Lead City University Law Journal
(LCULJ)

A Publication of the Faculty of Law, Lead City University, Ibadan, Nigeria
Vol. 2, No. 1 January – June, 2016 *ISSN 2504-9747*

Contents

Divorce in Nigeria's Dual Marriage System: Did *Jadesimi v Okotie-Eboh* Rest the Issue?

A Juxtaposition of Legal Personality under the Common and Islamic Laws

A Legal Appraisal of the Procedural Deficit in the Conditions Precedent to the Suits against the Nigerian Civil Aviation Authority

Accrual of Cause of Action in Torts of Defamation of Character and the Available Defences

African Women in the Cross-Currents of Customary and Contemporary Law: Idealism and Reality in Conflict

An X-Ray of Dispute Systems Design in Nigeria

Assisted Suicide Rulings in South Africa and New Zealand: A Contrasting Twist and the Nigerian Situation

Human Rights and the Judiciary: Islamic Law Perspective

Indigenizing Corporate Ideology for Better Corporate Governance

The Requirement for Payment of Tax as a Condition for Elections in Nigeria: Another View

Privatisation, Deregulation and Good Tax System: The Alchemy of Public Corporations in Nigeria

Tax Enforcing of the Self-Employed Persons Income in Nigeria: Issues, Challenges and Solutions

The Desirability or Otherwise of State Police in Nigeria – The Legal Framework

The Emerging Structure of Employee Participation in Corporate Governance

The Role of Media in Conflict Resolution and Management in Nigeria

An Overview of Corporate Governance Codes in Nigeria

Revisiting the Complementarity Regime of the International Criminal Court: The Role of African States and Challenges

The Land Use Act, 1978: A Reformative and Revolutionary Property Legislation in Nigeria

A Critical Re-Examination of the Principle of Corporate Personality and Limited Liability

The Legal Regime of Noise Pollution in Nigeria

Legal Framework Towards Fighting Theft and Kindred Crimes in Nigeria

1) The most important requirement is that since stocks represent pro rata c joint stock companies, the company itself must be engaged in Islamical activities.
2) A *Shari'ah* requirement that naturally follows the above observations mainta neither borrows money on interest nor keeps its surplus in an interest beari
3) It may be carefully noted that a company which fulfils the requirement cit contemporary stock markets. Hence, contemporary Muslim jurists have u examination of relevant verses from the Holy *Quran* and the *Sunnah*. I developed some important norms of Islamic ethics which are applicable the stock market scenario must not be neutral when facing unethical practi take all measures to avoid or eliminate it altogether. However, these Isla may form the basis of regulation and legislation relating to stock markets.

Some of these important Islamic ethics and norms are:

- **a.** Freedom to contract: Islam provides a basic freedom to enter into tra and the traditions of the Prophet *(S.A.W.)* emphansize on freed recognizes this freedom too. However this freedom does not imply contract. Exchange is permitted only when undertaken in permiss property *(al-mal)*.
- **b.** Freedom from all kinds of *riba*
- **c.** Freedom from excessive uncertainty *(gharar)*
- **d.** Freedom of gambling *(Qimar)* and gains made from games of c unearned income (speculation).
- **e.** Freedom from price control and manipulation.
- **f.** Entitlement to transact at fair prices.
- **g.** Entitlement to equal, adequate and accurate information
- **h.** Freedom from detriment *(darar)*

Avoiding whatever is likely to cause injustice, disputes or general animosity be parties. In addition, any contract between two parties concluded with their r not be detrimental to the interests of a third party, thus such a contract is cons not permissible.

These norms of Islamic ethics on which Islamic economics are based part of Islamic stock market policies in providing fair dealing and guarantees management and good accounting policies that ensure appropriate disclosure, just system to protect and ensure the continuity and the growth of the Islamic

Conclusively, it is momentous to reform stock exchanges to ensure the share prices refl more or less the underlying economic condition and do not fluctuate erratically in response speculative forces in the stock markets. In addition it is necessary to reform Joint Stock Compan in the light of Islamic principles and teachings to safeguard the interests of shareholders a investors.

Limitations

There are limitations to the legal recognition of legal persons. Legal entities cannot marry; th usually cannot vote or hold public office;[73] and in most jurisdiction there are certain positions wh they cannot occupy.[74] The extent to which a legal entity can commit a crime varies from country country. Certain countries prohibit a legal entity from holding human rights; other countries per artificial persons to enjoy certain protections from the state that are traditionally described as hum rights[75].

Special rules apply to legal persons in relation to the law of defamation. Defamation is area of law in which a person's reputation has been unlawfully damaged. This is considered an il itself in regard to natural person, but a legal person is required to show actual or likely monetary l before a suit for defamation will succeed.[76]

Usually a natural person perpetrates a crime, but legal persons may also commit crimes. Convers at least under U.S. Law, non persons such as animals cannot commit crimes.[77]

Conclusion

This paper has shown the essence of body corporate as a legal person differs between civil Islamic law. The existence of a corporate body as a legal entity under the common law is u recognition of the law while justification for artificial person under Islamic Law do not only lie in entity but also on the obligations and responsibilities of the fictitious person as required u Islamic law.

From the foregoing, it is glaring that the issue on the existence of the principle of sepa legal entity in Shari'ah draws differences of opinions among jurists. However, to draw back from principle will definitely be causing a huge impact on Islamic banking system institution, *waqf, b mal, masjid,* hospital etc which are already so advanced and well accepted throughout the world.

Recommedations

Before stocks can be qualified to be complied with the Shari'ah principles, they must satisfy criteria laid down by Shari'ah and some of them are as follows:

---

[73] In Hong Kong, Artificial persons are granted the right to vote in functional constituencies elections

[74] These restrictions vary from country to country. Some countries do not permit a corporate entity to be a direct liquidator while others do

[75] Most commonly in the area of taxation and in relation to search warrants

[76] New Zealand Defamation Act, 1992.

[77] People v. fRazier, 173 Cal. App. 4th 613, http://online.ceb.com/CalCases/CA4/173CA4t613.htm, 2009. In thi the California Court of Appeal explained: "Despite the physical ability to commit vicious and violent acts, dogs

6.0 Limited Liability in Modern Corporate Entities and Islamic Law

The Western Joint Stock Companies as a form of business organisation with does not appear directly in the classical books of *fiqh*. The closest approximati Company legal entity has been the *bayt al-mal* (*public treasury*), Mosque property *mufawadah,* partnership.[71]

The modern Joint Stock Company essentially constitutes a combinat *Sharikah al-inan*. In these kinds of Islamic partnership, all the shareholders are necessarily equal and by virtue of their having contributed in varying amount company. In this instance, the shareholders are considered as the *sahib al-mal*. H who also act as directors are like *mudaribs* by virtue of their responsibility for t company. They are agents via whom the company acts. They also occu position, and most of them act with loyalty, good faith, exercise maximum when executing their responsibilities similar to the way a *mudarib* is expected t a trustee. Therefore, the directors are considered as both *sahib al-mal* and *mudar*

Generally speaking, contemporary Muslim jurists have approved the Jo form on the basis of the Islamic Law Principles of *Qiyas* (*analogy*) and *masalih* Thus, it is only permissible to form a Joint Stock Company whose objectives accordance with the Islamic law. It is not permissible to buy shares in a objective is manufacturing a prohibited commodity such as alcohol, money len or trading in prohibited activity. The issuance of securities by Joint Stock C with *Shari'ah* principles and among the instruments traded or listed are ordi transferrable subscription rights and loan stocks or bonds. To ensure that thes are permissible (*halal*) or *Shari'ah* compliant stocks, contemporary Muslim jur have formulated a number of rules. *Shari'ah* compliance requires that the b given company pass certain criteria through a process called "stock screening." as mentioned earlier is that interest-based financing and earnings are no activities are prohibited (such as pork production and distribution, porn equality is encouraged (example equal rights in the event of bankruptcy). Oth be taken into consideration are that the core activities must not go against *Sha haram* element must be small compared to the core activities; the core activiti *maslahah* (in the public interest) to the Muslim *Ummah* and the country; th image of the company must be good or exemplary; and the non permissible be minimal and involve matters such as *umum balwa* and *urf*. These basic rules number of quantitative filters that are based on the financials of the company by most scholars that even companies that pass all these qualitative and quan "interim compliant" unless all ratios are zero in which case the company bec compliant," which is an indication that most scholars are in agreement that would be tightened over time.[72] The jurists agree that it is permissible to f shareholders are not liable for debts beyond the value of the shares they However, the creditors of the company are mainly aware that their claims are capital of the company and they accordingly deal with the company on that ba no possibility of fraud or deception in this case.

---

[71] Ali al-Khafif, Al-Shirkat fi al-Fiqh al-Islami, p. 2-7

[72] http://www.ratingsintelligence.com/*Shari'ah*.compliance-limits.pdf. last accessed 12/01/20

be expended in different avenues or for different purposes. For instance, if *zakat* money is construct a *masjid*, the obligation of *zakat* will not be discharged. If *zakat* money is thus spent category of expenditure which does not result in the discharge of the *zakat* obligation, it (*zakat*) be made good by person who had used the funds for another purpose. This is not with the *baitul mal*. This law applies to everyone. The *Khalifah* is empowered by the *Shari'ah* from one category of funds and utilize it for a different purpose other than for what has to be used for according to the *Shari'ah* but in relation to the *Khalifa,h* such use is not because the *Shari'ah* permits this. However, when later funds of the particular kind the *Khalifa* has to replace it to ensure that correct distribution is achieved. It is simply replacing the funds which the *Khalifa* had borrowed by virtue of the right the Shari'ah has The inanimate vaults in which are kept the funds do not lend. The *Khalifah* does not *baitul mal*. He does not contract on behalf of the *baitul mal* which has no such capacity. Allah and acts in terms of the mandate assigned to him by Allah. The *Khalifah* is not in concept such as 'separate legal entity' to carry out his mandate.[68]

of *zakat* only applies to Muslims. *Zakat* will not be obligatory, according to the Shafi on the joint stock owned by a Muslim and a non-Muslim. If the stock of a non-Muslim stock of a Muslim are combined, *khultah* has taken place. If the obligation of *zakat* devolves inanimate rice and barley which were mixed or on any other combined stock, it would follow that *zakat* will have to be paid regardless of one partner being a Muslim and one a Only the Muslim will pay *zakat* on his share of the mixture. The non-Muslim will not on his share of the admixture regardless of the incidence of *khultah*. If the joint stock was entity or a juridical person in the Western conception of the term, then *zakat* should obligatory on the stock by virtue of the principle of *khultah* regardless of the faiths of the joint stock. Faith does not apply to the inanimate 'juridical person[69] expressly stated person or juridical person cannot perform religious duties including *zakat*. It is meaningless to portray the joint stock as a juridical person and divert the obligation of joint stock to only the Muslim.

further opposed the existence of separate legal entity in *Shari'ah*, though termed it as person or artificial person. The concept of separate legal entity that a company is a person relied on the instances of *waqf*, *baitul mal* and the estate of deceased has been misplaced assertions by modern Muslim jurists. According to him, the concept of will lose its significance if the separate legal entity concept is acknowledged in *Shari'ah*. In the acceptance of the principle will destroy the whole structure and violates the principles of *Shari'ah* law particularly, law of contract. Hence, there is a strong to the concept of legal persona for a corporation.[70]

---

[68] et al, "Separate legal entity under Syariah law and its Application on Islamic Banking in Malaysia: A Note." Journal of Banking and Finance, Vol. 6, Iss. 2, Article 8, Produced by The Berkeley Electronic Press, 154 <http;//epublications.bond.edu.au/ijbf/vol6/iss2/8> Last accessed on 04/3/ 2013 at 8 am.

[69] Khan Nyazee "Islamic Jurisprudence." (Petaling Jaya: The other Press, International Institute of Islamic , p 117.

former and thus the person whose share is less than the *nisab* shall also con proportion to his ownership in the total assets. He was not subject to the levy levied on each person in his individual capacity. The same principle, which is '*Khultah-al-Shuyu°* is more forcefully applied to the levy of *zakat* on the lives person sometimes has to pay more *zakat* than he was liable to in his in sometimes, he has to pay less than that. This principle of '*Khultah-al-Shuyu°* wh some extent by the Maliki and Hanbali schools with some variance in details, a juridical person underlying it. It is not the individual, according to this prin *zakat.* Again, it is the 'joint-stock' which has been made subject to the levy. It stock' has been treated a separate entity which is very close to the concept of a

Lastly, when a deceased leaves liabilities exceeding his property, th owned by the deceased, nor is it owned by his heirs, for the debts on preferential right over the property as compared to the rights of the heirs. It the creditors, because the settlement has not yet taken place. They have their not their property unless it is actually divided between them. Being propert own existence and it can be termed as a legal entity. The heirs of the dece executor will look after the property as managers but they are not the owner settlement of debt requires some expenses, the same will be met by the prope

The basis of the opinion for the existence of the principle of separ been heavily criticised by Ulama. He started his argument on *waqf by saying* tha

> It is refuted and argued that the assets purchased with the income not become part of the original *waqf* property for the simple re anything to become *waqf,* there has to be a '*waqif*' (a human dedicates the asset in the Path of Allah (God) as *waqf.*[66]

The *waaqif* of the *waqf* property specifically and expressly made the property employed to generate income for distribution to whatever charitable cause designated. If the income of the *waqf* too has to become *waqf* automatic purpose of the *waqf* will be defeated and it will be devoid of utility.

As for *masjid*, it is concurred that the ownership vests in Allah and Ownership of the *masjid* in this context means *ownership of the Owner of the m* true owner of the *masjid* becomes likewise the owner of all assets made *waqf* the *masjid* and of all income generated by these *waqf* assets. As such, it negat being a fictitious entity like the common law principle of separate legal en attributes the real ownership of the *waqf* to Allah. Is it not against the *Shari* Allah's ownership for relegating *waqf* to the limbo of fiction merely for substa separate legal entity or 'juridical person?[67]

The argument applying to (*baitul mal) public treasury* as the basis for the legal entity has also been criticised by Ulama. The different classes of wealth s

---

[64] See Taqi Usmani 'The Principle of Limited Liability,' (2007), p. 106-107. Retrieved from http://www.meezanbank.com/knowledgeentre/knowledge-islamic-section-7-3.asp in *Inter Finance, Vol. 6, Iss. 2 [2009], Art. 8 last , last accessed on 04/03/2013 at 5 pm.*

[65] Ibid, p. 107

[66] Mujlisul Ulama of South Africa, "The Concept of Limited Liability – (http://books.themajlis.net/node/251).

[67] Ibid.

nd rights on real person. Moreover, the term *al-dhimmah* is not applicable at all and it has no relevancy in relation to interpretation of liability and obligation.[59]

However, the modern jurists like Usmani[60] propagate the existence of the principle of separate legal entity under *Shari'ah* law based on precedents of other Islamic institutions and practice like *waqf*, *masjid* (mosque), *baitul mal*, joint stock, inheritance under debt and *Al Abd al-Ma'thoon* (the slave who is permitted by his master to trade). Briefly, his argument as the basis for the existence of separate legal entity will be discussed.

According to Usmani,[61] *waqf* is a legal and religious institution wherein a person dedicates some of his properties for a religious or a charitable purpose[62] creating separate legal entity. The properties, after being declared as *waqf*, no longer remain in the ownership of the donor. The beneficiaries of a *waqf* can benefit from the corpus or the proceeds of the dedicated property, but they are not its owners. Muslim jurists (*fuqaha'*) have treated *waqf* institution as separate legal entity based on two rulings; first, if a property is bought by using the *waqf*'s money, the property does not become part of *waqf*, but become the property owned by the *waqf* institution. In other words, it demonstrates that the *waqf* institution may own a property. Another example given by him is that any donation given to the *masjid*, the donation belongs to the *masjid* and not become part of waqf.

Usmani further postulated that the existence of separate legal entity in *Shari'ah* law can be appreciated in the *baitul mal*. According to him, Imam Al-Sarakhsi, the well-known Hanafi jurist, in his work "*Al-Mabsut*" stated that *baitul mal* has some rights and obligations which may possibly be undetermined. Al-Sarakhsi also pointed out that "If the head of an Islamic state needs money to give salaries to his army, but he finds no money in the *Kharaj* department of the *Baitul-mal* (wherefrom the salaries are generally given) he can give salaries from the *sadaqah* (*Zakat*) department, but the amount so taken from the *sadaqah* department shall be deemed to be a debt on the *Kharaj* department."[63] Based on the views of al-Sarakhsi in *al-Mabsut*, it clearly shows that a department may borrow and be indebted to another department. A bequest made in favour of a mosque is accepted in Islam.

Furthermore, the principle in a joint stock company which is found in the *Fiqh of Imam Shafi 'i*, also formed the basis of Usmani's argument on the separate legal entity in Islam. It is a settled principle of Shafi 'i School that if more than one person run their business in partnership, where their assets are mixed with each other, the *zakat* will be levied on each of them individually. However, the *zakat* will be payable on their joint-stock as a whole, so much so that even if one of them does not own the amount of the *nisab* but the combined value of the total assets exceeds the prescribed limit of the *nisab*, *zakat* will be payable on the whole joint-stock including the share of the

---

[59] Al Tahanawi, Muhammead Ali, 'Kashshaf Mustahat al-funun wa al-ulum. Bint: Maktabah Lubnan, 1996 in Zainal A.Z, en ta "Separate Legal Entity under Syariah and its Application on Islamic Banking in Malysia: A Note" (International Journal of Banking and Finance, Vol. 6, Issue 2, Article 8, 2009, p. 7.

[60] Taqi Usmani 'The Principle of Limited Liability,' (2007), p.105. Retrieved from http://www.meezanbank.com/knowledgeentre/knowledge-islamic-section-7-3.asp last accessed on 03/03/2013 at 1 pm

[61] Ibid

[62] Zuryati et al, "Separate Legal Entity under Syariah law and its Application on Islamic Banking in Malaysia: A Note." (International Journal of Banking and Finance, Vol. 6, Iss. 2, Article 8, Produced by The Berkeley Electronic Press, 2009), pp. 139-154 <http;//epublications.bond.edu.au/ijbf/vol6/iss2/8> accessed on 04/03/2013 at 3.28 pm.

[63] See Al- Sarkhasi, Shams Al- Deen, *Kitab Al- Mabsut, Beirut* Vol. 26, 1986, p. 87-89.

physical maturity (*al rushd*[54]) such as a person with the following attributes s comprehension and discernment. Any person who lacks one of these qualities restricted *ahliyyat al-ada.*

The classical texts on the concept of legal person tend to be preoccupied with t concept of legal capacity of 'natural person' rather than the 'juristic person', a literature which had led many western orientalists to claim that the Islamic Law the concept of juristic person. However, the basic question here is whether the person is acceptable to the Islamic Law. Although admittedly that the ter explicitly by the classical texts, but in my humble opinion, the mere non-me "juristic person" in the classical Islamic texts does not mean the non-existence Islamic Law. The *fuqaha* have limited their attention in explaining the concept o reason according to the Muslim jurists (*fuqaha*), "juristic person" in the establish public purpose - becomes juristic persons *'ipsa jure'* without intervention of without limiting their capacity to acquire gifts and the Islamic Perspective p separate form differentiating itself from the individuals who establish it but it c qualities.[55]

The principle of separate legal entity as introduced under the common law sys provisions from any *Shari'ah* law resources. Zuhairah[56] noted that some of the like Mustafa Ahmad al-Zarqa, Muhammad Abu Zuhrah, etc justify the existenc human being as a legal person based on the theory of *fiqh* known as *aldh* Naiimi[57] '*Al-dhimmah*' basically means 'guarantee' or 'accountable.'

According to Al-Kabashi,[58] some jurists view that the term *aldhimmah* and *al* synonymous, both of which represent the entity that have rights, bear responsib Thus, if an entity (*al-dhimmah*) is recognised to be in existence, either artificial certain capacity (*al-ahliyyah*) and therefore will be subjected to certain obligations

Nevertheless, this opinion was heavily criticised by the majority of the jurist refers to anything which has attributes of human being that relates to its rights The *al-dhimmah* is a '*zat*' which is real and not fictitious since the *Shari'ah* only

---

54 Al-Zarqa, op.cit., p. 772-778; and Al-Sabouni, op. cit., p.35

55 Sanusi, M.M, **The concept of Artificial Legal Entity and Limited Liability in Islamic La**

56 Zuhairah Arif Abd Ghadas "The Myth of Corporate Personality : An Overview from th Presented at the International Conference on Harmonisation of Shari'ah and Civil La University, Malaysia, 2003, p. 16.

57 Nasri Naimi "Pernan Perundagan Dalam Merealisasikan Konsep Syirkah Dalam Pengurusa presented at the persidangan undang-undang 2007) in Zainal A.Z, en ta "Separate Legal En Application on Islamic Banking in Malysia: A Note" (International Journal of Banking and Article 8, 2009), p. 7.

58 Al-Kabashi, Al-Makashin Taha, "Al-Dzimmah Wa al-haq wa ta thiruha bi al-mawt fi muqranah Riyad; Maktabah al-Haramayn 1989) in Zainal A.Z, en ta "Separate Legal Ent Application on Islamic Banking in Malysia: A Note" (International Journal of Banking and Article 8, 2009), p. 7.

CamScanner

Islam recognise the basic concept of an artificial personality distinct from its members in whom it is treated as a natural person in relation to the legal consequences of the transactions made in its name? *If so, is limited liability a logical consequence?*[47] Legal capacity of natural persons or living human beings (*Ahliyyah*) corresponds to the living status of a human being. It begins when a person is born alive and ends upon his death. The exact beginning and end of the natural person with legal capacity is a different issue. It is particularly important that Islamic Law too concern presumed legal rights given to a human being to enjoy certain rights before his birth and even after his death.

Legal capacity *(Ahliyyah)* is defined by Al-Zarqa as "a description presumed in a person rendering such a person a possible candidate to receive a legislative injunction."[48] Al-Sabouni defines it as "the ability of a person to oblige, be obliged and conduct one's affairs by oneself."[49]

Based on the above brief definition, it indicates that *al-ahliyyah* is a capacity to qualify a person to become able to acquire rights, bear obligations and power to conduct actions and transactions that are able to produce their legal effects.[50] Such basic capacity is inherent in every natural person and is lost only through his death.

"Legal capacity" in Islamic Law consists of (2) two kinds, namely, *Ahliyyat al-wujup* (capacity to acquire rights) and *Ahliyyat al-ada'* (capacity to execute).

The first aspect, *Ahliyyat al-wujup* by definition, is the ability of a person to acquire rights and to bear obligations.[51] The said capacity corresponding to the living status of human being and forms the element of legal person. Thus, it exists in every living human being regardless of sex, colour, race, age, creed, mental and physical ability or disability.

The second aspect of legal capacity in Islamic Law is *Ahliyyat al-ada'* (capacity to execute) where it is defined as "the ability of a person to initiate actions, the consideration of which depends on a sound mind."[52] Al-Sabouni defines it as the ability to effect actions that are recognised by Law.[53] The presence of a sound mind comprehension and discernment are therefore the main attributes of *Ahliyyat al-ada'*. Once these conditions exist, the person attains the level of full legal capacity and becomes able to receive the *Shari'ah* injunctions and be accountable for actions involving obligations and use or abuse of rights. Full *ahliyyat al-ada* can be attributed to every human being upon attaining the age of maturity and satisfying its requirements, namely, attaining a sufficient level of mental and

---

47 Modern Practices from a Shari'ah Perspective in Collaboration with Shari'ah Perspective: Overview <htt//213.175.220.56/alqalamo/wp-content/uploads/Modern-Practices-from-a-Shari'ah-Perspective.pdf>accessedon 03/ 03/2013 10 Am.

48 Al-Zarqa, Ahmed M., *Al-Madkhal Al-Fikh Al-'am,* (6th edn, vol. 2, 1959), p. 733.

49 Al-Sabouni, Abd Al-Rahman, *Al-Madkhal Lidirasat Al-Fiqh Al-Islami,* (4th edn): vol. 2, 1978, p. 24.

50 Saleh, Nabil, **Definition and Formation of Contract Under Islamic Laws**, 1990, ALQ, p.101-111.TR

51 Al-Sabouni, op. cit., p. 25.

52 Al-Zarqa, op. cit., p. 738.

53 Al-Sabouni, op. cit., p. 31.

A similar point is made in the well known Hadith in which the *Prophet (S.A.W.* said: "*If one of you sees something wrong, let him change it with his hand; if he cannot, th cannot, then with his heart and this is the weakest faith (Sahih Muslim, narrated by Abu Sa*

This *Hadith* addresses the entire *Ummah* and says*: "if any of you see wrong, let him c* does not say*:" if any government official or any scholar or imam of mosque…"*[45]
The leader and government officials are supposed to act on, for, or on beha (*Ummah*) to achieve public interest in the present and future action of the gov does not run into conflict with the objectives of the *Shari'ah*. In the event objectives of *Shari'ah* must prevail.
The Head of State should aim at achieving public interest as the legal max *management of citizen's affairs is dependent upon public welfare (Maslahah)"*

In this connection, ***Qarafi*** has shown that no one appointed to any office down to guardianship – is allowed to act in that capacity unless it is to promot or prevent evil (*masfsadah*). Imams and rulers should therefore excuse themselv does not require the greatest effort. This means that what is outweighed (*marju* that adopting it is the easy way out.[21] To what he said, I should add the follo 'Abd Allah gave his pledge of allegiance to God's Apostle, the Prophet stipulat sincere and true to every Muslim." Furthermore, ***Qarafi*** mentioned, "In every must be given to the person who is more qualified and more suitable to the re who is less so"[22] It is therefore well defined that the position of a juristic pe even the Head of State and its administrators have no right to encroach into the legal maxim of the *Shari'ah* is not compromised.

The above discussion proves that the characteristic of the concept of juris commercial companies or *Sharikat*. Modern Muslim scholars (*fuqaha*) have acc of the concept "distinct legal person" to modern companies based on the sa and does not give rise to any problems with regard to the application of separa concept of limited liability from its shareholders. **Al-Sabouni** provides exampl such as ownership of companies and contract companies including companie on 'Labour', companies based on 'Capital' and companies based on the 'Rep partners.'[46] There is no doubt that the Muslim jurists (*fuqaha*) do treat the c juristic person throughout Islamic history. Although in the Islamic Law o "juristic person" did not specifically appear in its exact terminology in the clas is widely described in the concept for entity. Though the *Fuqaha* did not menti their writings, it could be understood from the cases that are cited in personalisation of these institutions including companies would not have been the cases.

---

[44] Sanusi M.M, *op. cit.* p. 195.
[45] Ibid.
[46] Qarafi, *Shihab al-Din Ahmed, al-Furuq*, vol. 4, p. 1165
Qarafi, *al-Furuq*, vol. 2, p. 601
Al-Sabouni, op. cit., p. 81
Ali al-Khafif, Al-Shirkat fi al-Fiqh al-Islami, p. 22-7

a debtor and a creditor, sue and be sued and thus, all the characteristics of a juristic person can be attributed to it.

The basis of the above discussion can also be valid regarding Islamic Public Treasury (*bait al-mal*) mosques, hospitals, universities, orphanages and charitable institutions as all of them have a separate juristic person different from their administrators. All these can be found in the classical books of Islamic *Fiqh*.

Al Imam Ramli says: *"The will (wasiyyah) in favour of a mosque is lawful although the intention is to make it owner of the property. Mosque is like a free natural person and can hold property."*[39]

Another example of the existence of juristic person which can be found in *Fiqh* literature is that, *Bait al-mal*, being a treasury for the public, it has its financial independence, it also has its special system in the distribution of *Zakat* resources, taxes, *(kharaj) booty*, tribute and spoils of war for the people mentioned in the *Quranic* verse on *Sadaqah*. *Bait al-mal* enjoys legal rights and has financial legal capacity independent in capacity. It is neither subordinate to the *Khalifah* (head of state) or any of the administrators.[40]

We can draw the analogy that the independence and separate entity of the Muslim State (*Ummah*) is distinguished from that of its Head of State. *Shari'ah* did not compromise in its dichotomy between the State and the Head of State. The guiding rule in *Shari'ah* that the State has juristic personality is based on the following *Qur'anic* verse: *"Let there among you be an Ummah that summon to all that is beneficial, commands what is proper and forbids what is improper; they are the ones who will prosper."*[41]

Allah also says: *"Those who, if We establish them in the land (with authority), establish regular prayers and practice regular charity and enjoin the right and forbid the wrong…"*[42]

The foregoing *Qur'anic* verses illustrated that *Allah (S.W.T.)* characterised the *Ummah* as a separate entity from its head of state, since *Allah (S.W.T.)* said: *"You are the best Ummah ever brought forth for mankind: enjoying the proper and forbidding the improper and believing in God."*[43]

Therefore commanding the proper and forbidding the improper (*amr bi alma'ruf wa nahi 'an almunkar*) is not incumbent upon everyone individually. It is rather a collective duty upon the whole *Ummah* (*`ala`l-kifaya*) in order to fulfill the task described in the Qur'an.

This is why the consensus (*ijma'*) of the *Ummah* has become a decisive argument (*hujja*). The *Qur'anic* verses make it a logical necessity that anything the *Ummah* does not ordain is not something proper, while anything it does not forbid is not something improper. Thus, it is right to say that the *Ummah* presumed personality entity that has separate existence from the individuals who is being ruled and who rule it which evolved from the *Qur'anic* injunctions.

---

[39] Al-Ramli, Shamsuddin Muhammed, *Nihayat al-Muhtaj*, vol. 3, p. 116
[40] Al-Sarkhasi, Shams Al-Deen, *Kitab Al-Mabsut, Beirut*, vol. 26, p. 87-89
[41] Q.3 V. 104.
[42] Q.22 V 41.
[43] Q.3 V 10.

> persons. Similarly, they have considered the schools, orphanages, hospi
> as the juristic persons and competent to hold and exercise the rights[32]

Mustafa Zarqa states clearly that the concept of juristic persons exist in Islam
developed form, he says:

> When we referred to the original texts and sources of the *Shari'ah*,
> found in its legal provisions which in substance propounds the con
> of juristic person and its legal status. We equally found the legal provisi
> which personify the juristic person with all its principles
> characteristics which are attributed to it by the latest (Western) law[33]

He further adds:

> In the same pattern of the latest (Western) legal position of the jur
> person, it is found in the *Shari'ah* in the most perfect form in the shap
> treasury, *waqf* and the state in which the head of state personifies the e
> Muslim community[34].

The above-mentioned findings clearly intended to show that the juris
been accepted by Muslim jurists (*fuqaha*). However, the above illustrations can b
by the following essential characteristics of a juristic person:

1. It can perpetuate its legal status independent of the natural person
2. It has legal right and can own property.
3. It is responsible for legal obligations and possesses the borrowing po

All these three (3) characteristics are exhibited in the *Shari'ah* mech
treasury *(Bait al-mal)* and *waqf*. Classical Islamic jurists unanimously regard
institution has a separate entity that is different from that of its administra
separate set of financial rights and obligations. The jurists *(fuqaha)* say that, if a p
by the income of *waqf*, the property so purchased shall be treated as a property c
clearly means that a *waqf*[36] is like a real person who can own a property. In add
too allow *waqf* to incur debts with the permission of the judge *(qadi)*.[37] Acc
administrator can ask the judge to allow him to borrow money on behalf of
provide the necessary maintenance for the *waqf* properties. The following qu
classic literature of *Fiqh* is evident that a *waqf* has a separate legal capacity whic
a juristic person, which says that: "The proof of loan against the *waqf*
intervention of the responsibility of the administrator *(mutawalli)*."[38]

It is clear from the above examination of various references that *waqf*
Obviously, a *waqf* is not a human being yet, Islamic law treats it as a human b
ownership. Hence, when ownership is established, it will logically follow that it

---

[32] Abd Al-Qadir Audah: *Al-Tashri Al-Jinni, Dar Al-Khatibi*; Beirut; vol. 1, p. 392
[33] Abd Al-Qadir Audah: *Al-Tashri Al-Jinni, Dar Al-Khatibi*; Buirut; vol. 1, p. 392
[34] Ibid
[35] Dr. Riaz-Ul-Hasan, **The Reconstruction of Legal Thought in Islam,** 1982, p. 389 – 398.
[36] Al-Fatawa al-Hindiyyah, *Waqf*. Ch 5 v. 2 p 417
[37] Ibn Najeem, *Al-Bahar Al-Ra'aq, Beirut*, vol 5, 1993, p. 202, 212, 217 and 227 - 228
[38] Tanqih al Hamidiyya, vol. 1, p. 206.

CamScanner

based on the principle that a company is an independent entity. A company also has perpetual succession despite the death of its shareholders. In *Lee (Catherine) v. Lee's Air Farming Ltd,*[25] the facts disclosed that in 1954, Mr. Lee had formed the respondent company carrying on the business of crop spraying from the air, Mr. Lee owned 2,999 of the company's 3,000 shares. Apart from that, he also was the company's governing director whereby he had appointed himself as the only pilot of the company at a salary arranged by him. In March 1956, Mr. Lee was killed while piloting an aircraft during the course of top-soil dressing. The appellant want to claim compensation from the company as the employer of her husband under the New Zealand Workers' Compensation Act 1922. The issue for determination was whether there existed the relationship of employer and employee between the company and Mr. Lee. The court held in favour of appellant and she was entitled to compensation. Following the grounds of the decision in *Salomon's* case, Mr. Lee was employed by the company in the sense required by the Act 1922.

According to Keenan & Bisacre,[26] the principle set out in the above case has also led to the use of the term 'the veil of incorporation, which is said to hang between the company and its members and in law at least, act as a screen between them.

Under certain circumstances, this doctrine of separate legal entity produces what appear to be unjust and purely technical results. As a result, judges tend to come out under a moral or intellectual pressure to sidestep the principle of separate legal entity and produce a result which seems more just.[27] There are many reported cases that show the attitude of the judges to by-pass the precedent of *Salomon's* case in order to achieve justice by 'lifting' or 'piercing' the corporate veil (*Re* Lord Denning MR in the case of *DHN Food Distributors Ltd. V. London Borough of Tower Hamlets*[28]suggested that the corporate veil could be lifted, that the companies were in reality a group, and should be treated as one. Note that the House of Lords criticized Lord Denning's approach and held that the corporate veil could only be lifted in this way in circumstances where the company is a 'façade' as was held in the case of *Woolfson v. Strathclyde DC.*[29] In *Adams v. Cape Industries plc,*[30] the court gave strong support to the idea that there is really only one well-recognised exception to the rule prohibiting the piercing of the corporate veil. That is, it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts. In *Trustor AB v. Smallbone & Ors. (No. 3),*[31] Morritt V-C held that the court would be 'entitled to pierce the corporate veil and recognise the receipt by a company as that of the individual in control of it if the company was used as a device or façade to conceal the true facts thereby avoiding or concealing any liability of those individual', and that on the facts this was satisfied.

4.0: The Concept of a Juristic Person in Islamic Law

The modern Islamic scholars (*fuqaha*) have been writing on the concept of a juristic person and have been asserting that Islamic Law has always recognised it. Abdul Qadir Audah illustrates this fact in a profound argument saying that:

> The Islamic Law has, since its dawn, recognized the existence of juristic persons. The jurists have discussed the state treasury and *waqf* as juristic

---

25 [1961] AC, 12 PC.
26 Keenan, D. & Bisacre, J, *op. cit.* p. 27
27 Pettet, B, **Company Law,** (2nd edn), Harlow Pearson, 2005, p. 24.
28 ([1976] 3 All ER 462.
29 (1978).
30 [1990] Ch 433; (1990) 2WLR; HL 726.
31 [2002].

subjected to certain legal obligations such as the payment of taxes. An entity may shield its shareholders from personal liability[18]

The concept of legal personality is not absolute. 'Piercing the cor looking at the individual natural person acting agents involved individual agents involved in a corporation are treated as the rights or liabilities shareholders or directors. Generally, legal person do not have all the same righ freedom of speech that natural persons have, although the Republic of Ir exception in this regard.

3.0: The Principle of Legal Personality under Common Law

A company is a corporation. A corporation is a succession or collection of pe existence, rights and duties, separate and distinct from those of the persons time its members.[19] A corporation carries with it several distinguishing feature at law, i.e. an artificial person and it has perpetual succession, that is, the com not dissolved despite the changes in its membership since its existence is main succession of new persons who replace those who die or being removed.[20]

The doctrine of separate legal entity was originated from the case *Sa Ltd.*[21] The facts in this case disclosed that a company had been incorporate which he and members of his family were the only shareholders. The i company's business becomes a failure. The value of the assets was insufficie Salomon and the company's other creditors. Consequently, the creditors ra they argued that Mr. Salomon should not receive the payment from the co degree of control he exercised over the company. It was held by the House Mr. Salomon having the control over the company, it was neither his age because, a company was treated as operating the business in its own right from its controller, i.e, in this case of Mr. Salomon. Therefore, the charge gi Mr. Salomon was valid and he was entitled to be paid his debt even though company would not be paid because the company had insufficient assets t Thus, it shows that a company is a legal person separate and distinct from its directors as in the words of Cave J in *Re Sheffield & South Sheffield Yorkshire P In Liquidation.*[23] "A company is a legal *persona* just as much as an individual."

In *Macaura v. Northern Assurance Co. Ltd.*[24] Mr Macaura had form Thereupon, he sold his owned timber estate for 42,000 to the estate company money was paid by the company in the form of issuance of 42,000 fully Macaura had effected an insurance policy on the timber in his own name an name. Eventually, on 23 February 1922, most of the timber was destroyed claimed under his insurance policies. However, it was ruled by the court insurable interest. The insurance policy effected by him could only be on the shareholder of the company which neither two has an insurable interest in th

---

18 Ibid.
19 Keenan, D. & Bisacre, J, **Smith and Keenan's Company Law,** (13th edn): Harlow: Pears
20 Ibid.
21 [1897] AC 22; 45 WR,193.
22 See Orojo, O.J, **Company Law and Practice in Nigeria,** (5th edn): London, Lexis Nexis
23 [1889] 22 CH 470, 476, 5 TLR, 192.
24 [1925] AC, 619

CamScanner

fictitious person and only an imaginary person, as such, has no capacity to engage in any commercial transaction. This is one view. Besides, if a company or the fictitious entity is declared insolvent, the creditors have only the rights over the assets of the company which is only registered under the imaginary person whereby if the assets are not sufficient to settle the amount, it is simply written off and cannot be claimed from anyone.

2.2: Concept of Legal Personality

The legal status of one regarded by law as a person; the legal conception by which the law regards a human being or an artificial entity as a person.[10] Legal personality has equally been referred to the peculiar device by which the law creates or recognises units to which it ascribes certain powers and capacities.[11]

The concept of legal personality in legal jurisprudence is not restricted to human being. Association of persons can also enjoy a separate legal personality.[12] In fact, there are some human beings that do enjoy these attributes. On the other hand, some non-living entities do have legal personality. In the early legal systems, slaves were regarded as mere chattels and therefore lack legal capacity before the law.[13] In the case of non living entities, a group of incorporated persons is a good example of non living thing with a separate legal personality. However, it is not every arrangement either by individuals or states established to enable them to carry out co-operative ventures that would necessitate conferring a separate legal personality on such an entity.[14]

This principle was echoed in the case of NAURU v. AUSTRALIA[15] where the court observed that:

> The arrangement under which Australia, Newzealand and the United Kingdom became the joint Administrative Authority for Nauru in the Trusteeship Agreement approved by the United Nations in 1947 did not establish a separate legal personality distinct from that of the state.

Legal personality is the characteristic of a non living entity regarded by law to have the status of personhood[16]

Legal entity has a legal name and has certain rights, protections, privileges, responsibilities and liabilities under law similar to those of natural person. The concept of legal person is a fundamental legal fiction. It is pertinent to the philosophy of law as it is essential to laws affecting a corporation (corporations' law) (the law of business associations).[17]

Legal personality allows one or more natural persons to act as a single entity (a composite person) for legal purposes. In many jurisdictions, legal personality allows that composite should be considered under law separately from its individual members or shareholders. They may sue and be sued, enter contracts, incur liability and owes property. Entities with legal personality may also be

---

[10] Garner A.B, **Blacks' Law Dictionary** (8th edn), USA, Thomson West, 1990, p. 1179-1180.
[11] George, W.P, **A Textbook of Jurisprudence 393** (4th edn), G.W. Paton 8 David P. Derham,. 1972.
[12] Ladan M.T, **Introduction to Jurisprudence; A Classical and Islamic,** Lagos, Malthouse Press, 2006, p. 147.
[13] Paton G.W, **A Textbook of Jurisprudence**, London, Sweet & Maxwell, 1972, p. 61.
[14] Shaw M.N, **International Law**, Cambridge, University Press, 1979, p. 137.
[15] ICJ Reports [1992], p. 24.
[16] Wikipedia, the Free Encyclopedia. Legal personality <http://en.wikipedia.org/wiki/legal-personality>, last accessed on 24/02/ 2013 at 2.09 pm.
[17] Ibid.

corporate personality is not entirely arbitrary and therefore must respond realities of the corporation as well as conforming with and making intelli organisation as legal actors.[4]

The metaphor of personality is indeed useful in describing many of th traditions and modern corporate attributes, namely, separate legal entity, the r to take its own legal proceedings, limited liability, to sue and be sued and perp Placing these attributes under the head of separate legal entity has resulted to few salient features from what would otherwise be an overwhelmingly compl

A fundamental belief of modern day worldly company law is that a incorporated pursuant to the provision of the law and it enjoys a distinct lega its shareholders. This characteristic applies irrespective of whether the comp company or a public limited company. A company as a legal person, among owning property, being subjected to legal rights and obligations, suing and bei

It is well established that Islamic Law too recognises the concept of juristic person is a presumed person, a legal entity with a separate form fro establish them. It has some human features but not the human qualities. It is not a human being. It is therefore untrue that Islamic Law does not recognise person although admittedly, the term juristic person is not mentioned explici jurists (*fuqaha*). However, they recognised this concept based on Islamic pract definition and explicit term.[8] Accordingly, entities such as commercial c hospitals and mosques can have such a presumed person and can ent relationship provided that such a relationship is carried out by their competen

Almost all Muslims countries have drafted their legislations that reco their Laws. If Islamic Law does not recognise the concept of a juristic perso could not have been a rich literature in Islamic Law on legal recourse and mat institution as separate entities. Jurists (*fuqaha*) make the distinction to differen substance from the individual and shareholders, who establish and manage the

Legal Person in order to have a clear picture on the concept consideration on this issue would be complete without a brief mention o natural person or real person in Islamic Law.

One of the important elements in the common law concept of separ once a company has been incorporated, it will be considered as 'a person'. Th has the right to sue and to be sued, own property in its name and it is separ shareholders of the corporation. The liability of the owner or the shareholde value of shares invested in that particular company. In Islam, there are view matter. The traditional Islamic jurist's opinion is that the principle of separat exist in Islam. It is for a very simple fact that a company which is regarded

---

[4] Dan-Cohen M, *Rights, Persons and Organisations: A Legal Theory for Bureaucratic Society,* Barkel Press, 1987.

[5] Ibid.

[6] Sanusi, M.A, ***The Concept of Artificial Legal Entity and Limited Liability in Islam*** Islamic Banking, Finance and Takaful.

[7] Al – Musa, M. Sharikat Al-Ashkhas Bain Al-*Shari'ah* Wa Al Qanun, Published M. Phil thesis Sa'ud University 1401 H, PP. 113-115; Dr Mahdi Zahraa, 'Legal Personality In Islamic Law' (1

[8] Ibid

[9] See Lerrick, A. and Main, Q.J, *Saudi Business and Labour Law,* (2nd edn), London, Graham and

Juxtaposition of Legal Personality under the Common and Islamic Laws

Dr. Hanafi. A. Hammed
Dept. of Public & Int'l Law, Faculty of Law, Al-Hikmah University, Ilorin.
&
Dr. A.A. Owoade
Dept. of Islamic law, Faculty of Law, University of Ilorin.

Abstract

The entity of beings other than human beings has been established since early Roman law. Such entity is represented by the state, ecclesiastical bodies and education institutions which had long been recognised as having legal entity distinct from their members. More so, a juristic person is a corporation which is established under the doctrine of corporate personality. Despite the fact that this doctrine has been legally acknowledged, it is normally described as an essentially metaphorical use of language, clothing the formal group with a single separate legal entity by analogy with a natural person. In Malaysia, an Islamic banking institution is incorporated under the Companies Act of 1965 where after its incorporation; it became a legal entity separated from its members and shareholders. In the case of Bank Islam Malaysia Berhad V. Adnan bin Omar (1994), the court held that Bank Malaysia Berhad is a corporate institution created by statute. This case was decided based on civil law principle but not pursuance to Islamic Legal system. Since the products offered by an Islamic banking institution is only those recognised by Shari'ah, a fundamental controversy is whether the principle of separate legal entity is recognised under Shari'ah in spite of the fact that the term juristic person is not being mentioned specifically by the classical text of Islamic jurisprudence. The thrust of this paper is therefore to examine the concept of legal personality and to provide a general overview of legal capacity doctrine representing the general framework of legal capacity of natural persons under common law and Islamic law. The paper further examines the controversies surrounding the existence or otherwise of legal personality under Shari'ah, some juristic persons, evaluates them from the Shari'ah point of view and makes some recommendations and conclusion.

Keywords: Legal Personality, Juristic Person, Limited Liability, Legal Recognition and Permissible Activities.

1.0 Introduction

The legal entity of beings other than humans (juristic person) had been established since early Roman law.[1] Such entity is represented by the state, ecclesiastical bodies and educational institutions which had long been recognised as having legal entity distinct from their members.

Another recognised juristic person is the corporation which is established under the doctrine of corporate personality. Although this doctrine has been legally acknowledged, it is often described as an essentially metaphorical use of language, clothing the formal group with a single separate legal entity by analogy with a natural person.[2] Majority of theories on corporate legal entity contend that the legal entity of the corporation is artificial due to the fact that the existence of the body corporate as a legal person is not real. It only exist because the law of state recognised it as legal person as it is recognised either for certain purpose or objective.[3] Being merely a metaphor or an analogy,

Contents

Divorce in Nigeria's Dual Marriage System: Did *Jadesimi v Okotie-Eboh* Rest the I
Michael Ehigi .....

A Juxtaposition of Legal Personality under the Common and Islamic Laws
Dr. Hanafi. A. Hammed and Dr. A.A. Owoade .....

A Legal Appraisal of the Procedural Deficit in the Conditions Precedent to the against the Nigerian Civil Aviation Authority
Ademola O. Ojekunle .....

Accrual of Cause of Action in Torts of Defamation of Character and the Availal
Abubakar Shehu Ahmad Tijani and J.O Olatoke .....

African Women in the Cross-Currents of Customary and Contemporary Law: Idealism and Reality in Conflict
Mary-Ann Ajayi .....

An X-Ray of Dispute Systems Design in Nigeria
Shittu A. Bello and Olufemi Abifarin .....

Assisted Suicide Rulings in South Africa and New Zealand: A Contrasting Twist the Nigerian Situation
B.A. Omipidan Ph.D. .....

Human Rights and the Judiciary: Islamic Law Perspective
Ahmad Hussein Folorunsho1 and Abdulqadir Ibrahim Abikan Ph. D .....

Indigenizing Corporate Ideology for Better Corporate Governance
Dr. (Mrs) Kathleen E. Okafor .....

The Requirement for Payment of Tax as a Condition for Elections in Nigeria: Another View
Prof. Rasheed Jimoh Ijaodola .....

Privatisation, Deregulation and Good Tax System: The Alchemy of Public Corporations in Nigeria
S.M. Olokooba, J.O. Olatoke and Mohammed Bala .....

Tax Enforcing of the Self-Employed Persons Income in Nigeria: Issues, Challenges and Solutions
S.M. Olokooba and Ali, Chinenye Felicia .....

The Desirability or Otherwise of State Police in Nigeria – The Legal Framework
Joel Adelusi Adeyeye, Esq. .....

CamScanner