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## ‘The Myth of Corporate Personality’: A comparative Legal Analysis of the Doctrine of Corporate Personality of Malaysian and Islamic Laws

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**Abstract:** Corporate personality is an entrenched legal principle of the English company law. In Malaysia, the Companies Act 1965 (Act 125), which is modeled on the English Companies Act 1948 and the Australian Uniform Companies Act 1961, clearly incorporated the English law doctrine of corporate personality. Under this doctrine, a company is recognized as a legal person and have distinguished features, namely perpetual succession, right to enter into legal proceedings, and deals with property under its own name and ability to limit the liability of its members. Under the Islamic law, the term “*musyarakah*” or “*shirkah*” is used to refer to business entities. *Shirkah* literally means ‘intermingle’ implying the intermingling of properties that form the capital, whereby one cannot be differentiated from the other. The approach in classifying business entities is different between the common law and the Islamic law whereby under the common law, the regime of a company is totally different from a partnership and both are subjected to different laws. However under the Islamic law, *shirkah* could refer to both company and partnership structure. In all type of arrangements in the *shirkah*, the individuals are not separated from the *shirkah* as the *shirkah* is not regarded as a legal entity. In Malaysia, Shari ‘ah compliance businesses are highly propagated. It is interesting to see that many Islamic institutions being established as body corporate. With such status, it is inherent that the common law principles on body corporate which are applicable in Malaysia under the Companies Act 1965 are unreservedly applicable to these institutions. An issue which arises from such practices is whether it is the corporate entity under the Companies Act 1965 is acceptable under the Islamic law and is it appropriate for Islamic businesses to be carried out by a conventional corporate entity. Objective of this paper is to analyze the status of corporate entity with special reference to the attribute of separate legal entity from both the Islamic law and the Malaysian law (which is based on the English law) and to conclude whether the principle of corporate entity is acceptable under the Islamic law.

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**Key words:** Corporate Personality, Legal Entity, *Shari ‘ah*

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### INTRODUCTION

The legal entity of beings other than the human (juristic person) had been established since the early Roman law (Friedman, 1967). Such entity is represented by the State, ecclesiastical bodies and education institutions which had long been recognized as having legal entity distinct from their members.

Another recognized juristic person is the corporation, which is established under the doctrine of corporate personality. Although this doctrine has been legally acknowledged, it is often describes as an ‘essentially a metaphorical use of language, clothing the formal group with a single separate legal entity by analogy with a natural person’ (Farrar, 1991). Majority of the theories on corporate personality contended that the legal entity of the corporation is artificial due to the existence of the body corporate as a 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. 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 and making intelligible the treatment of organization as legal actors (Dan-Cohen, 1987).

The metaphor of personality is indeed useful in describing many of the corporation’s traditional and modern corporate attributes, namely, separate legal entity, the rights to own property, to take its own legal proceedings, limited liability, to sue and to be sued and perpetual succession. Placing these attributes under the head of separate legal entity has resulted to selection of these few salient features from what would otherwise be an overwhelmingly complex reality (Dan-Cohen, 1987).

#### ***Corporate Personality:***

##### ***The English law Perspectives:***

The famous English jurist, Fitzgerald (1966) states that:

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“a person is any being whom the Law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not and no being that is not so capable is a person, even though he may be a man. People are the substances of which rights and duties are the attributes. It is only in this respect that person possesses juridical significance and this is the exclusive point of view from which personality receives legal recognition.”

The above contention emphasized that a person legally is not confined to a human being. In fact, there are men who are not legally recognized as persons for example, the slaves, are destitute of legal personality in any system which regards them as incapable of either bearing rights or liabilities. A famous jurist, Savigny, justify the existence of corporation as a juristic person by stating that besides men and ‘natural persons’, the law known as ‘subjects’ of proprietary rights certain fictitious, artificial or juristic persons, and as one species of this class it knows the corporation (Maitland, 1938).

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 (Wolff, 1938). There are many theories, which attempt to explain the nature of corporate personality, but none of them is said to be predominantly accepted (Hallis, 1930). It is claimed that while each theory contains elements of truth, none can by itself sufficiently interpret the phenomenon of juristic person. 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 (Dewey, 1925).

#### ***The Fiction Theory:***

This theory is supported by many famous jurists such as Von Savigny, Coke, Blackstone and Salmond (Dewey, 1925). Under 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 (Derham, 1958). Originally, the outward form that corporate bodies are fictitious personality was directed at ecclesiastic bodies whereby the doctrine was used to explain that the ecclesiastic bodies could not 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 (Hallis, 1930). Under fiction theory, rights and duties attached to corporation as artificial person totally depend on how much the law imputes to it.

#### ***The Concession Theory:***

The concession theory is basically linked with the philosophy of the sovereign national state (Derham, 1958). 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. 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. 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 (Dewey, 1926).

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 focuses on the sources of which the legal power is derived. The distinguished English jurist, Frederick Pollock, denied that English law applied the fiction theory but rather adopted the concession theory in explaining the nature of corporate personality (Pollock, 1911).

#### ***The Purpose Theory:***

Similar to the fiction and concession theories, the Purpose theory declares that only human beings can be a person and have rights (Hallis, 1930). 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 Purpose theory claims that the juristic person is not constructed round a person but based on object and purpose. 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.

***The Symbolist Theory:***

This theory is also known as the 'bracket' theory (Wolff, 1938). Under this theory, the conception of corporate personality is merely an economic device by which simplify the task of coordinating legal relations. 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 possesses a will. On the contrary, the will is at the service of law and it is the interest of man which the law protects. 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.

***The Realist Theory:***

Under this theory, a legal person is a real personality in an extra juridical and pre-judicial sense of the word (Derham, 1958). 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.

The realist theory also emphasized that the law has no power to create an entity but merely having the right to recognize or refuse to recognize an entity. A corporation is referred 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. Many of the realist jurists claim 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 have 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. It is observed that except for the realist theory, all the other four main theories agree on the principle that the legal personality of a corporation is artificial and depends upon what the law imputes upon it. The entity and extent of rights of a corporation totally depend upon the authorization of law. Adopting the majority's views, it can be adduced that the existence of legal entity of a corporation is a mere metaphor or a fiction of the law.

Farrar (1991), states that the personality of a corporation is "essentially metaphorical use of language, clothing the formal group with a single separate legal entity by analogy with a natural person". Nonetheless, the metaphor of personality is useful to conceptually facilitate and describe many of the traditional and modern corporate attributes, such as that of limited liability (James, N., 1993).

***The Malaysian law perspective:***

The English law doctrine of corporate personality is clearly applied under the Malaysian company law. Under the Companies Act 1965 (Act 125), section 16 (5) provides that a company shall be regarded as a body corporate, capable of exercising all the functions of an incorporated company. According to Salleh Abas FJ, it is 'artificial' the company's legal persona is the result of statutory acts of the Registrar of Companies under s. 16 of Companies Act 1965 (*Tan Lai v. Mohamed Bin Mahmud* [1982]). Upon incorporation, a company has the right of suing and being sued.

In *Lee Eng Eow* (as director of *Lee Guat Cheow & Co Sdn Bhd*) v *Mary Lee* (as executrix of the estate of *Low Ai Lian*) & Ors [1999], the Court of Appeal held that an association has a legal personality of its own apart from the persons who comprise it. If a director breached his duty, the company has the right to take legal action against him. A member of the company cannot sue on the company's behalf to enforce a company's rights. This rule is known as the 'proper plaintiff rule' or the rule in *Foss v. Harbottle* (1843). A company also has perpetual succession. In *Abdul Aziz Bin Atan v. Ladang Rengo Malay Estate Sdn. Bhd. A* [1985], the court held that although there are changes in the membership, the corporate entity continues unchanged. In *Re Noel Tedman Holdings Pty Ltd* [1967], the court held that a company may even continue to exist despite the death of all its shareholders and directors.

A company also has the power to hold land. Article 9 of the Third Schedule to the Companies Act 1965 provides that a company possesses the power to purchase, take on lease or in exchange, hire and otherwise acquire any movable or immovable property. Even though section 16(5) of Companies Act 1956 only mentions the right to own land, a company also possesses the right to own other sort of property (Zuryati, Yusoff, and Azrae, 2009).). The property will be treated as the company's own and not the shareholder. Therefore, even if a person owns all the shares in the company, he does not own the company's property nor does he have any legal

or equitable interest therein (*Macaura v. Northern Assurance Co. Ltd.* [1925]). Ability to limit the liability of members is another attribute of a company (section 16(5) of Companies Act 1965).

The limitation of members' liability depends upon the amount of his share contribution in the company or in the guarantee. Under section 214(1)(d) of Companies Act 1965, for a company limited by shares, the liability of its members is limited up to the amount of his unpaid shares in the company whilst for a company limited by guarantee, the members' liability is only up to the amount of his guarantee as prescribed in the company's Memorandum of Association (MOA). The above discussion clearly highlighted that the Companies Act 1965 adopted the English principle of corporate entity, which give rise to all the statutory attributes of a corporation.

#### **The Shari 'ah perspective:**

Under the Islamic law, discussion on corporate personality under the Islamic law is derived from the views of the Muslim jurists (*fuqaha*) on the entity of artificial person (*shakhsyah i'itbariyah*) (Abd Ghadas et. al, 2008). Most modern Islamic scholars claimed that this concept was known to Islamic law, while some are doubtful whether this concept, in fact exists in Islamic law (Nyazee, 1997).

According to Nyazee (1997), the earlier Muslim jurists were aware with the concept of corporate personality but rejected it because of the system, which they were dealing with. Nyazee contended that this nevertheless does not mean that the Islamic law totally rejects the concept. Since the early days of development in *fiqh*, there were many evidences, which show that the concept of fictitious person had been applied. For example the recognition of *waqf*, *bayt-a- mal* and the mosque as an entity. Mustafa Ahmad al-Zarqa (1968), a modern jurist in *fiqh* stated:

" 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*."

According to the modern jurists of *fiqh*, such as Mustafa Ahmad al-Zarqa and Muhammad Abu Zuhrah, 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* (Abu Zuhrah, Muhammad, 1996).

#### **Al-Dhimmah:**

*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 (Muhammad ibn Ismail, 1982);

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

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), 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 ذمته".

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

(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).

It is observed from above hadith that the application of the term *al-dhimmah* varies and does not connote the same definition (Abd Ghadas, ZA et al, 2008). Majority of the *fuqaha* have 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 but different from the English law, 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 *Shari'ah*.

However, according to Z. Zainal A et al, (2009) the discussion of *al-dhimmah* to an artificial entity is heavily criticized by the majority of the jurists because *al-dhimmah* is said to refer to anything which has attributes of human being which shall denotes to it rights and responsibilities (al-Izibn, 660H, al-Bahuti 1041H, Ibn 'Abidin, 1252H.). Other jurists such as al-Bazdawi (483H) and al-Nawawi,(676H) take the view that *al-dhimmah* is a 'dzat' which is real and cannot be fictitious because the Shariah only imposed obligations and rights on real person. Al-Tahanawi (1996), emphasized that the term *al-dhimmah* is not applicable and has no relevancy in relation to interpretation of liability and obligation (al-Tahanawi, 1996).

**Legal entity of Islamic Institutions:**

According to Taqi Usmani (2006), the existence of the principle of separate legal entity under *Syariah* law is 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). Taqi Usmani took the view that *waqf* is a legal and religious institution wherein a person dedicates some of his properties for a religious or a charitable purpose, creating separate legal entity. After being declared as *waqf*, the donor is no longer the owner of the property. This means the *waqf* institution may own a property.

Another example given by Taqi Usmani (2006) is the mosque (*masjid*) whereby any donation given to the mosque belongs to the mosque and does not become part of *waqf*. Another precedent that formed the basis for Taqi Usmani's (2006) for the existence of separate legal entity in *Shariah* law is the *baitul mal*. According to him, Imam Al-Sarakhsi (1986), stated that *baitul mal* has some rights and obligations which may possibly be undetermined. Al-Sarakhsi (1986) highlighted that the head of an Islamic state can pay salaries of the staff 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".

The principle of a joint stock company which is found in the *Fiqh of Imam Shafi'i*, also formed the basis of Taqi Usmani's argument on the separate legal entity in Islam (Zuryati, Yusoff, and Azrae, 2009). Under the Shafi'i School, when more than one person run their business in partnership and the 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 and 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 former.

According to Taqi Usmani, (2006), if the 'joint-stock' is subjected to the levy, it indicates that the 'joint-stock' is treated as an entity distinct from the partners. Despite his thorough discussion on juridical person, Taqi Usmani's view on the existence of the principle of separate entity under the Islamic law is heavily criticised by Mujlisul Ulama of South Africa in a book entitled "The Concept of Limited Liability – Untenable in *Shariah*" (Zuryati et.al, 2009). The writers contended that for *waqf*, the assets purchased with the income of a *waqf* do not become part of the original *waqf* property for the simple reason that for anything to become *waqf* there has to be a 'waaqif' (a human being who dedicates the asset in the Path of Allah (God) as *waqf*). If the income of the *waqf* becomes *waqf* automatically, the very aim and purpose of the *waqf* will be defeated and it will be devoid of utility.

As for the mosque or *masjid*, it is concurred that the ownership vests in Allah s.w.t. and Allah is not fictitious. Ownership of the *masjid* in this context means *ownership of the Owner of the masjid*. Allah s.w.t. who is the true owner of the *masjid* becomes likewise the owner of all assets made *waqf* for the expenditure of the *masjid*, and of all income generated by these *waqf* assets. The argument applying *baitul mal* as the basis for the recognition of separate legal entity is also been criticised by Mujlisul Ulama of South Africa.

The different classes of wealth such as *zakat* and *kharaj* have to be expended in different avenues or for different purposes. If, for example, *zakat* money is used to construct a *masjid*, the obligation of *zakat* will not be discharged. If *zakat* money is thus spent in a category of expenditure, which does not result in the discharge of the *zakat* obligation, it (*zakat*) will have to be made good by person who had used the funds for another purpose. This is not exclusive with the *baitul mal*.

As for the joint-stock company, the *Majlisul Ulama* highlighted that according to the Shafi'i Mazhab the stock of a non-Muslim and the stock of a Muslim are combined, *khultah* has taken place. The obligation of *zakat* only applies to Muslims. If the obligation of *zakat* devolves on the joint inanimate rice and barley, which were mixed or on any other combined stock, it would logically follow that *zakat* will have to be paid regardless of one partner being a Muslim and one a non-Muslim. Only the Muslim will pay *zakat* on his share of the mixture.

The non-Muslim will not pay *zakat* on his share of the admixture regardless of the incidence of *khultah*. If the joint stock was truly a separate entity or a juridical person in the Western conception of the term, then *zakat* should have been obligatory on the stock by virtue of the principle of *khultah* regardless of the faiths of the owners of the joint stock. Faith does not apply to the inanimate 'juridical person'. Imran (2003) also supported this view by stating that artificial person or juridical person cannot perform religious duties including *zakat*. It is therefore meaningless to portray the joint stock as a juridical person and divert the obligation of *zakat* from the joint stock to only the Muslim. Imran (2003) further opposed the existence of separate legal entity in *Shari'ah*, though termed it as fictitious person or artificial person.

The concept of separate legal entity that a company is a fictitious person relied on the instances of *waqf*, *baitul mal*, and the estate of deceased has been regarded as misplaced assertions by modern Muslim jurists. According to Imran, the concept of *syarikah* or *musyarkah* will lose its significance if the separate legal entity concept acknowledged in *Shari'ah*. In consequence, the acceptance of the principle will shatter the whole structure and violates the fundamental principles of *Shari'ah* law particularly law of contract. Hence, there is a strong opposition to the doctrine of corporate personality

**Observation:**

The above discussion shows that from the *Shari'ah* perspectives, there are views, which supported the application of juridical person and separate legal entity and there are also views which strongly dispute the doctrine of corporate person. However, from the Malaysian law perspectives, a direct application of the English doctrine of corporate personality is seen in the case law. The dissenting argument on corporate personality under the *Shariah* gives rise to a question as to the validity of Islamic corporations which are formed under the Companies Act 1965, for example, the Islamic banks, *zakah* institutions, Pilgrimage Board (Lembaga Tabung Haji) and Islamic insurance (*takaful*) companies. As an illustration to the above concern, a reference shall be made to the Islamic banks. With the introduction of Islamic Banking System by the Central Bank in March 1993, there are now many licensed Islamic banks in Malaysia which offer financial products and services using various Islamic concepts such as *Mudharabah*, *Musharakah*, *Murabahah*, *Bai' Bithaman Ajil* (*Bai' Muajjal*), *Ijarah*, *Qard*, *Istisna'* and *Ijarah Thumma Bai'*.

The first Islamic bank, which was established, is Bank Islam Malaysia Berhad (BIMB). BIMB was established under the Islamic Banking Act 1983 (IBA), which came into effect in April 1983. BIMB is essentially a *syirkah al'inan* based on the concept of *al-musyarakah* ((Zuryati, Yusoff, and Azrae, 2009).). BIMB is a company formed by having a group of shareholders and elected representatives to manage the business on the basis of *wakalah*. The shareholders retain their management control (i.e. voting rights) in the company in proportion to their shareholding.

Under the IBA, the term 'company' is used repeatedly to refer to Islamic banks. For example, 'Islamic bank' is defined as any company, which carries on Islamic banking business and holds a valid license (section 2, IBA 1983). It is also a requirement under IBA for an Islamic banking business to be transacted in Malaysia only by a company, which is in the possession of a license in writing from the Minister authorizing it to do so (Section 3, IBA 1983). The Companies Act 1965 also includes the definition of banking corporation (Sect 4, Companies Act 1965).

The recognition on the status of Islamic bank as a body corporate can be seen in the case of Bank Islam Malaysia Bhd. v. Adnan Bin Omar (Kuala Lumpur High Court, Civil Suit No. S3-22-101-91) (unreported) (1994) 3 CLJ 735). In this case, it was held *inter alia* that BIMB is a corporate body, which has no religion. As List II (State List) of the Ninth Schedule to the Federal Constitution provides for the jurisdiction of *Shari'ah* Courts only over persons professing the religion of Islam, the case is decided not to be within the jurisdiction of *Shari'ah* Courts.

**Pilgrimage Board (Lembaga Tabung Haji):**

The Pilgrimage Board or Lembaga Tabung Haji (hereinafter referred to as LTH) is a worldwide-recognized institution for their good services in managing pilgrimage affairs in Malaysia. The LTH was established under the Tabung Haji Act 1995. The effect of its establishment as enshrine under the Act is that it shall be a body corporate by the name of Lembaga Tabung Haji (Section 3 and Paragraph 5 of the Schedule to Tabung Haji Act 1995.) The effects of its establishment under the Act are:

- i) it is a body corporate by the name of Lembaga Tabung Haji;
- ii) it shall have perpetual succession;
- iii) it shall have a common seal;
- iv) it may sue and be sued in its name;
- v) it may enter into contracts; and
- vi) it may acquire, purchase, take, hold and enjoy movable and immovable property, and may convey, assign, surrender, yield up, charge, mortgage, demise, reassign, transfer, or otherwise dispose of, or deal with, any of those property or any interest therein.

**Takaful Malaysia:**

The Islamic insurance system (*takaful*) was introduced in Malaysia in 1984. The licensing of a *takaful* operator in Malaysia is provided under the Takaful Act 1984 (Section 53A, Takaful Act 1984). Essentially, there are two types of entity that may carry out *takaful* operation in Malaysia:

- (i) a company as defined in the Companies Act 1965.
- (ii) societies registered under the Co-operative Societies Act 1948.

If the *takaful* operator is a company, the Companies Act 1965 shall be applicable to it whilst in the case of the *takaful* operator is run by a registered society, the Cooperative Societies Act 1948 provides that:

- i) a society shall be rendered as a body corporate by the name under which it is registered;
- ii) it shall have perpetual succession;
- iii) it shall have a common seal;
- iv) it shall have the power to hold movable and immovable property;
- v) it shall have the power to enter into contracts;

- vi) it shall have the power to institute and defend suits and other legal proceedings; and
- vii) it may do all things necessary for the purposes of its constitution.

From the foregoing, it could be infer that both forms of *takaful* operator, either a company or a society shall be of a body corporate.

All the above examples of Malaysian Islamic institutions have the status of a body corporate. As such, intrinsically they inherit the common law attributes of a company/corporation as provided in the Companies Act 1965 (section 16(5)). The main effect would be that these institutions should be legal entities and have all the attributes of conventional companies. The contemporary Muslim scholars, such as Imran (2003), advocate for the acceptance of the corporate personality with certain guidelines. Imran (2003) contended that a Ruler may assign a restricted or limited *dhimmah* to a non-human on the following conditions:

(i) A body corporate with a fictitious identity will not be expected to observe religious duties; for example, not to be subject to the *khitab* of *ibadat*, and will not be liable for any religious duty or obligation that may arise from it.

(ii) A body corporate must be associated to some form of '*aql*'; either individual or group of individual (e.g. board of directors). This is because, in Islam, the *ahliyat al-ada*' will always be associated with the source of '*aql*', and so will the liability for such acts.

(iii) A concept of dual title of ownership must be associated with a body corporate. It entails, any property held by the body corporate in its own name must be assumed to be held on behalf of the members of the body corporate as a result of *khalt* or mingling of capitals. In addition, the body corporate may have the full right of disposal and transaction in the property if so permitted by its members.

Referring to the guidelines, it is obvious that there are similarities between the common law scholars and the contemporary Muslim jurists as regards to the status of the body corporate as a fictitious person.

### **Conclusion:**

The above discussion highlighted that the justifications of body corporate as a legal person differs between the civil law and the Islamic law. The existence of a body corporate as a legal entity under the common law is upon recognition of the law whilst justifications for artificial person under the Islamic law do not only lie in the entity but also on the obligation and responsibilities of the fictitious person as required under the *Shari'ah*. There are also vies of the Islamic scholars who totally rejected the application of the doctrine. It is observed that the civil law doctrine of corporate personality could be applied to "Islamic companies" but there are certain modifications and conditions which need to be fulfilled and therefore shall not be a direct application.

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