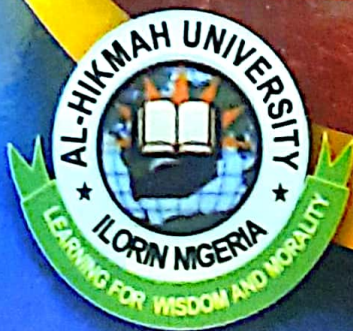


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CRIMINAL LIABILITY OF COMPANIES: AN ISLAMIC LAW PERSPECTIVE

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Abstract:

The limited company has witnessed an enormous increase globally within the last decades. Similarly, there has been a growing increase in corporate activities constituting crime. No wonder there has been reforms within the common law and statutes of various countries to bring the limited company within the ambit of the criminal law and thus hold companies liable for crimes. In addition, there are international conventions which allow holding companies liable for crimes. An example is the Organisation for Economic Cooperation and Development (O.E.C.D) 1997 Convention on Combating Bribery of Foreign Public Officials in International Trade Practices which is aimed at enhancing the global fight against corruption in international business. The aim of this paper is to attempt an analysis of the Islamic criminal law to determine the Islamic law perspective to the criminal liability of companies. This becomes imperative because the core essence of Islamic law is to regulate the affairs of man in relation to his Creator and the affairs of man in relation to his fellow man. Islamic law cannot therefore close its eyes to the phenomenon of corporate crime.

1.0 Introduction:

The common law case of *Salomon v. Salomon*¹ laid down the principle of corporate personality which states that upon incorporation, a company becomes a different person in law from its members. Lord Macgathen held that the company is at law a different person altogether from the subscriber to the memorandum and, that the company is not in law the agent of the subscribers or trustees for them. This principle has become entrenched as one of the fundamental principles of company law and has been adopted in the company legislations and case law of different countries especially common wealth countries like Nigeria and Malaysia.²

It must be stated that it is from the principle of corporate personality laid down in *Salomon's* case that the issue of criminal liability of companies flows. This is because capacity to sue and be sued is one of the consequences of the recognition of legal personality. It is when an entity is regarded as a person in law that it becomes capable of bearing rights and duties³

1.1 Corporate Personality under the Islamic Law

In determining the Islamic law perspective to the criminal liability of companies, it becomes imperative to examine the status of companies under the Islamic law. Thus, the question is does the Islamic law recognise that a company is a rights and duties bearing entity?

Generally, the Arabic word *Ahliyyah* which also means legal capacity literally means fitness or ability. Like the situation under the common law, *Ahliyyah* or legal capacity is expressed by two indices namely the ability to acquire rights and the ability to perform duties.⁴ Thus, a precondition to legal capacity is the ability to acquire rights also known as *Dhimmah*.⁵ The attribute of personhood is regarded as a basis for *Dhimmah* as it is taken for granted that a natural person from birth to death automatically enjoys the capacity to enjoy rights and obligations.⁶ While the basis for the enjoyment of the capacity for execution is discretion (*rushd*) and intellect or mental capacity (*aqil*).⁷

According to Nyazee⁸, the *Dhimmah* is a trust flowing from a covenant between the Lawgiver and the subject.⁹ Based on this, only natural persons can be assigned with the *Dhimmah* which is a condition for *Ahliyyah* or legal capacity. This is because only natural persons are the subjects of the covenant.¹⁰ It is assumed that an artificial person cannot enter into such covenant because it is incapable of discharging religious duties.

Relying on this assertion means that the Islamic law¹¹ does not acknowledge the capacity of a fictitious person and thus, the idea of a corporate personality is incompatible with the Islamic law. Thus, it seems that the limited definition of the concepts of *Dhimmah* excludes the personality of a corporate entity. However, the works of the early jurists shows the tacit recognition of corporate personality through the imposition of some rights and duties on some fictitious entities.¹² For example, Islamic history shows that States have been recognised as persons in Islamic law. This is because States in the Islamic era entered into treaties with other States. In addition, the tradition of the Noble Prophet Muhammad (S.A.W) shows that government is a legal person.¹³

Also, theories of *waqf*, *baytul-mal* and the estate of the deceased are supportive of the doctrine of corporate personality of the state in Islam.¹⁴ A form of vicarious liability existed where the State is held responsible for the acts of its employees. Worthy of mention also is the position on the deceased in Islam. Following Nyazee's submission will mean that a deceased who cannot perform religious duties or obligations does not enjoy legal personality in Islam. However, a deceased is recognised as a person under the Islamic law, in fact enjoying certain rights.¹⁵ It is submitted that the legal personality of a company under Islamic law is higher than that of the deceased. This is because; a company can discharge duties and perform some religious obligations like the payment of *Zakat*.¹⁶ Although, it is conceded that a company cannot perform some religious duties like *Salat*, *Ramadhan* fast and *Hajj* (the holy pilgrimage to Mecca).

The effect of all the above is that corporate personality under the Islamic law can be divided into two broad categories. The first category is the total and absolute

personality which applies to only natural persons. The second category can be described as qualified personality which applies to companies, States and the dead.¹⁷

Another justification for recognising the legal capacity of companies under Islamic law is based on the existence of some Qur'anic injunctions and *Hadiths* which is applicable to companies. For example, it is provided in the Holy Qur'an¹⁸ as follows:

وتعاونوا على البر والتقوى

"...And co-operate ye one another in righteousness and piety"
It is further provided:

...لا تأكلوا أموالكم بينكم بالباطل إلا أن تكون تجارة عن تراض منكم

"...Do not eat up your property among yourselves in vanities, but there be amongst you business by mutual goodwill"¹⁹

It also provides:

يا أيها الذين ءامنوا لا تأكلوا أموالكم بينكم بالباطل إلا أن تكون تجارة عن تراض منكم

"O you who believe do not take the properties among you by illegal means unless by way of trade and mutual consent"²⁰

Thus, the implication of the above provisions is that Allah (SWT) in His infinite wisdom, permits business and mutual cooperation between men. The Qur'an permits man to strive to make a comfortable living on earth. Therefore, Islam permits and encourages business and investment which can be through the purchase of shares in companies as a means of living a comfortable life on earth. However, it must be stated that the freedom to engage in business or employment is not absolute as such business or employment must not be contrary to the general principles of the *shari'ah*.²¹

The third justification for recognising corporate personality under the Islamic law is based on the *Maqasid Shari'ah* (objectives of the Islamic law). It means that the Islamic law is ultimately premised on the benefit of man. The company as an artificial entity can be accommodated under the Islamic law based on the *Maqasid Shari'ah* which is geared towards the benefit of man and the community as a whole.

There are a lot of Qur'anic injunctions to support this fact. For example, the holy Qur'an says:

ما يريد الله ليجعل عليكم من حرج...

"God does not intend to inflict hardship on you...."²²

Again, the holy Qur'an in describing the essence of the prophet-hood of Muhammed (S.A.W) says:

وما أرسلناك إلا رحمة للعالمين

"We have not sent you but as a mercy to the world."²³

This is to give credence to the fact that the main objective of Islamic law is for the protection and preservation of benefits to man. Therefore, business, political, economic and social activities of man that are geared towards conferring benefits on man and humanity as a whole are accepted under the Islamic law.

The modern form of business through incorporated companies is one way through which benefits can be conferred on man and the society. It is unanimously agreed by the *Ulamas* (scholars) that the *maqasid* or benefits of the *shari'ah* are classified into three main categories,²⁴ these are *Daruriyyat* (essential), *Hajiyyat* (complementary) and *Tahsiniyyat* (embellishments).²⁵

The essential benefits which Islamic law seeks to protect are further classified into five which are faith, life, lineage, intellect and property.²⁶ Therefore, just as theft is punished as a means of protecting property and retaliation (*qisas*) is legalised as a means of protecting life,²⁷ so also business and trading is encouraged in order to help an individual earn a living and by so doing preserve life and property. As stated earlier, the modern form of business through incorporated companies can come under the ambit of the complementary benefits which Islamic law seeks to protect. This is because it can help to protect and preserve life, property and intellect.

Therefore, the idea of a corporate personality can be accommodated under the Islamic law; such entity however, enjoys a limited legal capacity. As stated, the legal personality under Islamic law refers to both real and artificial entities.²⁸ The real legal persons under Islamic law are human beings as natural persons, while artificial persons include companies, States and even the deceased.

2.1 Elements of Criminal Liability in Islam

Before analysing the position of the Islamic Law on the criminal liability of companies, it is imperative to explain the essence and elements of the Islamic criminal law.

Personal liability is the hallmark of criminal liability in Islam. This is because a feature of crime under the Islamic law is that it is regarded as an offence against ALLAH (S.W.T) and man.²⁹ Thus, like the common law, the Islamic criminal law is individualistic in nature. It is provided in the Qur'an:

لا تزر وازرة وزر أخرى، وأن ليس للإنسان إلا ما سعى

"No bearer of burden can bear the burden of another; Every soul draws the seed of its acts on no one but itself"³⁰

The Noble Prophet Muhammad (S.A.W) was reported to have reiterated the importance of personal responsibility when he said that everyman shall have but that which he intended.³¹ It must however be noted that the payment of *diyat* (blood money) is an exception to personal responsibility. The compensation here is borne by members of the offender's family in homicide committed in error or quasi wilful homicide.³²

Also, a requirement of criminal liability or responsibility under the Islamic law is that there must be clear provisions on the offence.³³ In addition, the twin attributes of *mens rea* and *actus reus* are also recognised under the Islamic penal system. The *actus reus* which is the physical manifestation of crimes can be explained *viz* deliberate act which aims at violating the law and an act which occurs by neglect or mistake. The acts which occur as a result of neglect and mistake are treated as lesser crimes than the deliberate acts.³⁴

The application of the *mens rea* under the Islamic law is to the effect that a person is deemed responsible for a crime if he intends the consequences of such act. This is premised on the Qur'anic injunction that states that a man can have what he strives for.³⁵ The Qur'an reiterates this position when it said that intention in the hearts is fundamental to responsibility.³⁶

The doctrine of *aql* or knowledge is also part of the *mens rea*. This doctrine implies that the offender must be capable of understanding. By this, only sane adults are generally regarded as criminally liable. Also, the Holy Prophet Muhammad (S.A.W) was reported to have excluded three persons from liability. A child until he or she reaches the age of puberty, a person in sleep until he wakes and an insane person until he becomes sane.³⁷ This further underscores the importance of *mens rea* or the mental element to criminal responsibility in Islam.³⁸ Therefore, criminal liability under the Islamic law entails the commission of an unlawful offence with the mental capacity and capacity of perception.

2.2 Criminal Liability of Companies under the Islamic Law

Generally, in determining the criminal liability of companies under Islamic law, all the above elements of criminal liability should be satisfied. It is based on this that *Oudah Shaheed* asserts that man alone is the subject of criminal responsibility under the Islamic law.³⁹ He stated further that although institutional persons are recognised as right bearing persons under the Islamic law, such institutional persons are however incapable of criminal responsibility because of the lack of mental capacity or *mens rea*. It must be stated that mental capacity under the Islamic law, unlike under the common law includes *aql* or intelligence i.e the capacity to understand and thus, it may be difficult to prove that a corporate body had the *aql*.

However, based on the earlier submission that a corporate entity enjoys a limited and qualified personality; the conditions of criminal responsibility of natural persons should not be rigidly applied to the company which is an artificial person. It suffices therefore that a corporation has the *actus reus* and the *mens rea* of intention without satisfying the *aqlor* knowledge.

The justification for the criminal liability of companies under the Islamic law is that firstly, a company can commit crimes under the Islamic law,⁴⁰ and these corporate crimes can fall under the offences of *Ta'azir*.⁴¹ The *Ta'azir* offences are regulated by the consensus of opinion of the Islamic scholars taking into consideration the circumstances relevant to the particular time. The rules on *Ta'azir* are essentially based on the discretion of the Islamic scholars with guidance from the Qur'an and the *Sunnah*. Its essence is to justify the dynamic nature of the Islamic law as guidance for all times and for all ages. Therefore, corporate criminal liability under the Islamic law is justified because of the realities of the times in which companies as a constant feature of modern living commit crimes through some of their activities.

Secondly, the requirement of *mens rea* or mental capacity can be satisfied through acknowledging the corporate culture of the corporation. The corporate culture means the practises, written and unwritten rules existing in the company. However, it is conceded that *aqlor* knowledge as a component of the *mens rea* may not be easy to satisfy in the case of a company because of its artificial nature. But, based on the earlier submission that a company enjoys a limited and qualified personality; the conditions of criminal liability of natural persons who enjoy absolute legal personality should not be rigidly applied to the company as an artificial person with limited and qualified personality. This is because of the fact that rulings on the *shari'ah* are of two types. The rigid rules fixed by *Qur'anic* injunctions and the *Hadiths*⁴² and the flexible rules⁴³ which are subject to change as dictated by circumstance and the need of the society.⁴⁴ Thus, criminal liability of companies falls under the category of flexible rules. After all, the purpose of Islamic law is to protect public interest, ensuring good and minimising harm.⁴⁵

3.0 Sanctioning Companies under the Islamic Law

Having established that the Islamic law can accommodate the idea of holding companies criminally liable, it is imperative to examine the Islamic law position on sanction in order to determine whether companies can be validly and adequately sanctioned within the ambit of the Islamic law.

3.1 Sanctions under the Islamic Criminal Law

Unlike the common law, the ultimate goal of sanction under the Islamic law is known by Allah (S.W.T), who is the ultimate law maker and law giver.⁴⁶

In addition, a characteristic of the Islamic notion of sanction is that human existence is not limited to life on earth but includes reckonings in the hereafter.⁴⁷ Therefore, a major goal of Islamic criminal law is expiation of sin.⁴⁸

As regards the goal of sanction under the Islamic law, a major goal of punishment under the Islamic criminal law is the protection of the interest of individuals, the community in which the crime has occurred and the society as a whole.⁴⁹ After all, Allah (S.W.T) has nothing to lose in the commission of crimes by His creatures. Therefore, it is in protecting the interest of the society that the rights of the victim of crime are recognised as a feature of punishment under the Islamic criminal law.

By this, the Islamic criminal law tries to satisfy the hurt of the victim or his family. Hence, forgiveness by the victim can ameliorate the sanction in specific crimes.⁵⁰ For example, in crimes of *qisas* (retaliation) and *diyat* (blood money), forgiveness by the victim affects the sanction imposed. Like in the case of intentional homicide for which the normal sanction is the *qisas*, but when the victim or his family forgives, then the *qisas* is overlooked and only the *diyat* is paid.⁵¹ In the same vein, forgiveness by the victim can mitigate the sanction for *ta'azir* crimes.⁵²

Asides the aforementioned, the traditional common law goals of deterrence, retribution, rehabilitation and incapacitation are also reflected in the Islamic criminal law;⁵³ especially the goals of deterrence and reformation.⁵⁴ For example, the penalties prescribed for some *hudud*⁵⁵ offences are severe and this might be in order to serve as a deterrent to others. Furthermore, the Qur'an provides that sanction should be inflicted in public so that it can serve as a deterrent.⁵⁶ The purpose of others witnessing is for them to be deterred from committing such offence.⁵⁷

Also, the reformatory aim of sanction under the Islamic criminal justice system is based on the principle of *tawba* or repentance which is evident in a number of *Qur'anic* verses showing that Allah (S.W.T) is most merciful and ever willing to forgive his creatures of whatever sin or crime.⁵⁸ It is provided in the Qur'an:

وما نرينهم من آية إلا هي أكبر من أختها وأخذناهم بالعذاب لعلهم يرجعون

"We showed them sign after sign each greater than its fellow and We seized them with punishment, in order that they might turn (to us)."⁵⁹

The Qur'an provides⁶⁰ that Allah (S.W.T) has nothing to gain by punishing His creatures other than for man to turn to Allah in repentance.

3.2 Application of Sanctions to Companies under Islamic Law

The recognition of *Ta'azir* (discretionary) sanction under Islamic law is a most appropriate justification for punishing companies for crimes.⁶¹ This is because *ta'azir*

sanctions are discretionary sanctions which are not expressly prescribed by the Qur'an but which the *shari'ah* grants the judge or ruler the discretion to decide upon. Nevertheless, this discretion must not contradict the general principles of the Qur'an and *Sunnah*. Examples of some *ta'azir* sanctions appropriate for companies are explained as followed.

- (a) Financial sanctions are part of the *ta'azir* sanctions recognised under the Islamic criminal law. Generally, financial sanctions under the Islamic criminal law can be through payment of fine or destruction of property.⁶² The amount of fine to be imposed is discretionary and based on public interest. Thus, it is submitted that fine is appropriate as a sanction for companies under the Islamic law.
- (b) *Muqatah* or boycott is another example of *ta'azir* sanction that can be applied to companies. It was practised by the Noble Prophet Mohammed (S.A.W) and even by Caliphs after him. This simply means that the community severe dealings with the offender for a limited period of time until he repents. The Holy Prophet Mohammad (S.A.W) enforced this punishment on three men who did not participate in the battle of *Tabuk*. So they were boycotted by the Muslim community for fifty days.⁶³ Therefore, it is submitted that *muqatah* can be adapted in punishing companies. This can be through suspension of their license for a period of time and it will serve the purpose of boycott, since by so doing, the goods and services of such companies will not be used by the society.
- (c) *Tahdid* (threat or warning) though not a sanction under the Islamic law, can however be applied to companies. This means the offender is threatened with the imposition of harsher sanctions if he does not reform his behaviour. It is submitted that this will be an effective sanction for companies under the Islamic law.
- (d) *Nasihah* (admonition) can be another way of sanctioning companies. *Nasihah* means reminding the offender that he has committed a crime.⁶⁴ The essence of admonition is to reform the offender. In applying this to a company, it takes the form of a warning and is similar to the *Tahdid* discussed earlier.
- (e) *Tashhir* or the public disclosure of the conviction of the offender is another form of *ta'azir* sanction. It is mostly used for offences bothering on breach of trust, forgery and dishonest acts generally. The essence of this sanction is to draw the attention of the public to the act of the offender. Therefore, this sanction can be administered in these modern times by publicising same through the print and electronic media. As a sanction for a company, it is similar to the sanction of adverse publicity practised in jurisdictions like the United Kingdom and the United States.

4.0 Conclusion

The Islamic criminal law jurisprudence is still evolving in the area of corporate criminal liability. Nevertheless, there is guidance from the Holy Qur'an, *Sunnah*, *Qiyas* and *Ijmash* showing that Islamic law can and should in fact accommodate corporate criminal liability. In addition, some recognised sanctions under the Islamic law can be applied to companies. The aim of the Islamic law is to regulate the affairs of man in relation to his Creator and the affairs of man in relation to his fellow man. Islamic law cannot therefore close its eyes to the phenomenon of corporate crime.