

Introduction: Intractable problems of human rights – Law, legitimacy and the limits of protection

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The history of human rights on the African continent is punctuated by bold normative ambition and deep disillusionment in equal measure. On the one hand, African states have constructed one of the most elaborate regional human rights frameworks in the world, anchored in the African Charter on Human and Peoples' Rights (African Charter) and its supporting institutions. On the other hand, the lived realities of millions of Africans reflect a disturbing persistence of violence, exploitation and exclusion. This paradox – of abundant laws but persistent violations – is the central concern of this volume. It is also the problem that motivated the wider research programme, 'When the law is not enough: Tackling intractable problems of human rights'.¹

We adopt the term 'intractable problems' to denote human rights violations that have resisted decades of normative and institutional effort. These violations are 'intractable' not because they are insoluble, but because the dominant mode of legalistic response has proved largely insufficient. Child labour, human trafficking and the persecution of lesbian, gay, trans, queer, intersex (LGBTQI+) persons exemplify these stubborn problems. Each is prohibited by a rather extensive body of international and regional instruments, recognised in domestic law, and monitored by institutions at multiple levels. The paradox is that each continues to devastate lives across the continent, mutating in form

1 T Kaime, I Zundel & S Debele 'When the law is not enough: Tackling intractable problems of human rights' (Project application, 2021).

and finding sustenance in the very structures – legal, political, cultural, economic – that are meant to eradicate them.²

This introductory chapter reflects on the contributions in the book, situating them within broader debates on law's limits, legitimacy frameworks, and the possibilities of integrated and transformative approaches. We advance three interrelated arguments: First, the persistence of intractable problems is symptomatic of the disjuncture between law *on the books* and law *in action*:³ The former is usually so orderly, and the latter quite messy. Second, the endurance of these problems is enabled by deeper cultural, economic and political structures that the law alone cannot dismantle.⁴ Third, novel ways of thinking – across disciplines, across traditions and across normative registers – are necessary if human rights are to be meaningful in Africa.⁵ According to Kaime, 'if human rights are to gain any resonance, their purveyors must necessarily learn to speak in tongues'.⁶ These chapters are the authors' attempts to do that and step beyond the templates offered by law.

The various chapters in this collection explore the intractability of various issues across several African jurisdictions. The collection focuses on three broad areas, namely, child labour, sexual orientation, gender identity, gender expressions, sex characteristics (SOGIESC) and human trafficking. The chapters grapple with the various aspects of these broad areas to highlight the extent to which they remain intractable human rights issues. The chapters constitute the author's efforts to understand why, despite the decades of resourcing and establishment of extensive legal frameworks across jurisdictions, some human rights violations persist with little or no change.

2 S Dersso 'Forty years of the African Charter and the reform issues facing the discourse and practice of human rights' (2021) 21 *African Human Rights Law Journal* 655.

3 S Tamale *Decolonisation and Afro-feminism* (2020) 191.

4 F Fanon *The wretched of the earth* (1963).

5 U Okeja *Normative justification of a global ethic: A perspective from African philosophy* (2013).

6 T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009).

Law, the human, and the intractability of exclusion

Zundel and Debele (chapter 2) begin by challenging the category of the 'human' itself and present a fundamental and overarching positioning of the human as an intractable problem of the law. Drawing on Wynter,⁷ Mbembe⁸ and African communitarian traditions, they demonstrate how colonial and post-colonial states have conspired to delimit humanness in ways that exclude queer Africans. Far from remedying this exclusion, the law entrenches it – oscillating between ignoring violence and actively criminalising existence. This paradox confirms a long-standing argument that legal frameworks lack traction when detached from the social legitimacy of the communities they purport to regulate.⁹ The legitimacy deficit of human rights regimes is starkly visible in relation to LGBTQI+ struggles, where colonial era criminal codes continue to be defended as 'authentically African'.¹⁰ In this respect, the intractability is not merely doctrinal but ontological: As long as categories of personhood are policed through heteronormativity and colonial moral codes, law reproduces exclusion.

Child labour and the structural roots of vulnerability

Chapters 3 to 5 explore child labour. Child labour can be seen as a rupture in communal duties to children; trafficking as a betrayal of obligations of hospitality and protection; queer exclusion as a denial of kinship and belonging. Kaime's legitimacy critique¹¹ suggests that duties and solidarity might be productive anchors for rights frameworks that resonate with African normative universes. Chirwa and Kaime (chapter 3) highlight the under-utilised potential of the African Commission on Human and Peoples' Rights (African Commission) in addressing child labour, building on earlier socio-legal work on the African Charter on the Rights and Welfare of the Child (African Children's Charter), which

7 K McKittrick & S Wynter *On being human as praxis* (2015).

8 A Mbembe *A critique of black reason* trans L Dubois (2017).

9 Kaime (n 6).

10 R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 104.

11 Kaime (n 6).

stressed that children's rights gain legitimacy through participatory and contextualised implementation.¹² Instead of boilerplate procedures, more imaginative approaches could actually bring the African Commission closer to the constituencies it seeks to serve. Fiattor (chapter 4) situates child labour in mining within global corporate structures, echoing scholarship on business and human rights that stresses how local exploitation is shaped by global capital.¹³ To counter this, it is critical that international standards are also internalised at the local level through active legitimacy-seeking efforts. Msosa (chapter 5) demonstrates how Malawian efforts to eliminate child labour confront the realities of poverty and weak capacity. Msosa echoes the approach suggested by scholars such as Ibhawoh in appreciating the importance of localising human rights norms by using various strategies, such as adopting familiar language and terminology.

This set of articles confirms the critical insight that the persistence of child labour is not a failure of law alone but of political will, economic justice and social protection. Dinokopila's institutional critique has repeatedly shown that enforcement gaps often reflect not legal design but political economy and institutional weakness.¹⁴ Eliminating child labour requires an adaptive design that takes into account these realities.

Human trafficking and the crisis of legal formalism

Chapters 6 to 9 tackle the scourge of human trafficking. Nanima and Kaime (chapter 6) analyse the work of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), while Protas and Kaime (chapter 7) examine blurred boundaries between migration and trafficking in East Africa. Wahu and Kaime (chapter 8) foreground Kenyan domestic workers in Saudi Arabia, and Iroanya (chapter 9) critiques South Africa's formalistic, prosecution-heavy approach. All of these contributions reveal how trafficking persists not because of the absence of law and its structures, but rather because of the

12 Kaime (n 6) 57.

13 J Nolan 'The corporate responsibility to respect human rights: Soft law or not law?' in S Deva & D Bilchitz (eds) *Human rights obligations of business: Beyond the corporate responsibility to respect?* (2013) 138.

14 B Dinokopila 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights' (2010) 10(1) *African Human Rights Law Journal* 26.

dominance of criminal law-focused paradigms. As Gallagher has shown, international anti-trafficking law is overwhelmingly prosecutorial, sidelining victim protection.¹⁵ African experiences confirm this imbalance. Kaime's legitimacy critique helps explain why such laws remain ineffective: Frameworks imposed without legitimacy or socio-economic grounding fail to resonate in lived contexts.¹⁶

Queer bodies, intersex lives and the politics of belonging

Chapters 10 and 11 return to identity and exclusion. Wahu and Maranya (chapter 10) interrogate conversion practices imposed on intersex persons, while Dinokopila and Kaime (chapter 11) situate anti-LGBTQI legislation within colonial legacies and post-colonial sovereignty struggles. These contributions resonate with Tamale's insistence that African debates on sexuality are fundamentally about power, not morality.¹⁷ The contributions show how law functions not only as an insufficient shield but also as an active producer of exclusion. Dinokopila's research on decriminalisation reminds us that such law making is deeply political: often less about universality than about anxieties of sovereignty and belonging.¹⁸

The case for socio-legal, critical and grounded methodologies

This volume also models methodological pluralism. Fiattor (chapter 4) and Wahu & Kaime (chapter 8) exemplify socio-legal approaches by situating law within economic and migratory structures. Zundel & Debele (chapter 2) and Wahu & Maranya (chapter 10) deploy grounded perspectives, starting from the lived realities of queer and intersex Africans. Protas & Kaime (chapter 7) and Dinokopila & Kaime (chapter 11) engage critical theory and Third World Approaches to International Law (TWAIL) debates on sovereignty and exclusion.¹⁹

15 A Gallagher *The international law of human trafficking* (2010).

16 T Kaime 'Legitimacy, public international law and intractable problems' (2023) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 399-413.

17 S Tamale (ed) *African sexualities: A reader* (2011).

18 B Dinokopila 'The decriminalisation of homosexuality in Botswana' (2022) 70 *Journal of Homosexuality* 2201-2225.

19 BS Chimni 'Third World approaches to international law: A manifesto' (2006) 8 *International Community Law Review* 3.

These approaches converge on a central insight: Law must be studied in its context, with consideration of its legitimacy and lived impact. This socio-legal, critical and grounded orientation points toward a new research agenda for African human rights – one that interrogates law’s complicity, foregrounds legitimacy and re-centres lived struggle. It calls for an encompassing critique of law’s empire and opens up the possibilities for a relational account of law and its antecedents.

Conclusion: Reimagining human rights in Africa

The law is necessary, but not enough. Intractable problems of human rights persist because they are rooted in colonial epistemologies, global capitalism, patriarchal norms and fragile institutions. We argue that rights frameworks succeed only when legitimised through and by lived realities.²⁰ From this viewpoint, institutions falter less from design flaws than from political and structural constraints. Reimagining human rights in Africa requires three moves: a *critical move* interrogating law’s complicity; a *decolonial move* drawing on African traditions of solidarity and duty; and a *methodological move* embracing socio-legal, grounded and interdisciplinary approaches. Intractable problems demand no less. Together, these insights highlight the need for strategies that are integrated, grounded, and legitimacy seeking: a call that is well-represented throughout the contributions in this volume.

20 Kaime (n 6).