

Deva, Surya and Birchall, David (eds), *Research Handbook on Human Rights and Business* (2020), Edward Elgar Publishing Cheltenham (UK) and Northampton (US). Pp 576. Price Rs. 26, 298/- £48 (e-book).

How business can contribute to the post COVID recovery

The inequities of globalisation have never been more starkly demonstrated than in the Covid-19 pandemic. In India, as in many other countries, this has manifested itself in an explosion of business-related human rights violations with the lowest paid losing their jobs, an increase in forced labour and breaches of many fundamental human rights norms. The world watched as millions of informal migrants walked back, sometimes hundreds of kilometres, to their villages only to be faced with a further humanitarian crisis. This continues as migrants return to the cities to be confronted with job shortages amidst a downturn in the global economy. Whilst the pandemic has been labelled ‘unprecedented’, the extensive business-related human rights violations we are witnessing are rooted in underlying economic and political issues. It is a situation that has highlighted the urgency of developing state and non-state mechanisms to ensure a consistent response to these violations, including on global issues such as climate change, migration and poverty.

As far back as 1999, the then United Nations (UN) Secretary-General Kofi Annan, realised the necessity of this task. In a keynote address at the annual meeting of the World Economic Forum (WEF) in Davos, which in retrospect appears prophetic, he promoted United Nations (UN) norms on human rights, labour standards and the environment to address corporate conduct, he stated:

Globalisation is a fact of life. But I believe we have underestimated its fragility. The problem is this. The spread of markets outpaces the ability of societies and their political systems to adjust to them, let alone to guide the course they take. History teaches us that such an imbalance between the economic, social and political realms can never be sustained for very long... The industrialized countries learned that lesson in their bitter and costly encounter with the Great Depression... Our challenge today is to devise a similar compact on the global scale, to underpin the new global economy

The above quote is recorded in a chapter entitled ‘The social construction of the United Nations Guiding Principles on Business and Human Rights’ by John Ruggie in ‘Research Handbook on Human Rights and Business’¹ (the Handbook). Ruggie was one of the architects of the global compact, one of the first UN initiatives on business and human rights. He later went on, as the UN Secretary General’s Special

1 Deva, Surya and Birchall, David (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing, 2020).

Representative for Business and Human Rights, to develop the UN ‘Guiding Principles on Business and Human Rights’(guiding principles)in 2011, which established the three-pillar “Protect, Respect and Remedy” framework. In his chapter Ruggie summarises the framework as follows: “(1) states have a *duty to protect* against human rights abuses by third parties, including business, through policies, regulation, legislation and effective enforcement; (2) business enterprises have an independent *responsibility to respect* human rights; that is, to avoid people’s human rights being harmed through their activities or business relationships and to address harms that do occur; (3) where human rights are harmed, affected individuals and communities should have access to *effective remedy*, and both states and enterprises have a role to play in enabling this to occur”. The guiding principles do this by adopting 31 principles, each with a commentary, elaborating their meaning and implications for law, policy and practice. The handbook is a timely, welcome and extensive (at over 500 pages, yet admittedly not comprehensive) research publication, with chapters from experts, which looks both at the field of business and human rights (BHR) and deconstructs and critiques the guiding principles.

In the opening introduction of the handbook, Surya Deva one of the handbook’s editors and a member of the UN Working Group on Business and Human Rights tasked with implementing the guiding principles, describes the journey that the interface between business and human rights is embarked on. In his view, the evolution can be analysed in three broad eras, the ‘business *or* human rights’era, the ‘business *and* human rights’and the ‘business *of* human rights’ era. In conceptualising these epochs, Deva draws on the 1984 Bhopal gas disaster, the enormity of which was and remains one of the motivations for the making businesses accountable for their human rights violations. However, Deva’s point is that whilst the eras may have originated consecutively, they do not currently exist sequentially, but co-exist with different concerns dominating the fractured discourse. So whilst the BHR era is currently dominating the scene, others still vouch for the business *or* human rights and the new era of business *of* human rights remains in its infancy. I would also add that despite the extensive and increasing business-related human rights violations we are facing, the continuity of the BHR era is not inevitable. Therefore, for BHR to respond effectively to the significant global issues Covid-19 has exposed it needs to be mainstreamed (and fast). However, as reflected upon by Deva in the passage quoted below, the BHR era currently lacks consistency and clarity to guarantee its growth and survival: “However, key differences exist regarding the normative basis of corporate responsibilities, the nature and extent of those responsibilities, the process of identifying individuals and communities to whom responsibilities are owed, and the modus operandi of enforcing corporate responsibilities in cases of non-compliance”.

The subsequent chapters of the Handbook further explore some of these crucial questions and go on to provide some tentative answers.

Human rights and business: History and evolution

Part 1 on the ‘Human Rights and Business: History and Evolution’ is not simply of interest from a historical perspective, but illustrates how few companies are currently engaged in a “serious and holistic implementation process” to incorporate human rights in their business activities. There is particular criticism of Corporate Social Responsibility (CSR), much promoted by the Government of India, as failing to provide accountability for business-related human rights violations. Over 20 years after Kofi Annan’s speech to the WEF, and nearly 10 years after the formal endorsement of the guiding principles by the United Nations Human Rights Council, companies’ actual commitment to the BHR era remains woefully low. In a 2016 study amongst 200 of the largest Swiss multinational companies, 61 per cent of the surveyed companies had neither a code of conduct nor a policy on human rights, with only 11 per cent explicitly endorsing the guiding principles. These results are even more striking when compared with a 2017 survey of 152 companies and their implementation of Human Rights Due Diligence (HRDD). HRDD is the process set out in the guiding principles for businesses to proactively manage potential and actual adverse human rights impacts with which they are involved. The guiding principles outline the four-step process, an assessment of human rights violations caused or contributed to by a company; acting on the findings; tracking responses and communicating how the impacts are addressed. The survey found that whereas 80 per cent of companies using dedicated HRDD *did identify* adverse impacts, conversely over 80 per cent of companies using non-specific HRDD (such as health and safety procedures) *did not identify* adverse impacts. This is presumably because those systems were themselves not human rights compliant. A recent 2020 study by the EU Commission found that current regimes of voluntary measures have failed to significantly change the way businesses manage their social, environmental and governance impacts, nor provide a remedy to victims. This has been used to justify the forthcoming legislation on *mandatory* HRDD by companies, as part of the European Union Green Deal, to ‘build back better’ after the pandemic.

Corporate human rights due diligence

This shifting environment in the BHR era from voluntary to mandatory HRDD has been a key development in the last 10 years and Part II of the book is dedicated to scrutinising this important concept in more detail. It deals with the following crucial question: What should a company do when its HRDD identifies serious human rights violations such as child labour in its supply chain and where company engagement may move children from one form of child labour to a worse form of child labour? The guiding principles provide one solution through the concept known as

'leverage'. Leverage is an advantage that gives a company the power to influence another through its business relationships. Through building leverage a company(s) can improve its ability to deal with human rights violations in its supply chain. In the case of child labour, this may mean engaging with the supplier to improve wages, limit working hours, allow workers to organize, find educational options for the children or hire other members of the households. In another chapter, social auditing comes in for criticism. Social auditing is a process by which a company verifies supplier compliance with human rights standards. However, its failure to effectively ensure and enforce compliance is exemplified by a number of high-profile disasters, including Rana Plaza and the fires at Tazreen and Ali Enterprises. In all three instances there had been social audits shortly before the disasters took place, indicating that there needs to be a move away from the heavy reliance on this method of verifying supplier compliance. The chapters on the readymade garments supply industry in Bangladesh and the HRDD in the extractive industries, both indicate that a 'new governance' approach is necessary and query whether HRDD could serve as a shield to ultimately avoid legal liability, or serve to bolster tort liability allegations by establishing a duty of care.

Regulatory role and the tools of states

In Part III, the book considers aspects of what the 'new governance' may look like through the regulatory role of states to fulfil their duty to protect. For decades, many states have relied on disclosure laws that require companies to disclose what they are doing to address any business-related human rights violations, without actually requiring them to address them. The rationale behind this contradiction is the reliance on pressure from consumers, investors and civil society organizations to achieve greater human rights protection. However, it is recognised that the enforcement of disclosure provisions are weak, with many of the negative impacts occurring in other countries and that therefore a mandatory HRDD regime would be necessary for full and proper disclosure. This raises another recommendation for the 'new governance' regime, that being the regulatory and adjudicatory jurisdiction over transnational business activities. Whilst states are increasingly asserting jurisdiction over transnational corporate conduct affecting human rights, the author of the chapter recognises that if there is to be *effective* protection of human rights, there is no realistic alternative than to continue this trend. Further this trend must not be limited to private companies, but extend to state-owned enterprises and in the public procurement of goods and services. In particular the 'new governance regime' offers an as yet unrealised opportunity to drive respect for human rights in global supply chains as well as domestically. This could be done by for instance, simplifying the complex legal structures of sovereign immunity and by transmitting labour clauses down the value chain as has been proven to work in some cases.

Human rights' interaction with trade, investment and finance

One aspect of the BHR era which has got less attention than it deserves, is the interaction with human rights and trade, investment and finance that is the subject of Part IV of the handbook. Indeed, some of the strongest proponents of mandatory HRDD have been investor organisations. What is advocated is a full-fledged re-thinking of global economic governance to align it more closely with human rights. This requires not only a rights-compliant international investment regime, but also for multilateral development banks to take a lead taken on managing the human rights impacts of their operations.

Heightened human rights risks: Groups and/or operating context

It is to some of the most vulnerable to business-related human rights violations that the handbook turns to next in Part V, including indigenous peoples, children and those in conflict or post-conflict environments. Here the authors advocate incorporating core protections specific to these high-risk groups into BHR protections. It is recognised in the handbook that gender is a significant omission to this list. It is however the last part of the handbook on access to remedy and corporate accountability in Pillar III that is arguably the most important. Whilst the 'do no harm' principle is certainly vital, the reality is that there are *gross* business-related human rights violations in India and elsewhere that continue without redress. The pandemic has increased and aggravated these violations and the authors of the handbook recognise that this situation provides both opportunities and challenges. The opportunities start with the state in addressing information deficits through mandatory disclosure; the protection of human rights defenders through criminal law sanctions; and ensuring that multinationals cannot escape liability through the compartmentalisation of subsidiaries and contractors. Businesses must also meet the challenge of access to remedy by setting-up grievance mechanisms that lead to fair and effective remedy outcomes and should fully cooperate with judicial and non-judicial mechanisms in addressing business-related human rights violations to which they have contributed.

Access to remedy and corporate accountability: Opportunities and challenges

It has been rightly pointed out by Deva that the Handbook does not include any of the regulatory initiatives attempted, tried or tested so far. However, he asks the reader to take solace from the fact that "hardly any of the regulatory initiatives not discussed here have been able to trigger significant changes in how corporations are run". I would add the lack of positive examples of the implementation of the guiding principles to the list, despite their endorsement by the UN Human Rights Council nearly ten years ago. In some ways the handbook is an indictment of the BHR era in itself, however it also provides strong impetus to reimagine the tools we engage to meet challenges. The Covid-19 pandemic has shown that we simply cannot go on as before and allow the most vulnerable and marginalised to take the brunt of an

economic and political structure that we are all responsible for. With all these challenges and unknowns how then do we then proceed? Deva quotes from Gandhi in 1948, who provides us with as good a path as any. Gandhiji urged:

I will give you a talisman. Whenever you are in doubt or when the self becomes too much with you apply the following test. Recall the face of the poorest and the weakest man whom you have seen and ask yourself if the step you contemplate is going to be of any use to him.

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