

Limited Liability in Islamic Jurisprudence: The Case of Authorized Slave

*Dr. Syed Naeem Badshah

**Dr Najeeb Zada

Abstract:

The landscape of modern business and finance is evolving fast. Consequently, commercial law, be it Islamic or secular, is also adapting itself according to these changes. One example where many changes have and are still taking place is the notion of a legal person with the feature of limited liability. A legal person is a non-human entity which is treated as a natural person in the eyes of law; a good example of the modern legal entities is corporations / companies which have the feature of limited liability. As the liability of these entities is limited, their shareholders are not liable for losses beyond their capital contribution in case they go bankrupt. As far as Islamic law is concerned, legal persons in their present forms are not found in this law. Same is the case with the liability of the business owners which is treated unlimited in case of bankruptcy. But the debate is still going on and it seems that it will continue so in the near future. In this connection, some jurists have drawn attention to the concept of authorized slave which carry many features of the modern day limited liability corporations. In this research, we briefly trace the features of limited liability vis-à-vis authorized slave from the perspective of Islamic law in the light of the opinions of both modern and classical Muslim scholars. The research finds that according to some contemporary Muslim jurists, authorized slave has some features which are similar to the concept of limited liability companies of the modern era.

Key Words: Authorized slave, legal personality, limited liability, company

* Chairman Department of Islamic / Pak- Studies, Agriculture University Peshawar.

**Lecturer, Department of Islamic Theology, Islamia College Peshawar

Introduction

Limited liability is the hall mark of present day business and finance world. In its simplest form, limited liability means that the shareholders of a company are not held liable for the losses that are beyond the capital they have contributed in the company. In other words, in the case of bankruptcy, the shareholders only lose their invested capital and their personal / private wealth is not made to compensate for such losses. Although limited liability company is a modern phenomenon, the concept of limiting one's liability has been there since ages. In fact this concept was well recognized in the early days of Islam. Even before Islam, the Roman and Byzantine civilizations accommodated this concept. Masters of slaves authorized to trade in ancient Roman times had their liability limited, since losses incurred by slave were not supposed to be covered by the personal wealth of their masters¹ Being an accommodative rather than abrogative religion, Islam incorporated the concept of authorizing a slave at the inception recognizing the fact that slavery was a part of society at that time. It was a social institution which existed since centuries before the advent of Islam. Consequently, we find bulk of literature in Islamic jurisprudence that deals with the humane treatment and management of this social institution. This literature consists of a few Qur'ānic verses, some sayings of the Prophet peace be upon him and a detailed juristic explanations and analysis of the issue in light of these verses and Prophetic traditions.

In the discussion around legal personality and limited liability, few researchers have referred to the concept of authorized slave¹ which is well established part of the classical Islamic jurisprudence. Those who have referred to authorized slave have passed some brief remarks about it, with the exception of Al-Qarī² (2013) and Hasan³

¹ It should be made clear at the outset that this research does not propagate the notion of slavery. In fact Islam was the first religion that laid down the mechanism of a system that ultimately led to the abolition of slavery system from the Muslim societies. However, this abolished institution has some striking similarities with the modern day limited liability concept and this research only attempts to highlight these aspects. In other words, this research aims to show that limiting one's liability has a precedent in Islamic law and jurisprudence.

(1989). However, there are many lessons embedded in this centuries old institution which are applicable in modern times, although the institution itself is no more in existence today. The heritage of Islamic jurisprudence can, in our view, provide some solutions or, at least, some indications as to how to approach the modern day complex questions like that of legal personality and limited liability.

Authorized Slave: Definition and Rationale

The Arabic term used for authorized slave is '*abd ma'dhūn*'. In Islamic jurisprudence, an authorized slave, which is also called "licensed slave" by Hasan (1989)⁴, is the one who is permitted by his master to do business and trade. Al-Qarī (2013)⁵ defines it as the slave whom his master has partially relieved from the restriction of slavery by allowing him to trade. This permission is given to the slave either by providing him capital for business or by entering with him into partnership through his effort and hard work (p. 18). The writer argues that it is possible to make the provisions of authorized slave as the base or "*aṣal*" for the provisions of legal personality and limited liability in many ways since the texts dealing with authorized slave are in abundance. However, this will not be considered as *qiyās iṣtilāḥi* but *qiyās shibh*.

There is a logical reason presented for the existence of limited liability companies. Purchasing shares instead of doing personal business is attributed to the busy nature of contemporary life. It is difficult for the thousands of shareholders of a corporation to leave their other duties and start doing personal business, or keep a close check and balance (as managers) on the activities of the companies they invest in. It is rather impossible even if they had time; it is seldom possible for laymen to be experts in all the financial statements and other business activities of firms and decide whether to invest in these firms or not? In this situation, if the liability of these common shareholders, who are mostly common masses and rarely know the technicalities of business and finance, is declared unlimited and they are made responsible for the losses of a company beyond their invested amount, it will definitely stop them from investing in stocks; thus, stock market which is the backbone of an economy would cease to exist. Hence, limiting their liability to the extent of their invested wealth is the only way that matches their busy life schedule. In the case of an authorized slave, the same logic is presented by Al-Tūri (1997) in these words:

The reason for the legality (of authorizing a slave to do trade) is need because a person is sometimes not free for doing business himself due his many commitments. Hence, he needs to resort to the help of slave and (discreet) minor (by allowing them to trade and earn for him). (p. 155)⁶

The situation mentioned as the logic for authorization of slave in the above text strikingly resembles the situation of contemporary world; people are obsessed with their daily life affairs and are unable to directly participate in business. Shares give them the opportunity to participate in trade and still keep their liability limited to the level of their investment.

Debts Incurred by Authorized Slave

Among different provisions of authorized slave found in Islamic jurisprudence, our concern is the case when he incurs debts in doing business after being authorized by his master. In this connection, Al-Kāsānī (Died: 587 AH)⁷ states that when debt is incurred by the authorized slave, it gives creditors the right to: *“request the judge that the slave be sold ... except if the master pays their debts which will free the slave’s ownership for the master...”* (v. 7. p. 204). The writer further adds that after sale, the price would be distributed according to the respective shares of the creditors. Then, if something from the price of slave is left after paying the creditors their due debt, it will belong to the master. However:

if the debt is more (than the price), the master will not be asked to pay it because the debt is not owed by the master. Instead, the slave will be chased (demanded) for the debt after freedom because it is the slave who owes the debt... (Al-Kāsānī, 1986, v. 7, p. 204)⁸

This text is very clear in that the debts incurred by the authorized slave while doing business are not the responsibility of his master. It is the slave himself who is responsible for the payment of his debts. The same view is held by ibn al-Humām (Died: 861 AH) who states that:

The debts incurred by authorized slave relate to (i.e. to be deducted/received from) his earning; it makes no difference whether he earns before the incurring of debts or after that... It will not be related to what the master has received from his possession before his incurring of debt (1317, AH, v. 8, p. 344).⁹

The above texts about the debts incurred by authorized slave and the master's freedom from these debts give some interesting clues about the issue of limited liability of the shareholders of a company. The fact is that the whole chapter of authorized slave as dealt in classical Islamic jurisprudence is full of such insights and is worthy of detailed exploration which is beyond the scope of this study.

Authorized Slave and Modern Companies: A Comparison

Based on the similarities between authorized slave and modern day limited liability concept, Al-Qarī (2013)¹⁰ argues that it is valid to resort to the tool of “parallel *qiyās*” (*qiyās shibh*) and make authorized slave as the foundation for the provisions of public joint stock companies, special purpose vehicles and trusts. The writer detects some similarities or parallels between limited liability company and authorized slave that include:

1. Both are “persons” (one legal and the other natural)
2. Both are “owned” by one or more persons
3. Both have “limited liability” relation with their owners
4. Both can “own” and be “owned”
5. Both have the feature of “separation of ownership from control”
6. The objective of both is “investment and increase of wealth”
7. Both can own their “subsidiaries and/or slaves”
8. The owner of both is ranked “last in claims”
9. The shareholder and master are “strangers” for company and slave

These similarities between the two leads the writer to conclude that the modern day corporations with the features of legal personality and limited liability, whether corporation, SPV or trust, are in fact: “modern legal version of the “authorized slave”” (Al-Qarī, 2013, p. 29).¹¹

The following table draws a parallel comparison between the concept of modern corporations and that of classical Islamic *sharikāt* and authorized slave:

Table 1: Comparative Analysis of the Three Parallel Concepts

S. No	Modern Corporations	Authorized Slave	<i>Fiqhi Sharikāt</i>
1	Limited Liability	Limited Liability	Unlimited liability
2	<i>Shirkat al-Milk</i>	<i>Shirkat al-Milk</i>	<i>Shirkat al-‘Aqd</i>
3	After initiation of the company, its shares are purchased	After authorization, people may have ownership in it	Commingling of wealth in order to start it
4	Separate liability from shareholder(s)	Separate liability from owner(s)	No separate liability
5	Can be owned by one or more persons	Can be owned by one or more persons	There must be more than one owner
6	Shareholders have the right to dividend & residual ownership right	Master has the right to income or price of slave if sold, or join the creditors	Owners own all the assets
7	Shareholders do not have the right of disposition in company’s assets	Owner of the slave is like a stranger with respect to disposition in his property	Owners own all the assets

Source: Adapted from Al-Qarī (2013, p. 29)¹²

Apart from the above similarities between the two, they also share the feature of an incomplete legal capacity or *ahliyyah nāqisah*. Whereas a legal entity can incur

financial rights and liabilities only and can not perform religious obligations like *'ibadāt* etc., the slave is subject to certain restrictions when compared to a free human being. Thus, he is subject to half the punishment of a free human. He also has half the right in terms of marrying women and many other examples like performing *hajj* and paying *zakat* etc.

Conclusion

Just as legal personality, limited liability is a modern concept which is not found in classical Islamic law. This led the contemporary jurists look for its equivalent in Islamic jurisprudence by way of analogy. Many proposal have been presented in this connection. Authorized slave is one of them. However, all these proposals suffer from some weakness and, consequently, they have been criticized even within the circle of contemporary Muslims jurists. Nevertheless, since Islamic law claims to be equipped to solve the problems faced by humanity throughout ages, the notion of limited liability, just like legal personality, has been fundamentally accepted in their modern form, though some restrictions would apply. In spite of its practical acceptance, the scholastic debate around limited liability continues and it seems far from consensus or final verdict in the near future. However, such debate should be appreciated since it shows the Islamic law's spirit of investigation, tolerance and the never ending quest for solution of the endless problems of modern era through the means of *ijtihad*.

References:

- ¹ Hillman, R. W. (1997). Limited Liability In Historical Perspective, 54 *Wash. & Lee Law Review* 615, Retrived from: (Hillman, 1997).
- ² Al-Qarī, Muḥammad ‘Alī. (2013). *Athar al-Ikhtilāf bayna al-Shakhḥiyyah al-Tab‘iyyah wa al-Ai‘tibariyyah fī al-Aḥkām al-Fiḥiyyah li Mustajiddāt al-Maḥrafiyyah al-Islāmiyyah*, Paper presented at Fifth Fiḥi Conference for Islamic Financial Institutions Organized by Shūra Sharī‘ah Consultancy, 20-21 November 2013, Kuwait
- ³ Hasanuzzaman, S. M. (1989). Limited Liability of Shareholders: An Islamic Perspective, *Islamic Studies*, 28:4
- ⁴ Ibid
- ⁵ Al-Qarī, Muḥammad ‘Alī. (2013).
- ⁶ Al-Tūri, Muḥammad ibn Hussayn. (1997). *Takmilat al-Baḥr al-Rā‘iq, Sharḥ Kanz al-Daqa‘iq*, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1st Edition
- ⁷ Al- Kāsānī, ‘Alā’al-Dīn Abū Bakr ibn Mas‘ūd ibn Aḥmad, (1986). *Badā‘i‘ al-Ṣanā‘i‘ fī Tartīb al-Sharā‘i‘*, Dār al-Kutub al-‘Ilmiyyah, Second Edition
- ⁸ ibid
- ⁹ Ibn al-Humām, al-Kamāl (1317 AH), *Takmilat Faṭḥ al-Qadīr*, al-Matba‘at al-Kubrā al-Amīriyyah, Cairo
- ¹⁰ Al-Qarī, Muḥammad ‘Alī. (2013).
- ¹¹ Ibid
- ¹² Ibid