Corporate Personality under International Law and Justice Gaps: Could Delocalisation Prompt a Potential Role Within African Regional Courts Frameworks?

By:

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Historical and dominant perspectives about the nature of the corporate personality are complicit in the way the burden of justice is allocated. The doctrine of separate corporate personality in domestic legal systems is almost universally accepted. However, this acceptance, conflicts with the multinational nature of the economic activities of large corporations. The multinational nature of the large corporations is veiled by insistence on separate compliance of each subsidiary to its local laws. Yet, Baxi effectively demonstrates the pervasive nature of corporate power and capital that further weakens the role of the host state. This misalignment at the international level provides convenient governance gaps, which prevent effective access to justice and insulates

corporate groups from involuntary creditors, such as human rights victims.

This necessitated the current delocalisation attempts through transnational litigation in home states. Delocalisation refers to litigation or arbitration which is divorced from the forums of national jurisdiction, where the wrongful act, omission or harm occurred. Nevertheless, these transnational litigation cases often based on torts law, have yielded mixed results. For example the cases of *Vedanta Plc Resources & Another v Lungowe & Others*, *Okpabi and Others v Royal Dutch Shell Plc and Another*, in the UK Supreme courts, were based on jurisdictional appeals, and therefore only established the potential of a triable issue. *The case of Kiobel v Royal Dutch Petroleum Co*. in the US courts, closed down the potential use of the Aliens Torts Claims Act for extraterritorial litigation. However, the case of *Nevsun Resources Ltd v Araya*, in the Supreme court of Canada, was a majority decision on a motion to strike the pleadings, which opened up the possibility of applying international customary law claims to corporations. *Then, the case of Four Nigerian Farmers, Milieudefensie & Others v Shell Petroleum NV & Others*, decided at the Court of Appeal level in the Netherlands, found corporate liability for oil spills. The results have been uneven and focused on limited access permitted by home states legal systems.

This blog explores whether delocalisation can be made to work within Africa by mutual and collective recognition of corporate personality within that region, in order to enhance capacity of regional courts, to handle cases involving corporate actors. Therefore, the blog initially examines corporate personality issues and then assesses attempts to regulate it under international law. Finally, it explores potential for such delocalisation to be implemented within the African regions to encourage localism to the region.

Corporate Personality Issues

Corporate personality is viewed as a universal bedrock of company law. This results in separation between a company and its shareholders. Limited liability is applied, and this protection extends to the separate legal entities in a multinational corporate structure. Choudhury and Petrin refer to this as ‘the corporate shield’. This also consequently results in the multinational corporations having an indirect presence in international law as they constitute networks of domestic legal personalities. Johns notes that this presence is

therefore “sifted through a grid of state sovereignty into an assortment of secondary rights and contingent liabilities”.

This shield has come sharply into focus, when placed against third party torts victims, who attempt to claim compensation for human rights and environmental violations. The domestic jurisdiction raises apparent sovereign control over subsidiary company. However, when the ineffective domestic state capacity is said to result in substantial injustice, it has led victims to side-step limited liability (and its limited exception of veil piercing) and instead push for direct parent liability via torts and the assumption of duty of care route. This has met with both limited success and significant implications for how the host state’s judicial forum is viewed. Indeed, the proper legal venue is viewed as the local judicial system and access to another is often predicated on the risk of substantial injustice in the local fora as well as the existence of a direct duty of care owed or assumed by the parent company. For example, in the Vedanta case, heard by the UK Supreme court, this was based on an attempt to litigate alleged violations which occurred in Zambia, against a Zambian company and its UK parent company.

The integral nature of the risk of substantial injustice in Zambia, to questions of the proper place to bring a claim and obtaining access to justice against both the parent company and subsidiary company before the UK courts, can be seen in the decision of the Supreme Court which suggests the real risk of the deprivation of substantial justice was also an important factor in permitting jurisdictional access to human rights - torts litigants. This risk could be the result of limited funding, limited legal resources, level of complexity or scale which cannot be effectively handled within a weak legal system.

Furthermore, the capacity of the legal system in providing access to justice may be hampered by its complicity and history with the company involved. For example, Shell which is a party to the *Okpabi, Kiobel, and Milieudefensie* cases for events occurring in Nigeria, is a dominant operator in a sector essential to the Nigerian government. Shell’s history in Nigeria predates Nigeria’s independence. This led to a ‘first-mover advantage’ reinforced by the lack of technical capacity and investment capability of the state oil company. These coupled with, the overwhelming dependence of the economy on oil results in an imbalance of competing interests. Soremekun and Obi observe that “Nigeria's

concrete dependence on the MNOCs who mine and produce the oil, and provide it with the bulk of national revenue, have seriously undermined the ability of government to organize to control the oil industry". The economic dependence has resulted in the diminished emphasis of social and environmental rights protection, thus placing the host country system in a position where weak regulation of the sector and a lack of independence could result in a substantial risk of injustice.

The Potential for a Special Regime at the Global Level

When exploring options, attempts to create a binding treaty on business and human rights remains the primary target but it has a long history of failed attempts. The vision of a new international economic legal order put forward by developing countries (including African countries) in the 1970s drove the first call for the regulations of transnational corporations – and this resulted in the draft UN code of conduct on transnational corporations (1983). Rubin observed that in this period, these developing countries were already aware of the powerful role these companies play in the international economic system and, therefore, called for regulation. However, the draft code was not adopted, and the period instead yielded the OECD Guidelines for Multinational Enterprises in 1976, which offered voluntary principles based on a narrower platform of the OECD.

The second significant attempt was made through the UN draft norms on responsibilities of the transnational corporation and other business enterprises with regard to human rights (2003) but this also failed.

In 2011 the UN Guiding Principles on Business and Human Rights was adopted and it proposes a voluntary approach towards corporate responsibility to respect human right. It did not impose a legally binding responsibility grounded in international law. This can be illustrated through the emerging ambiguous emphasis on due diligence, although there are attempts to concretise this through mandatory due diligence in certain home jurisdictions with an accompanied extraterritorial reach.

There is a current third attempt for a legally binding instrument which was initially proposed in 2014 by Ecuador and backed by South Africa with the aim to "immediately begin negotiations to end human rights violations and

environmental damage by transnational corporations”. This attempt is in its second revised draft and is likely to result in a repeated failed experience, as alternate calls for extraterritorial due diligence laws following the UN Guiding principles take centre stage.

Potential for a Special Regime at the (Sub-)Regional Level

The lack of codification of human rights and obligations of multinational corporations under international law, partially as a result of the dominance of national corporate personality rather than notions of international corporate legal personality, has left the African regional courts, state-centric in relation to human rights. They surmise that in relation to human rights, they are only empowered to litigate against states. However the right to bring claims directly is extended to companies, if it can be inferred from treaty obligations, especially in relation to international trade law.

The difficulty in bringing a claim against corporations, was demonstrated in the case of *SERAP v Federal Republic of Nigeria & Others*, where the Socio-Economic Rights and Accountability Project (SERAP) brought a case against the President of the Federal Republic of Nigeria, the Attorney General of the Federation, Nigerian National Petroleum Company, Shell Petroleum Development Company, ELF Petroleum Nigeria ltd, AGIP Nigeria PLC, Chevron Oil Nigeria PLC, Total Nigeria PLC and Exxon Mobil before the ECOWAS Court of Justice, with regard to alleged violations in the Niger-delta area of Nigeria.

The preliminary judgment in 2010 given in response to preliminary objections by the companies, highlighted that:

“Despite the campaigned launched advocacy organizations towards new developments, the bare truth, however, is that the process of codification of international Law has not yet arrived at a point that allows the claim against corporations to be brought before International Courts. Any attempts to do so have been dismissed on the basis that the Companies are not parties to the treaties that the international courts are empowered to enforce. This understanding is widely shared among regional courts with jurisdiction over Human Rights”.

SERAP eventually got a successful decision on the merits but only against the state, Nigeria, before the Ecowas Court of Justice.

Nevertheless, there may be scope for a recognition of a special regime for multinational corporate personality within African regional agreements, especially for companies operating within and across specified African regions. A potential solution could be found via a harmonisation of company laws across a region such as West Africa, such an attempt was made in the EU, albeit unsuccessfully. A related example is OHADA which involves the harmonisation of business law in 17 mainly francophone countries through the adoption of 'uniform acts'(UA). It has the Common Court of Justice and Arbitration as a key judicial, arbitral and advisory institution, however there are noticeable gaps in the coverage. Leno notes "OHADA does not cover all aspects of business law and to date, there is no UA relating to mergers and acquisition, investment, or contract and employment". An explicit human rights in business focus is also necessary because OHADA is focused on the growth of the business enabling environment. Mbori also demonstrates the drawbacks of the arbitration jurisdiction in light of the *GETMA v Guinea* case.

Furthermore, the divisions in legal traditions between francophone African states (civil law) and Anglophone African states (common law) may mean that it is better to initially develop the principle of mutual recognition and then extend to harmonisation principles and shared jurisdiction, under an existing (sub-)region-wide system such as ECOWAS court of justice.

The use of sub-regional systems like ECOWAS, is one step removed from national governments. This is necessary because some governments could be open to allegations of complicity especially in view of commodities dependency and direct links to national oil companies and national mining companies, as they are involved in joint ventures with some of the large multinational companies that have been the subject of extraterritorial litigation. This proposal could also pool together funding resources that would negate financial access issues for poor victims. It would indicate a desire to counter extraterritorial delocalisation attempts outside Africa, especially where it gives an unintended impression, that African legal systems pose a substantial risk of injustice for human rights victims of corporate violations.

It would enable the filing of claim against companies within the ECOWAS territory by virtue of such agreement, but it may not enable the joinder of the parent companies outside jurisdiction.

Furthermore practical challenges remain as the regional courts systems have witnessed low enforcement rates and lack of cooperation from governments, although Akinkugbe successfully demonstrates how the ECOWAS courts are acquiring a socio-political relevance as an independent platform with potential for achieving the instrumental objectives of litigants. An additional objective can be located in the Agenda 2063, which is the African Union document for an aspirational vision and plan to transform post-colonial Africa. It recognises the role of the regional economic communities such as ECOWAS, as critical to a vision of a united Africa that deals adequately with inequalities, exploitations and grievances that occur within its territories.

Conclusion

There is the potential to create regional or sub-regional frameworks, which through agreements can handle claims against companies within their territories. This may strengthen local regional capacity, alleviate the allegations of complicity of the state and exemplify the cooperative spirit embodied in more recent collaborative African action. It would demonstrate an attempt at African solutions which are not dependent on home states. Nevertheless, it may not be enough to counter the lack of legally binding responsibility grounded in international law, as it would not be able to bring parent companies, who reside outside the African jurisdiction, within its scope.

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