal, judicial and, institutional mechanisms; impunity for perpetrators; and a lack of will on the part of political leaders. This broad identification of the general causes of corruption in African countries reflects the same causes that are recognised internationally.

In addition, Olaniyan argues that the lack of an internationally accepted definition of corruption has exacerbated not just the diagnosis of corruption but also the appropriate prescription to cure corruption. In this regard, he contends that the current globally accepted definition of corruption. That is

* Willard T Mugadza. LLM and LLB (Honours). LLD – candidate North-West University, Potchefstroom, South Africa. Email mugadzapsalm23@gmail.com or 23890363@nwu.ac.za.

"abuse of power for personal gain," defines corruption from a criminal law perspective. The author submits that this definition fails to define corruption from a human rights perspective. According to him, this has reduced the fight against corruption to just an ordinary criminal law violation, where it may seem to have no victims. The effect of this is that the sanction has become criminally inclined and there is little or no recourse for the actual victims of corruption, who are the ordinary citizens. In all African countries the fight against corruption is regulated mainly through criminal law measures.

While addressing the definitional deficiencies of corruption and their detrimental consequences, Olaniyan recognises the different role players involved in corruption. These include but are not limited to individuals, government officials at different levels, and private organisations - foreign-owned companies in particular. The book proceeds to engage in a general discussion of corruption and human rights, while remaining true to its particular theme, which is that human rights are not regarded as an integral part of the fight against corruption. It is in this context the author embarks on the main part of the discussion that forms the core of this work, in which he examines the effectiveness of the criminal law instruments used to combat corruption and, if they are unsatisfactory, considers the role human rights law might play in addressing any deficiencies.

Part I of the book deals with two themes. The first section is a general overview of corruption and human rights. The second is a discussion of the international dimensions of corruption and money laundering. Olaniyan uses this discussion to show how money laundering can be used to fuel corruption, in that "dirty money" which may have been corruptly obtained may be "cleaned" through normal financial systems in order to allow the money to be used again (at 77).

Olaniyan highlights that African countries are the worst affected by money laundering, and he cites Nigeria as an example. Nigeria has lost an estimated US\$ 400 billion since 1960 through corruption and money laundering.

He focusses on the two key instruments pertinent to fighting money laundering and corruption in Africa, namely the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating Corruption. However, Olaniyan rightly points out that most of the provisions in these instruments are treated as "soft law" by most African countries. According to the author, this has resulted in the continued use of

money laundering as a conduit for corruption particularly by multi-national companies operating in African countries.

Although this book is not exclusively devoted to the topic of money laundering, Olaniyan discusses the importance of African countries' combatting money laundering, due to its detrimental effects. It is common cause that if a country is able to curb money laundering, then by the same token it is capable of fighting corruption, as both practices flourish under the same conditions.

It is important to recall that the focus of the book is to highlight the negative effects of corruption on human rights as well as to explore the use of human rights as an additional tool that can be employed by African governments to curb corruption, so that there is no over-reliance on the use of criminal law. In discussing the relationship between corruption and money laundering, Olaniyan does not do justice to the topic of the source of money laundering. This can be understood, as money laundering, like corruption, is secret in nature, and has recently become even more difficult to fathom because of the use of sophisticated technology in wiring money transfers coupled by bank secrecy in certain jurisdictions.

The author does not offer practical solutions pertaining to what the victims of money laundering can do in order to find redress. However, his highlighting of the numerous causes and effects of corruption and money laundering as well as his identifying that some of the culprits are politically exposed persons (at 90) are good starting points. He correctly points out that in Africa some of the people implicated in money laundering are shielded from accountability by the political systems of their countries. In this regard, he cites the example of the son of President Teodoro Nguema Obiang Mangué, who laundered and transferred US\$110 million from Equatorial Guinea to the United States. This may give the victims of money laundering at least a starting point in identifying the politically exposed persons, for example through the media, after which they may be able to kick-start the legal process possibly from a human rights perspective.

Part II of the book broadly discusses national and international laws against corruption. Olaniyan divides Part II into two sub-themes, which are national legal frameworks for fighting corruption in Africa (Chapter 3) and international legal frameworks for fighting corruption across Africa (Chapter 4). Part II is well researched, which this is evidenced by the selection of literature discussed and the detailed discussion of the constitutional provisions and the legal frameworks of three selected jurisdictions. In the

same vein, Part II concludes with a detailed and well-argued comparative analysis of the UNCAC, the AU Convention, the SADC Protocol and ECOWAS.

Under the sub-theme on national legal frameworks for fighting corruption (Chapter 3), the author chooses three countries as the subjects of case studies, namely Angola, Equatorial Guinea and Nigeria (at 119). He justifies his choice of jurisdictions (discussed at 121) by arguing *inter alia* that all are constitutional democracies, have an array of legislation that seeks to combat corruption, and suffer from astronomical levels of corruption, which is symptomatic of the majority of African countries, arguably with the exception of Botswana, Cape Verde, Mauritius and Rwanda. These four countries are ranked in the top 50 of the least corrupt countries in the world, according to the Transparency International Corruption Perception Index 2016.

Chapter 3 considers the international standards and principles that are necessary in the fight against corruption as envisaged in UNCAC, the AU Convention, the SADC Protocol on Corruption and the ECOWAS Protocol on Corruption. Internationally recognized principles such as transparency, accountability and integrity must be reflected in African Constitutions. Olaniyan argues out that it is possible to use Constitutions to combat corruption from a human rights approach. He develops his argument (from 121-139) by reasoning that public officers are bound not to be corrupt by reason of the oath of office they have taken.

In addition, the author reaffirms the importance of codes of conduct, asset declarations and anti-corruption-related objectives. In a brief but well-argued thesis, the author discusses the impact of legislation in combating corruption. He meticulously highlights how legislation is biased towards preventative measures that are founded mainly on criminal law principles and criminal enforcement. He authoritatively states that corrupt acts such as bribery are prohibited and punishable under almost all African jurisdictions, yet corruption does not seem to be declining despite the existence of an array of criminal legislation.

The author addresses the substantial deficiencies of criminal legislation at 135-139. For example, he highlights how criminal legislation has failed to adequately regulate matters such as bribery, the receiving of gifts, and the conflict of interest and assets. He maintains that what constitutes the administration of the receipt of gifts and the conflict of interest and assets is a matter of interpretation. This means that what may be viewed as the

receipt of a gift in one jurisdiction may be viewed as a corrupt act in another jurisdiction. Such inconsistencies perpetuate corruption. Hence the need to employ a human rights approach to complement the existing criminal mechanisms. Chapter 3 concludes with a thorough discussion (at 140-190) of legislative impediments to fighting corruption. Some of the legal barriers highlighted by Olaniyan include immunity clauses, prosecutorial discretion, and the frequency with which political appointees are made to key posts. Most if not all African countries are confronted with these challenges.

Chapter 4 comprises of 39 pages and addresses the international legal frameworks for fighting corruption across Africa. This chapter is an amplification of the first part of Chapter 3 and its main purpose (at 152) is to examine and compare four instruments: UNCAC, the AU Convention, the SADC Protocol and the ECOWAS Protocol. This part of the text eloquently and thoroughly investigates the anti-corruption institutions provided for in these instruments. In this Chapter Olaniyan analyses the effectiveness of these instruments in combatting corruption from a human rights perspective.

The author uses UNCAC as the benchmark against which the other three instruments are measured. He justifies the choice of UNCAC by arguing first that it is comprehensive and second that it is international in character. More importantly, this chapter investigates whether there is sufficient compliance with these instruments at domestic level. The main findings of the chapter are that the characterisation of all forms of corruption as being of the same degree without distinguishing between grand corruption and petty corruption is a major contributing factor to the ineffectiveness of anti-corruption measures; that the lack of the implementation and enforcement of international and regional instruments supports their dismissal by African nations as soft law; and the unrestrained recognition of sovereignty has given immunity to top politicians such as Presidents and their cronies who are implicated in corruption.

Chapter 4 concludes by advocating the use of human rights law in Africa to bridge the gap between the use of criminal law in fighting corruption and astronomical levels of corruption currently beleaguering the African continent.

Part III is divided into three chapters and begins with Chapter 5, which discusses how corruption undermines the African Charter on Human and Peoples' Rights. This chapter proceeds by showing that the purpose of the African Charter is to promote and protect human rights. Olaniyan reaffirms that the African Charter must be interpreted in the spirit of the 1969 Vienna

Convention on the Law Treaties, in that the ordinary grammatical meaning of words must take precedence when interpreting treaties.

In this context Olaniyan suggests that the African Charter must be interpreted to promote and protect human rights and he advocates a creative interpretation of the African Charter, as held by the Africa Commission on Human and Peoples' Rights in *Amnesty International v Zambia* (discussed at 196-197). The author goes on to cap his well-researched and argued discourse by highlighting 18 human rights (such as life, movement, property, health, education and family) that are undermined by corruption (at 193-271). For example, Olaniyan articulately points out that the African Commission has sadly not been able to establish the nexus between the right to life and corruption (at 204).

This argument is quite profound if regard is had to the fact that corruption that takes place in the procurement of health facilities and medical resources. For example, the corrupt procurement of health facilities may result in the provision of inferior medical services which may directly or indirectly cause death or lessen life, which impinges on the right to life. In most cases the victim or his family do not have recourse against the corrupt person who might have contributed to his death.

What is critical in this chapter, as Olaniyan says, is that victims of corruption who are ordinary citizens have almost been totally ignored in the fight against corruption. He goes on to argue that governments have become inconsiderate to the remedies available to the victims of corruption by their continued use of criminal sanctions, which in actual fact have so far proved not to be successful. The author goes on to contend that on the proper construction and interpretation of the African Charter it is possible to clothe the victims of corruption with *locus standi*, which has been elusive in almost all African countries.

In this chapter Olaniyan is able to demonstrate that corruption has victims, and it is these victims that must be protected by using the existing international and regional instruments, which must be interpreted and properly enforced within the domestic jurisdictions. He notes that no case has been brought before the African Commission on the basis of corruption, a lack which has affected and undermined the human rights envisaged in the African Charter. In order to encourage the adjudication of the violation of human rights on the grounds of corruption, Olaniyan suggests that the Commission should adopt progressive legal concepts and principles, such as the precautionary principles and the public trust doctrine (at 274). This

chapter lays a very solid foundation for Chapter 6, which deals with the potential of human rights law in combating corruption in Africa.

Chapter 6 is the climax of the book. He persuasively argues that there is an obligation for states to promote the doctrine of permanent sovereignty over natural resources. The author links this obligation with Article 21 of the African Charter, which guarantees the right to resources (at 289), and which has also been called the "duty of care" (at 291). The importance of discussing Article 21 is that it enjoins positive obligations to ensure that resources benefit ordinary citizens.

In most African countries, especially in cases of grand corruption, multinational companies connive with corrupt politicians and government officials to exploit resources, and this prejudices ordinary citizens (whom Olaniyan classifies as victims of corruption). In this context Olaniyan argues that Article 21 clothes the victims of corruption with the legal force to hold their leaders accountable for corruption (at 291). The basis of this argument is that human rights are the benchmark upon which the relationship between the citizens and the state must be tested.

Therefore, interpreting and enforcing corruption laws without taking into consideration the interests of the victims of corruption (especially the vulnerable) is a travesty of justice. Olaniyan expresses the opinion that any interpretation of the laws on corruption which does not accord due weight to its victims is hollow (at 291). He describes an interview he had with an African Union Commissioner who admitted that corruption was rife in Africa and acknowledged that this a possible infringement of the African Charter (at 298-299). Olaniyan suggests that if that is the case there is hope that it may be possible to use the African Charter to hold political leaders and multi-national companies accountable for grand corruption from a human rights perspective.

In other words, there has to be proper evidence that proves that the African Charter has been violated through corrupt acts. The author bemoans the fact that there is no active and deliberate adjudication of cases of corruption both at the African Commission and at the African Court. He contends that, in order to breathe life into Article 21, to enable the African Charter to fight corruption from a human rights approach, there is a need to rely on Articles 60 and 61 of the African Charter, which enjoin that when interpreting the Africa Charter guidance must be sought from international law, and this includes the Universal Declaration of Human Rights (at 303).

The author balances his argument by accepting that there are some procedural and substantive legal hurdles that must be overcome in order to achieve success in combatting corruption from a human rights point of view. Notable legal hurdles identified by Olaniyan include state immunity as well as legal standing and causation. The author mentions existing precedent that can be used as a starting point to deal with these legal hurdles, such as *SERAP v Nigeria*, which was decided by the ECOWAS Court of Justice (Communication 155/96). This chapter concludes by reinforcing the observation that corruption has victims who are ordinary citizens, and making the claim that the time has come for a robust and more vigorous human rights approach to combatting corruption for the sake of transparency and accountability between the state and its citizens.

Chapter 7 is the concluding chapter of the book. Here the author reiterates his plea that corruption be combatted from a human rights perspectives in the African context, which must take the following into account: the comprehensive legal and judicial reforms required to combat corruption; the introduction of the office of the independent special counsel; the setting aside of trust funds for victims of corruption; asset recovery; the establishment of a mutual review panel; the integration and harmonization of anti-corruption treaties; the improved roles of civil society in combatting corruption; and the establishment of a regional centre for civic education and of a regional law enforcement academy.

This book is well researched and written, and brings with it a refreshing approach to combatting corruption in Africa. It may be the first to address comprehensively the human rights approach to fighting corruption in Africa. The author argues that five things must be present if the fight against corruption from a human rights perspective is to be successful: the political will; a creative and dynamic interpretation of the legislative framework; advocacy (lobbying by NGOs at international, regional and domestic level); taking the victims of corruption seriously; and a comprehensive and inclusive anti-corruption strategy that fully recognizes and advances the human rights approach to fighting corruption. Although the book is written with the intention of addressing the issue of corruption from an African perspective, its argument is of global application.

While this work may be viewed as highly academic, the simplicity of its arrangement, language and arguments will make it appealing to a wide-range of stakeholders such as scholars, judicial officers, ordinary citizens, judges and advocates of human rights. It contributes to the most pertinent debate engulfing Africa at the moment, that is, how to effectively deal with

corruption – and it offers the human rights approach not as a replacement of criminal measures but to complement the already existing criminal measures, in order to give a voice to the victims of corruption in Africa, who are, inevitably, ordinary citizens.