

The Myth of Corporate Personality; An Overview from the Common law and the Islamic Law Perspective.

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‘The question is at bottom not one on which law and legal conceptions have the only or the final voice: it is one which the law shares with other sciences, political science, ethics, psychology and metaphysics’.¹

Introduction

The decision of House of Lords in *Salomon v A Salomon & Co. Ltd*² had a lasting influence in corporation law. It is often credited with the principle of separate legal entity of the corporation distinct from the members. Though there is no doubt that the Salomon case had play a significant role in company law, the Lordship decision in this case was hardly the origin of the separate legal entity principle. The legal entity of beings other than the human has long been recognized prior to 1897, in which the Salomon case was decided. The jurisprudence theories on juristic person had been established since the early Roman law to justify the existence of legal person other than the human. The State, ecclesiastical bodies and education institutions had long been recognized as having legal entity distinct from the members.

The acceptance of the corporate personality of a company basically means that another non-human entity is recognized to assume a legal entity. Although this theory has been accepted as a well-established principle, it is actually ‘essentially a metaphorical use of language, clothing the formal group with a single separate legal entity by analogy with a natural person’.³ This can be seen from the many theories of jurisprudence on corporate personality. Majority of the principal jurisprudence theories on corporate personality contended that the legal entity of the corporation is artificial. The fiction, concession, symbolist and purpose theories supported the contention that existence of corporation as a

¹ Geldart, Legal personality, *Law Quarterly Review*, (1911) 27 at 94. This connotation is clear on the extensive discussion on corporate personality. Nonetheless, this paper exclusively concentrates on the discussion of corporate personality from legal perspective, particularly, the theories of jurisprudence.

² [1897] AC 22, HL

³ Farrar JH, *Company Law*, 3rd ed, Butterworths, London, 1991 at 72

legal person is not real. It only exists because the law of the state recognized it as legal person and it is recognized either for certain purpose or objectives. The fiction theory, for example, clearly stated that the existence of corporation as a legal person is purely fiction and that the rights attached to it totally depend on how much the law imputes upon it by fiction.⁴

Being merely a metaphor or an analogy, corporate personality is not entirely arbitrary and therefore must respond to the organizational realities of the corporation as well as conforming with the treatment of organization as legal actors.⁵ As such, conception of a corporation should be analytical and ideological, descriptive and prescriptive. The metaphor of personality is indeed useful in describing many of the corporation's traditional and modern corporate attributes, namely, perpetual succession, ability to own property, rights to take its own legal proceedings, ability to create floating charge, limited liability and compliance with the formalities of the Companies Act.⁶ Placing these attributes under the head of separate legal entity has resulted to selection of these few salient features existence of the concept of a fictitious person (*shakhsiyah i'itbariyah*) from what would otherwise be an overwhelmingly complex reality. Nevertheless, the use of the metaphor is mainly to describe and not to dictate the reality of corporation. As Bryant Smith pointed out:⁷

“ It is not the part of legal personality to dictate conclusions. To insist that because it has been decided that a corporation is a legal person for some purposes it must therefore be a legal person for all purposes... is to make of... corporate personality... a master rather than a servant, and to decide legal questions on irrelevant considerations without inquiring into their merits. Issues do not properly turn on a name.”

Similar to the common law, the existence of the concept of a fictitious person (*shakhsiyah i'itbariyah*) under the Islamic law has been continuously debated.. Most modern Islamic scholars claimed that this concept was known to Islamic law, while

⁴ W.Friedman, Corporate Personality in Theory and Practice, *Legal theory*, 5th ed., 1967 at 556

⁵ Dan-Cohen M, *Rights, Persons and Organisations: A legal Theory For Bureaucratic Society*, University of California Press, Berkeley, 1987 at p 44

⁶ Supra note 3 at p 81-82

⁷ Smith, Legal Personality, *Yale Law Journal*, Vol 37, 283 at 298

some are doubtful whether this concept in fact exist in Islamic law.⁸ According to Nyazee, the earlier Muslim jurists were aware with the concept of corporate personality but rejected it for the system they were dealing with.⁹ However, this does not mean that the Islamic law totally rejected the concept. After a thorough study on Corporations and Islamic Law, Nyazee found that the concept of corporate personality may be accepted in Islamic Law with certain qualifications.

Referring to both the common law and Islamic law theories on corporate personality, it is felt that there is a harmonization of law on the application and existence of corporation as a fictitious person.

The relevancy of the discussion on establishment of corporate personality as a fictitious person is seen as fundamental in justifying the existence of other business medium as a legal entity. With expansion and development in the market place, there are many other business medium which need to be recognize as a legal person and this can legally justified with the basis of argument on corporate personality.

Artificial Legal Personality

The common law perspectives

Generally, there are two types of person which the law recognized, namely the natural and artificial person. The former is confined merely for human beings whilst the latter is generally referred to any being other than human being which the law recognized as having duties and rights. One of the most recognized artificial person is the corporation. A famous exponent of the fiction theory, Savigny, took the view that:

‘Besides men and ‘natural persons’ the law knows as ‘subjects’ of proprietary rights certain fictitious, artificial or juristic persons, and as one species of this class it knows the corporation.’¹⁰

⁸ Imran Ahsan Khan Nyazee, *Islamic Law of Business Organization: Partnerships*, International Institute of Islamic Thought and Islamic Research Institute, Islamabad, 1997 at 316.

⁹ *Ibid.*,

¹⁰ Maitland, *Translator Introduction to Gierke's Political Theories of the Middle Age*, Cambridge, 1938 at

Legal scholars, particularly the jurists, have always explored the issue on the recognition of corporation as a 'legal person'. In the study of jurisprudence, the separate legal personality of corporation is based upon theories, which are concentrated upon the philosophical explanation of the existence of personality in beings other than human individuals.¹¹ W.Friedman, stated that:

'All law exists for the sake of liberty inherent in each individual; therefore the original concept of personality must coincide with the idea of man.'¹²

Even though there are many theories which attempted to explain the nature of corporate personality, none of them is said to be dominant.¹³ It is claimed that while each theory contains elements of truth, none can by itself sufficiently interpret the phenomenon of juristic person.¹⁴ Nonetheless, there are five principal theories, which are used to explain corporate personality, namely, the fiction theory, realist theory, the purpose theory, the bracket theory and the concession theory.¹⁵

(i) The fiction theory

The fiction theory of corporation is said to be promulgated by Pope Innocent IV (1243-1254).¹⁶ This theory is supported by many famous jurists, particularly, Von Savigny, Coke, Blackstone and Salmond. According to this theory, the legal personality of entities other than human beings is the result of a fiction. Hence, not being a human being, corporation cannot be a 'real person' and cannot have any personality of its own.¹⁷ Originally, the outward form that corporate bodies are fictitious personality was directed at

¹¹ Wolff M, On The Nature of Legal Persons, *Law Quarterly Review*, Oct 1938 at 496

¹² Supra note 4

¹³ Ibid., According to the writer, at the time the article is written, there are sixteen existing theories which dealt with the nature of juristic person.

¹⁴ Supra note 4 at p 571. The reason for this contention is said to be that corporate personality is a technical legal advice, applied to multitude of very divers aggregations, institutions and transactions, which have no common political or social denominator, whereas each of the many theories has been conceived for a particular type of juristic personality.

¹⁵ Supra note 4 at 556

¹⁶ John Dewey, The Historic Background of Corporate Personality, *Yale Law Journal*, Vol XXXV No.6, 1926 at 665

¹⁷ David P.Derham, *Theories of Legal Personality, Legal Personality and Political Pluralism*, Melbourne University Press, 1958 at 9

ecclesiastic bodies.¹⁸ The doctrine was used to explain that the ecclesiastic colleges or universities could not be excommunicated or be guilty of a delict as they have neither a body nor a will. The ecclesiastical courts applied the Canon law which made use of the Romanistic Fiction theory in dealing with religious corporations that came under their jurisdiction. The lawyers in the temporal courts later borrowed the theory from their colleagues in the Courts of Christian. As a result, the fiction theory became an established theory of the English Law.¹⁹ It is claimed that the fiction theory is orthodox in English law if any theory is although it is distinctive that the English law had never adopted one complete theory as part of its law.²⁰ The famous case of *Salomon v A Salomon Co Ltd*²¹ is a proof of the English court adoption of the fiction theory. In this case, Lord Halsbury stated that the important question to decide was whether in truth an artificial creation of the legislature had been validly constituted. It was held that as the company had fulfilled requirements of the Companies Act, the company becomes a person at law, independent and distinct from its members.²²

Among other distinguished followers of fiction theory is Coke, who took the view that corporations are 'invisible, immortal and resting only in intendment and consideration of law'.²³ Salmond, the principal English fiction theory advocate, made it clear that a human being is the only natural person whilst legal persons govern any subject matter other than a human being to which the law attributes personality.²⁴ States, corporations and institutions cannot have rights of a person but they are treated as if they are persons.²⁵ Under this theory, rights and duties attached to corporation as artificial person totally depend on how much the law imputes to it by fiction. The juristic personality of the corporation is a fiction and the author is the state.²⁶ The personality the corporation

¹⁸ Ibid.,

¹⁹ Frederick Hallis, *Corporate Personality. A study in Jurisprudence*, Oxford University Press, London, 1930 at xl

²⁰ Supra note 17

²¹ [1897] AC 22; HL

²² Ibid.

²³ Sutton Hospital case, 10 Rep.I (a) 32

²⁴ Salmond, *Jurisprudence*, 10th ed, at 324-5

²⁵ Ibid.,

²⁶ supra note 17

enjoys is not inherent in it but as conceded by the state. Due to the close connection made in this theory as regards to relation of legal personality and the power of the state, fiction theory was claimed to be similar to the theory of sovereignty of state which is also known as the concession theory.

(ii) The Concession Theory

The concession theory is basically linked with the philosophy of the sovereign national state.²⁷ It is said to be essentially a product of the rise of the national state at a time when there were rivals between religious congregations and organizations of feudal origin (communes and guilds) for the claim of national state to complete sovereignty.²⁸ Under the concession theory, the state is considered to be in the same level as the human being and as such, it can bestow on or withdraws legal personality from other groups and associations within its jurisdictions as an attribute of its sovereignty.²⁹ Hence, a juristic person is merely a concession or creation of the state.

Concession theory is often regarded as the offspring of the fiction theory as it has similar assertion that the corporations within the state have no legal personality except as it is conceded by the state.³⁰ Exponents of the fiction theory, for example, Savigny, Dicey and Salmond are found to support this theory. Nonetheless, it is obvious that while the fiction theory is ultimately a philosophical theory that a corporation is merely a name and a thing of the intellect, the concession theory is indifferent as regards to the question of the reality of a corporation in that it focus on the sources of which the legal power is derived. Dicey took the view that sovereignty is merely a legal conception which indicates the law-making power unrestricted by any legal limits³¹. Hence, as the parliament in England has such power, it can be said that it is the sovereign. The distinguished English jurist, Pollock, denied that English law applied the fiction theory

²⁷ Supra note 4 at 556

²⁸ Ibid.,

²⁹ Supra note 4 at 557-8

³⁰ Supra note 4 at 557. Nonetheless see note 14 at p 666-8 for discussion that there is nothing in common between the fiction and concession theory.

³¹ Dicey, Law of Constitution, 8th ed. at 70

but rather adopted the concession theory in explaining the nature of corporate personality.³²

(iii) The Purpose Theory

This theory is also known as the theory of *Zweckvermogen*. Distinguished advocates who are associated with this theory are E.I Bekker, Aloys Brinz and Demilius.³³ Similar to the fiction and concession theories, it declares that only human beings can be a person and have rights.³⁴ Entities other human is regarded as an artificial person and merely function as a legal device for protecting or giving effect to some real purpose. As corporations are not human, they can merely be regarded as juristic or artificial person. Under this theory, juristic person is no person at all but merely as a 'subjectless' property destined for a particular purpose and that there is ownership but no owner. The juristic person is not constructed round a group of person but based on the object and purpose. The property of the juristic person does not belong to anybody but it may be dedicated and legally bound by certain objects.³⁵ This theory rationalized the existence of many charitable corporations or organizations, such as trade unions, which have been recognized as legal persons for certain purposes and have continuing fund. It is also closely linked with the legal system which regard the institution of public law (Anstalt) and the endowment of private law (Stiftung) as legal personalities.³⁶

(iv) The Symbolist Theory

This theory is also known as the 'bracket' theory.³⁷ It was set up by Jhering³⁸ and later developed particularly by *Marquis de Vareilles-Sommières*.³⁹ Basically, this theory is

³² Frederick Pollock, *Has the Common Law Received the Fiction Theory of Corporations?*, 27 *Law Quarterly Review*, 1911 at 219

³³ *Supra* note 19

³⁴ *Supra* note 17 at 11

³⁵ *Ibid.*,

³⁶ *Supra* note 4 at 558

³⁷ This theory is also known as the Bracket Theory.

³⁸ *Geist des römischen Rechts*, I 6th ed, 1907

³⁹ See *Les Personnes Morales*, Paris (1902) and *Principes Fondamentaux du droit* (1889)

similar to the fiction theory in that it recognizes that only human beings have interests and rights. of a legal person.⁴⁰ According to Jhering, the conception of corporate personality is indispensable and merely an economic device by which simplify the task of co-ordinating legal relations. Hence, when it is necessary, it is emphasized that the law should look behind the entity to discover the real state of affairs. This is clearly in line with the principle of lifting of the corporate veil. Under this theory, rights are not inherent attributes of the human will and that an individual is not a subject of right by reason that he posses a will. On the contrary, the will is at the service of law and it is the interest of man which the law protects.⁴¹

The symbolist theory is often acknowledged for its availability to justify corporate personality from non-legal facts but it has been repeatedly rejected by the courts in common law jurisdictions because it denies the law by deducing that the only legal relation which is fixed and certain can be discovered by removing the 'brackets' of the corporation and analyzing the relations of the human beings involved.⁴²

(v) The Realist Theory

The founder of this theory was a German jurist, Johannes Althusius⁴³ while its most prominent advocate is Otto von Gierke, who not only responsible for the scholarly wisdom of his writings but also as the challenger to the entire basis of Roman jurisprudence. According to this theory, a legal person is a real personality in an extra juridical and pre-juridical sense of the word. It also assumes that the subjects of rights need not belong merely to human beings but to every being which possesses a will and life of its own. As such, being a juristic person and as 'alive' as the human being, a corporation is also subjected to rights. Under the realist theory, a corporation exists as an objectively real entity and the law merely recognizes and gives effect to its existence. Under this theory, the law is regarded as having no power to create an entity but merely

⁴⁰ Martin Wolff, On the nature of legal persons, Law Quarterly Review, Oct 1938 at 497

⁴¹ Supra note 19 at 169

⁴² Supra note 17 at 11

⁴³ Supra note 16 at 670

having the right to recognize or refuse to recognize an entity. A corporation is referred to as a social organism while a human is regarded as a physical organism. The realist theory contended that, action of the corporation is deemed to be carried out on its own, similar to the way of the normal person and not by its agents or representatives like those of the incapable, such as the infant and insane. While human uses his bodily organ to do an act, the corporation uses men for that purpose. Some of the Realist theory followers even claimed that similar to the human being, juristic person also has organs. For example Nicholas of Cues, the great precursor of modern philosophy contended that as a juristic person, the State's skeleton comprises of the land, the people formed as the State's flesh whilst the law acted as the nerves.⁴⁴ This theory is found to be favored more by sociologists rather than by lawyers.⁴⁵ This justified the fact that realist theory is more popular in France and Germany compared to United Kingdom. The basis of English law was made by judges via their judicial reasons whilst in France and Germany, the jurists who are mainly sociologists took vital part in drawing the whole legal code.⁴⁶

While discussing the realism of the corporate personality, most of the realist jurist claimed that the fiction theory failed to identify the relation of law with the society in general. The main defect of the fiction theory according to the realist jurist is the ignorance of sociological facts that evolved around law making process. Hence, by ignoring the 'real capacity and functions' of corporation in the real world, the fiction jurists had failed to see the 'live' possessed by a corporation. The realist contended that by rejecting the fiction theory, one would succeed to reject an abstract conception and untrue account of the reality with which the practical lawyer has to deal. According to the realist jurist, lawyers have to acquire the habit to depart from the plain meaning of law and go behind the scenes of the legal platform for the realization and justice which law is supposed to introduce to life.

Summary

⁴⁴ Supra note 11 at 498-499

⁴⁵ Ibid., at 502

⁴⁶ Supra note 10 in the early days of development in fiqh at xli

From the discussion on jurisprudence theories of corporate personality, it is observed that main arguments lies between the fiction and realist theories. The fiction theory claimed that the entity of corporation as a legal person is merely fictitious and only exist with the intendment of the law. On the other hand, from the realist point of view, the entity of the corporation as a legal person is not artificial or fictitious but real and natural. The realist also contended that the law merely has the power to recognize a legal entity or refuse to recognize it but the law has no power to create an entity.

Referring to the English company law case law, it can be seen that in most cases, the court adopted the fiction theory. *Salomon v A Salomon Co.Ltd*⁴⁷, is the most obvious example. It is also observed that fiction theory provide the most acceptable reasoning in justifying the circumstances whereby court lifted the corporate veil of corporation. If the entity of the corporation is real, then the court would not have the right to decide the circumstances whereby the separate legal entity of the corporation should be set aside. No human being has the right to decide circumstances whereby the entity of another human being should be set aside. Only law has such privilege. However, as the entity of corporation is artificial and merely an intendment of the law, the court has the right to apply its discretion when and where the corporate entity should be ignored

Nonetheless, the realist contention that the corporation obtain its entity as a legal person not because the law granted it to them but because it is generated through its day to day transaction which are later accepted and recognized by law also seem acceptable. This reasoning is found to be very much true if one look at the treatment of the law towards unincorporated associations and partnerships. Even though the basis of distinction between incorporated and unincorporated associations would, at first sight, lies in the very fact of legal personality, under the English law, this distinction appears to be very fragile. For example, in *N.U.G.M.W v Gillian*,⁴⁸ trade unions, have been declared by the court to have all the powers of *persona juridica* except for those solely characteristics of a natural person and those expressly expected by the creating statute. Partnerships have

⁴⁷ [1897]AC 22, HL

⁴⁸ [1946] K.B 81

also in certain circumstances treated by the court as distinct from its partners for example by allowing actions taken between the firm and its partners. A writer who supported the realist theory claimed that the corporation exist as a legal entity because the law is recognizing an objective fact whilst in refusing to recognize fully the existence of partnership or voluntary association as an entity, the law is shutting its eyes to facts.⁴⁹ This explanation seems logic because if we look at the English law, although in certain circumstances, the court allows the firm to be separated from the partners, partnerships are still not recognized as an entity. Where as, in Scotland and Continental European countries, partnership has a separate legal personality because the law recognized it as an entity. Nevertheless, the fiction theory has a reasonable reasoning to justify the position of unincorporated associations and partnerships. Under the fiction theory, to exist as a legal person it depends upon impediment of the law. Therefore, partnerships and unincorporated associations can also be treated as legal persons if the law granted to them such status. In Scotland and continental European countries, as the law granted partnership a legal entity, then it exists as legal person whilst in England even though its partnerships have similar attributes to partnerships in Scotland and Continental European countries, it is not an entity because the law in England refused to grant such status to partnerships. By merely being a metaphor, the existence of artificial persons, highly depends upon the law. The fiction theory reasoning is able to justify that the existence of a legal person does not solely belong to corporations. Hence, it is possible for other organizations to be treated as an entity provided that the law granted it such recognition. This finding is vital to justify that the concept of separate legal entity in corporation is not an exclusive right of corporations. The corporate personality of corporation which granted it the right to be treated as legal person is actually a mere metaphor and not real. To be a legal person, it does not actually depend upon incorporation but on the recognition of law.

Today, the development of partnership laws has proved that the status of legal person can also be embraced by partnerships. The recent limited liability partnership introduced in Jersey, United Kingdom and the United States limited liability partnerships are examples

⁴⁹ Arthur W. Machen, *Corporate Personality*, Harvard Law Review, Vol XXIV, 1911 at 260

of partnerships which are treated by law as legal persons. Other than having separate legal personality from the partners, limited liability partnerships also enjoy main attribute of corporation, namely limited liability. Applying the fiction theory, again this is justifiable. As the attributes of corporations are not naturally generated by corporation by itself but exists because they are granted by the law to corporations then once the law granted the entity as legal person and attributes of corporations to limited liability partnership, it can act similar to corporations.

Even though this paper highlighted supports for the fiction theory and other theories which provide that the legal entity of corporation is artificial, it does not meant to totally reject the rationale of the realist theory. Both theories carry merits of their own as Sir Frederick Pollock had rightly pointed out, “...authority can be found in the same case to support different theories”⁵⁰. The concept of corporate personality has been evolved in law for the sake of convenience and not for the purpose of creating complications.⁵¹ It is also observed that the discussion on ‘corporate personality ‘ and legal persons have taken shifts with the progress of time. The fiction theory is generally acknowledged by the early jurist whilst the realist theory has many supporters from the new generation of jurist, particularly from the United States. Nevertheless, different jurist has different theories which either related or opposed to each other. Despite the irritant that sometimes occurred through out the discussions, the writer strongly supported the view that although it is purely a matter of legal convenience.⁵²

⁵⁰ Pollock, *A First Book of Jurisprudence*, London at p 110-1

⁵¹ K.P. Chakravarti, *Jurisprudence and Legal Theory*, Eastern Law House, India, 1989 at 303

⁵² *Ibid.*,

(b) The Islamic Law Perspective

The concept of artificial legal personality is not alien to Islamic law although it does not specifically refer to companies. As such, the concept of corporate personality cannot be explicitly found in the classical Islamic law. Nonetheless, the basic discussion on corporate personality under the Islamic law can be derived from the discussion and views of the Muslim jurist (*fuqaha*) on the entity of artificial person.

Since the early days of development in *fiqh*, there were many evidences which showed that the concept of fictitious person had been applied. For example, the recognition of *waqf*, *bayt al mal* and the mosque as an entity. Mustafa Ahmad al-Zarqa, a modern jurist in *fiqh* clearly stated⁵³:

“ If these institutions which exist now recognized ‘fictitious personality’ existed in the early era of development in *fiqh*, it would be obvious that it (the principle of fictitious personality) would be recognized by the *fuqaha* (at that time) through legal justifications which are similar to legal justifications of the institution of *Daulah*, *Bayt al-Mal*, *al Waqf*.”

Al-Dhimmah

According to the modern jurists of *fiqh*, such as Mustafa Ahmad al-Zarqa⁵⁴, Muhammad Abu Zuhrah⁵⁵ and Ali al-Khafif⁵⁶, the theory which recognizes an entity other than human being as a legal person can be justified through the theory of *Fiqh* known as *al-Dhimmah*.

⁵³ al-Zarqa', Mustafā Ahmad, *al-Madkhal al-Fiqhi al-'Am*, Dimashq, Dar al-Fikr, 1968, vol.3, pg. 287

⁵⁴ Ibid.,

⁵⁵ Abu Zuhrah, Muhammad, *al-Milkiah wa Nazariat al-'Aqd fi al-Shari'ah al-Islamiah*, al-Qahirah, Dar al-Fikr al-'Arabi, 1996, pg.264

⁵⁶ al-Khafif, 'Ali, *al-Sharikat fi al-Fiqh al-Islami*, Buhuth Muqaranah, Jami'at al-Duwal al-Islamiah, Ma'ahad al-Dirasat al-'Arabiah al-'Aliah, pg. 22

Al-dhimmah is a term used in theories of fiqh used by the fuqaha to resolve issues relating to *al-iltizamat* (obligation) and *al-ahliyyah* (capacity). The concept of *al-dhimmah* is not new as it had been commonly applied and discussed by the fiqh jurists since the early era of development of fiqh theories. The application of *al-dhimmah* can be traced since the era of prophet Muhammad (s.a. w), for example;

• عن عائشة رضي الله عنها: قال رسول الله صلى الله عليه وسلم: " ذمة المسلمين واحدة يسعى

بها أدناهم⁵⁷"

From Ai'shah (r.a):

(The lives of all Muslim are equal, they are one band against others; the lowest of them can guarantee their protection)⁵⁸

or in another translation:

(and the asylum granted by any Muslim is to be secured by all Muslim , even if it is granted by one of the lowest social status among them)

• عن أنس بن مالك رضي الله عنه: قال رسول الله صلى الله عليه وسلم: "من صلى صلاتنا

واستقبل قبلتنا وأكل ذبيحتنا فذاك المسلم الذي ذمة الله ورسوله فلا تخفروا الله في ذمته⁵⁹".

From A'nas ibn Malik (r.a):

⁵⁷ al-Bukhari, Muhammad ibn Isma'il, *Matn al-Bukhari mashkul bi Hashiat al-Sindi*, al-Qahirah, Dar Ihya' al-Kutub al-'Arabiah, vol.4, pg.169.

⁵⁸ al-Bukhari , Muhammad ibn Ismail, *Matan al-Bukhari mashkul bi Hashiat al-Sindi*, al Qahirah, Dar Ihya al Arabiah, vol 4 at p 169

⁵⁹ al-Bukhari, Muhammad ibn Isma'il, *Sahih al-Bukhari*, Bayrut, Dar al-Qalam, Kitab al-Salat, Hadith no: 378.

(Who ever pray like us and faces our Qibla and eats our slaughtered animals is a Muslim and is under Allah's and his Apostle's protection. So do not betray Allah by betraying those who are in His protection) ⁶⁰

● سمعت عمر بن الخطاب رضي الله عنه : قلنا : أوصينا يا أمير المؤمنين: قال: "أوصيكم بدمة الله

فإنه ذمة نبيكم وورث عيالكم" ⁶¹.

Narrated by Juwairiah bin Qudama al-Tamimi, (We said) to 'Umar ibn al-Khattab: ' o chief of the believers! Advise us", He said " I advise you regarding Allah's convention (made with the dzimmis) as it is the convention of your prophet (s.a.w) and the source of the livelihood of your dependents. ⁶²

It is observed from above ahadith that the application of the term *al-dhimmah* varies and does not connote the same definition. The justification for the variation lies in different views of Muslim scholars and fiqh jurists on the meaning of the term *al-dhimmah*.

a.) View 1:

Among the fuqaha who applied this view are, al-'Izibn 'Abd al-Salaam d.660H, al-Bahuti, Mansur ibn Yunus d.1041H, Ibn 'Abidin, Muhammad Amin d 1252H, al-Qurafi, Ahmad ibn Idris d.684H, Ibn Shat, Qasim ibn 'Abd Allahd.723 and al-Kharashi, Muhammad ibn 'Abd allah d.1101H. According to these fuqaha, *al-dhimmah* refers to anything which has attributes of human being that denotes to it rights and responsibilities.

b.) View 2

Among supporters of this view are Fakhrul al-Islam al_Bazdawi, 'Ali ibn Muhammad Fakhrul al-Islam al-Bazdawi, 'Ali ibn Muhammad d. 483H ibn Malak, 'Abd al-Latif ibn

⁶⁰ al-Bukhari , Muhammad ibn Ismail, Sahih al-Bukhari, Bayrut, Dar al-Qalam, Kitab al-Salat, Hadith no.378

⁶¹ al-Bukhari, ibid., Kitab al-Jizyah, Hadith no: 1330.

⁶² al-Bukhari , Muhammad ibn Ismail, Kitab al-Jizyah, Hadith no: 1330

'Abd al-'Aziz d.801H and al-Nawawi, Yahya ibn Sharaf. d. 676H. According to this view, *al-dhimmah* is a 'dhat' which is real and not fictitious. This contention is based upon the principle that in Shariah only real person can be imposed with obligations and righth.

c.) View 3

According to Al-Tahanawi, Muhammad 'Ali⁶³, the term *al-dhimmah* is not applicable at all and has no relevancy in relation to interpretation of liability and obligation in Fiqh. Under this view, the term *al-dhimmah* is merely used by the fuqaha in its literal meaning

d.) View 4

There are also some fuqaha who have the view that *al-dhimmah* and *al-ahliyyah* is a synonym.⁶⁴ They claim that both terms represent the entity which have rights, bear responsibilities and obligation. This contention is heavily debated by the Muslim jurist because the interpretation of *al-dhimmah* and *al-ahliyyah* is separated by a very thin distinction. The fuqaha who supported this view argue that *al-dhimmah* is related to *al-ahliyyah* (capacity) which gave rise to *iltizamat* (obligations). The fuqaha claimed that Islam is a way of life which combined law with the beliefs. As such, once an entity (*al-dhimmah*) is recognized to be in existence, either artificial or real, it will have a certain capacity (*al-ahliyyah*) and therefore will be subjected to the Islamic law which requires obligations (*iltizamat*) in both this life and the hereafter. In this case, as an artificial person can not be expected to perform or be liable for the obligations in the hereafter, its existence should not be recognized.

This contention has been argued as contradicting with the majority fuqaha who have the view that *al-dhimmah* and *al-ahliyyah* are two different term which can be clearly distinguished.. According to the majority of fuqaha, *al-dhimmah* refers to the entity

⁶³ al-Tahanawi, Muhammad 'Ali, *Kashshaf Mustalahat al-Funun wa al-'Ulum*, Bayrut, Maktabah Lubnan, 1996, vol.1, pg.826.

⁶⁴ Al-Kabashi, al-Makashifi Taha, *al-Dzimmah wa al-Haq wa -ta'thiruha bi al-Mawt fi al-Fiqh al-Islami -Dirasah Muqaranah*, al-Riyad, Maktabah al-Haramayn, 1989 at p 28-29.

whilst *al-ahliah* refers to legal capacity. A very good example to distinguish the two terms is the institution of waqf.

In administering the property of waqf, the work is done by a real person (human being) who does all the paper work, business transaction and related matters. The real person committed all the tasks as a representative of the 'waqf' as it is impossible for the institution to perform all the physical act in administering its property. Nonetheless, the property and all the profits derived or liabilities incurred from the business transaction belong to the waqf and not to the real person who committed all the physical act. Recognition of the shariah of the institution of 'waqf' to own all the property means that the Islamic law recognizes the existence of entity (an artificial person) or *al-dhimmah* which has the right to own property and enter into business transactions under its name. The real person is merely working for it and not subjected to the obligations or rights of the institution as an entity. The real person who administers the waqf property is also not a beneficiary as he has no interest in the waqf property. These arrangements are also applicable to other institutions such as *al-daulah*, *bayt*, *al-mal* and the mosque.⁶⁵

The above argument clearly justifies the view that artificial person is recognized as entity under both the common law and Islamic law.

Observation

It is observed that from the Islamic law perspective, majority of the Fiqh jurists accepted and acknowledged the existence of an entity other than a human being which is entitled to some rights and liable to certain obligations and responsibilities. Nonetheless, the discussion of the fuqaha on artificial person does not only lie in the entity of the fictitious person but also whether it is subject to obligation and responsibilities as required under Shariah.

⁶⁵ For more information refer to al-Zuhayli, Wahbah, *ibid.*, vol.4, pp. 2842-2843; Madkur, Muhammad Salam, *al-Madkhal li al-Fiqh al-Islami, Tarikhuhu Masadirihu wa Nazariyyatuhu al-'Ammah*, al-Kuwayt, Dar al-Kitab al-Hadith, pg.447-449; al-Khafif, *ibid.*, pp. 24-26; Abu Zuhrah, *ibid.*, pp.264-265, al-Zarqa', *ibid.*, 258-264.

Summary

It is observed that the entity of artificial person is acknowledged and accepted by the majority under both the common law and Islamic law. This can be seen from the recognition of both laws that there are some entities other than the human being that exist in the society which are entitled to some rights and liable to certain obligations and responsibilities.⁶⁶

It is also observed that different from the common law which merely focuses on the discussion on establishment of the entity, either it is real or fictitious, the Muslim jurists discussion includes the spiritual aspects which includes obligation in the hereafter.

Nonetheless, from the above discussion it can be seen that the existence of artificial person is clearly established in both the common law and the Islamic law. This finding is important in substantiating any proposal to include Islamic business practices into a civil business structure or vice versa. Once the basic entity of the business structure has been successfully and clearly defined, other attributes can be easily imputed into the structure. Today, in Malaysia, for example, in the era of developing the nation economy and globalization, it is no longer a surprise for Islamic business and banking practices being applied by conventional and civil business organizations. Harmonization of laws between the shariah law and the civil law is indeed possible in business and had been a reality in certain business sectors.

⁶⁶ Lewis, B., eds, *The Encyclopedia of Islam*, Leiden, E.J. Brill. 1965, vol.II, pg. 231. Also see: al-Sanhuri, 'Abd al-Razzaq, *Masadir al-Haq fi al-Fiqh al-Islami*, Bayrut, Dar Ihya' al-Thurath al-'Arabi, vol.1, pg. 18, see footnote (1).