

Global Shell Companies, Corporate Corruption and Bribery: The Multi dimensions Sustainable Development

**Dr. Mrs. Kathleen Okafor, LL.B, BL, LL.M, Ph.D,
ke_okafor@yahoo.com. Faculty of Law, Baze University, Abuja.**

Abstract

The growth of companies in advanced and emergent economies over the past thirty years has been buoyed by respective operational models of broad institutional ownership¹, inclusive board structure², stock exchange listings, sharp focus on long-term profitability and aggressive cost control. Although many emerging market companies are state or family-owned, their different operating philosophies and tactics tend to reflect their home countries' business climate, market structure and short-term dividend policies³

Some of the new competitors also in the emerging markets take a longer-term view of profitability thereby focusing on top-line growth and investments rather than short-term earnings and returns on invested capital⁴. A good example is the Quindao Haier group incorporated only about 30 years ago and has grown to be in the top five companies in the world in the electronic refrigerating industry with \$89.75bn in annual revenues⁵.

The emerging paradigm of corporate profitability and success exhibit a need for integration of human rights and business ethics in their operating models. Otherwise, companies will altogether fail to deliver sustainable development mandate which could jeopardise their ability to continue to operate in the corporate firmament.

The question which resonates is to what extent corporate performance can be divorced from the scourge of corruption and other exogenous factors in the world economy. Also, is the issue of how legal doctrines can continue to be allowed to shield corporate corruption as

¹ General Electric has broad institutional and Mutual funds are major shareholders thereby separating ownership from management.

² Midea Group has a Chairman who was the previous executive management.

³ Nigerian Guaranty Trust Bank

⁴ The Tata Group based in Mumbai comprises 19 (nineteen) companies with more than 50,000 workers in the United Kingdom alone, making it one of that country's largest private-sector employers. Brazil's JBS has become the world's biggest meat producer through a series of acquisitions, including U.S.-based Swift & Company and Pilgrim's Pride.

⁵ 2016 Financial Times Report.

well as how the veil of incorporation can be lifted to find liability and mitigate corporate criminality and impunity.

One of the key solutions lies in broader-based stakeholder principles against the myopia in shareholder primacy.

1. Introduction

No one now doubts that many corporations are considerably more economically powerful than the State⁶. Thus, as social and economic institutions, the activities of corporations should be subjected to the rule of law, transparency tests, centripetal power for national and economic benefits of corporation.

The legal doctrine that the separate corporate entity which bestows a distinct legal entity from its members has become a cloak for illicit funds and corruption flow through companies into the global financial markets⁷ facilitated by banks, lawyers and accountants who exploit legal loopholes and weak enforcement requirements.

It is not contested that many endogenous factors contribute fiercely to corporate and national failures. These factors include undercapitalisation, fraud, corrupt owners and managers, meddlesome interference of board members in the day-to-day operations, ineffective supervision by the regulatory and supervisory authorities, culture, fiscal manipulations, perennial political instability and poor democracy. However, exogenous factors like multinational company breaches of business ethics and human rights⁸, financial malpractices, environmental degradation and other trans-border influences affect national companies, economies, democracies and societies.

The classical view that the stockholders own the corporation and, as such, managers should govern only in their interest to maximise stockholder value was dominant in corporation law jurisprudence⁹ thereby sanctioning immoral capitalisation. This view was popularised by Nobel Prize winning economist, Milton Friedman, before scholars like Merrick Dodd, who expanded the stakeholders of companies.

This classical position evolved in *Automatic Self-Cleansing Filter Syndicate Co. v. Cunningham*¹⁰ and became truly established with the decision in *Shaw & Sons (Salford)*

⁶ Exxon Mobil's profits are the same as Bolivia's GDP. At nearly \$750 billion in early 2015, Apple's market capitalization was almost as large as the whole of Russia's stock market. Walmart's profits are comparable to Botswana's GDP, and its workforce is bigger than the population of Latvia or Slovenia.

⁷ See The World Bank & Global Witness Report: Banks and Dirty Money, June 18, 2015.

⁸ *Wiwa v Shell Petroleum Development Company*

⁹ *Hutton v West Cork Railway Company* (1883) 23 Ch. D. 654

¹⁰ (1909) 2 Ch. 34

*Limited v Shaw*¹¹ holding that companies are directed and controlled to enhance shareholder value. The principle of shareholder primacy¹².

On another pedestal, the stakeholder value theory adopts a pluralist approach and factors the legitimate interest of all stakeholders in a modern corporation i.e. shareholders, employees, environment creditors, directors, customers, and the society.

Creditors, intellectual capitalists, customers, as well as shareholders and directors have become prime assets of corporations worldwide. This, reality requires companies to invest in material, and financial resources as well as intrinsic values of integrity, culture and rule of law practices which will sustain balanced success.

2. Intellectual assets

For optimal performance of prime assets like human capital the environment and human rights companies now improve workplace environment and their solid reputation as good employers. The strategies include giving employees a greater ownership and participatory stake in the company to build commitment, as stakeholders rather than imbibing shareholder primacy and profit maximisation.

Also, falling labour costs save cost for companies because of automation and cheaper technology options. Since 1980, the global workforce has grown by 1.2 billion people, mostly from emerging markets that have become more connected to the rest of the world through supply chains and migration, making employees even greater stakeholders in companies whose interests and integrity must be assured for sustained profitability.

3. Corporate Oligopolies

In 2015, developed countries continued to manifest the world's biggest businesses, grossing up revenues as large as nations e.g. Walmart's profits are comparable to Botswana's GDP, and its workforce is bigger than the population of Latvia¹³ or Slovenia¹⁴. The cumulative profits of the biggest twenty (20) of the companies account for the majority of world corporate profits¹⁵.

Exxon Mobil's profits are the same as Bolivia's GDP¹⁶. At nearly \$750 billion in early 2015, Apple's market capitalization was almost as large as the whole of Russia's stock market.

In 1980, just 21% of global corporate revenue came from the emerging world. By 2013, the global revenue had almost doubled to 41%. Large western corporations have transformed themselves from predominately national corporations into truly global ones. GE, for example generated \$4.8 billion in revenue outside the United States in 1980, but by 2014 that figure

¹¹ (1935) 2KB 113

¹² S. 279 (4), Companies and Allied Matters Act (CAMA) 1990 (cap C20, LFN 2004)

¹³ OECD Foreign Bribery Reports: An analysis of the Crime of Bribery of Foreign Public Officials, Dec., 2014

¹⁴ OECD Reports, Supra

¹⁵ OECD Reports, Supra

¹⁶ OECD Reports, Supra

had climbed to about \$80 billion, more than half the company's total. These humongous profits emanate partly from poor and hungry nations with huge markets for global products and services.

4. Aspects of Anonymous Companies & Offshore Bank Accounts

The US Department of Justice alleges that anonymous companies, shell companies and offshore bank accounts were regularly used by corporate entities across nations in breach of the law by exploiting legal loopholes and weak enforcement.

Until recently, most jurisdictions permitted non-disclosure of the 'beneficial owners' of companies. Consequently, tax cheats, terrorists, corrupt politicians, swindlers and drug traffickers exploited the loopholes¹⁷.

Bribes are known to have flown unimpeded through global financial markets, assisted by a corporate legal framework that accepts secrecy. Indeed, almost all economic crimes involve the 'misuse of corporate vehicles'¹⁸.

5. Corruption and sustainable development:-

Huge illicit money leave developing countries through money laundering of shell companies through government officials with the collusion of multinational companies¹⁹.

A good example is the Democratic Republic of Congo, one of the poorest countries in the world. Between 2010 and 2012, billions of dollars of Congolese mining concessions were granted for very low amounts by a series of companies registered in the British Virgin Island (BVI)²⁰. The companies were alleged to be owned by a personal friend of the president who sold them on to major industry players at the market rate pocketing an alleged difference of \$1.4bn which was the equivalent of twice the country's health and education budgets combined.

Corruption denies education, health, housing and better conditions of life for millions of people around the world, especially in poor countries²¹. This is aided by legal doctrines of the corporate entity doctrine and shareholder primacy at the risk of world peace.

6. Disclosure, Transparency and Business human rights.

Shell companies conduct no active business and usually exist only on paper. This is also the case with 'Shelf' companies and some transnational parent companies who are bequeathed the veil of incorporation with no tangible value added to economies.

¹⁷An Anti-corruption NGO, Global Witness, has been pushing for the introduction of public registries as industry standard for several years.

¹⁸OECD Reports Supra.

¹⁹World Bank and Global Financial Integrity Report, June 2015

²⁰World Bank and Global Financial Integrity Report, Supra

The Financial Action Task Force, the global standards-setting body for anti-money laundering (AML) and anti-terrorist regulation, recommends that beneficial ownership information should be available to authorities in a timely fashion²².

The UK has agreed to introduce public registries for beneficial owners, defined as those with an interest in more than 25 per cent of shares or voting rights in a company, or who otherwise control the way a company is run²³.

The United Nations Guiding Principles on Business and Human Rights (UNGPs) impose a duty on states to protect human rights and a responsibility on corporations to respect them. Many of the provisions in the UNGPs have already been translated into domestic black letter law²⁴. The responsibility to provide a remedy for business-related abuses is crucial to sustainable development.

In this regard, the US domestic courts have been courageous in bribery and corruption matters as well as in environmental breaches²⁵. In December 2008, US authorities fined the German engineering group, Siemens, a record \$800m to settle a long-running slush fund scandal. The company subsequently cleaned up their act, put in place stringent compliance systems and fired all their intermediaries.

7. Conclusions

1. To tackle the phenomenon of shell companies' role in corruption, a public registry will allow citizens to hold companies and governments to account and also reduce policing and investigation costs.
2. Information on beneficial ownership would increase competitiveness and ensure that only legitimate businesses are awarded contracts. Also, the risk of unwitting complicity in corruption²⁶ will be minimised.
3. Ethical business is no longer merely about paying lip-service to corporate social responsibility (CSR), but includes companies' core values in their operational strategy, human rights and transparency.
4. Transnational and multinational corporations are like nation states and should be subjected to the same rules of inclusive democracy and transparency for sustainable development.

²² The World Bank investigation into 213 cases of corruption' found that 70 per cent relied on anonymous companies, most of which will set up in the US. Another study, *Global Shell Games*, published in 2012, sampled 60 countries and found the US to be second only to Kenya in the ease with which someone can set up an anonymous company. The UK and the US score high on the list of countries with ease of incorporation and weakness of regulatory oversight. Directors can be nominees, No disclosure of real owners is required and no checks are made to ensure the information given is accurate.

²⁴ John Ruggie: *Guiding Principles on Business and Human Rights*, presented to U.N. Human Rights Council, June 2011.

²⁵ *Wiwa v Shell Petroleum Development Company*. 48 ILM 972 (2009)

²⁶ Ethical and effective businesses do not require anonymous companies.

5. Skilled management and intellectual personnel of companies especially in developing economies should be integrated into the stakeholders of companies for better ethical management and mitigation of corporate impunity.
6. In many jurisdictions, prosecuting corporate crime is extremely difficult and such difficulties are magnified at the international level. Corporations, unlike states, are not subject to international treaties and there is currently no global court to hold them to account.
7. Economic and social engineering, eradication of poverty and hunger are predicated upon institutionalising the rule of law in all corporations for sustainable development.