Comparative Study on the Legal Framework of Corporate Group Under Common Law and Shariah

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Abstract. Under common law, the legal framework of corporate group is derived from the ownership of share by holding over its subsidiaries. The parent company has majority shareholding ownership and control in the subsidiaries. From Shariah perspective, group of companies is discussed under the *sharikah* concept founded under the *wakalah* contract between its partners. This article discusses the legal framework of corporate group under the common law and Shariah (Islamic Law). The study refers to Malaysia as a sampling country that adopts the common law and Saudi Arabia and Kuwait as Shariah-sampling countries. The discussion is necessary since the legal framework of corporate group under both legal systems differs in many aspects, and any attempt to apply each other would lead to inconsistent results. The doctrinal and comparative analysis adopted in the study found that due to dissimilar frameworks, it is untenable to directly recognise the common law of corporate group under *sharikah* or vice versa. Modifications of the former are needed for it to be compatible with the latter. Although the legal framework of corporate group in the three countries is based on a separate legal entity doctrine, both Saudi Arabia and Kuwait laws adopt a *sharikah* approach to the former. This study is crucial to reveal the extent to which a group of companies can be structured in accordance with *sharikah* under the Shariah.

Keywords: Corporate Group · Common Law · Shariah

1 Background

Corporate group or group of companies legally lies on the shareholding ownership and control structures between the parent and its subsidiaries [1, 2]. Entrenched from the common law principle of company, the corporate group represents multiple legal entities that are separated from each other, each having distinct rights and liabilities despite being related to each other [3]. Therefore, invoking the limited liability feature within the corporate group does not only provide privilege to its shareholders irresponsibly but also causes detriment to other creditors who could not pursue debt claims against its parent or affiliate, despite benefitting from the former's business undertaking [4]. In contrast, *sharikah* (Islamic partnership) constitutes a contract between two or more persons to undertake a business by sharing capital, profit, and losses. The contract is

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indeed a business partnership inseparable from its partners under the principle of *wakalah* (agency), and they share joint and several liabilities toward each other constantly [5].

Despite the controversy surrounding the legal framework of corporate group, Mohd Sulaiman [6] proposed that Shariah be accepted as an alternative way to address the liability of a corporate group, specifically the parent-subsidiary relationship, particularly by exploring the *sharikah* concept. This is because reforms towards a corporate group's liability under the common law are based upon a just and equitable principle, compatible with the Shariah law. Nonetheless, such proposal does not critically discuss how *sharikah* is distinguished from the legal framework of corporate group and how it is applied to address the above concern. There is also a lack of discussions on the comparison of the legal framework between the common law-based countries and other Islamic countries that adopt *sharikah* in their various forms of companies. Given these gaps, this article aims to analyse the comparison between the legal framework corporate group and that of *sharikah*, and further scrutinise how the comparison is demonstrated in the sampling countries. Ultimately, this article attempts to bring to the readers' attention the necessity of having a separate business model for corporate groups undertaking Shariah-compliant business activities that are structured to be compatible with the *sharikah* concept or principles.

The central research question of this paper is whether the legal framework of corporate group under the common law and that of Shariah are compatible and mutually applicable. Comparison between the frameworks applied in the three sampling countries aims to identify how the s*harikah* concept is extensively applied in its respective legal framework of corporate group.

2 Method

Both doctrinal and comparative legal analysis research methodologies were adopted to identify the differences in the legal framework of corporate group between the common law and Shariah. Comparison between the three countries focused primarily on the comparative statutory analysis.

3 Legal Framework of Company and Corporate Group Under Common Law: Reference to Malaysia Law

A company or corporation under the common law is an artificial legal personality or body corporate capable of functioning as an institutional entity, duly separated from its members [7, 8]. This legal personhood of a corporation is derived from the doctrine of corporate personality, which entails that the notion of juristic or legal person is entrenched in the corporation [9]. Upon incorporation, the corporation subsists with few legal features such as the legal owner of assets and liabilities under its own name, perpetual succession, the capability of performing transactions, capable of suing and being sued and others.

Fundamentally, the above legal features are also applicable to group of companies which makes the formation feasible [10]. In Malaysia, the doctrine of corporate personality and other related-legal features of corporate group are governed under the Companies Act 2016 (CA 2016).

3.1 The Essence of Group of Companies

Rachagan et al. [11] enunciated that under the company law, the word group denotes companies that are internally related. Related companies usually relate to a holding-subsidiary relationship. According to Petrin and Choudhury [12], group of companies is a "business enterprise or firms that order their operation using a structure involving parent companies and subsidiaries".

The CA 2016 does not specifically define group of companies, though several provisions describe the concept. For example, section 4(1) states:

A company is a subsidiary of another company (holding company) if;

a. the holding company;
    (1) controls the composition of the board of directors of the subsidiary company or;
    (2) controls more than half of the voting powers of the subsidiary company or
    (3) holds more than half of the issued share capital of the subsidiary company, excluding any preference shares; or
b. the corporation is a subsidiary of another company which is also the holding company's subsidiary.

Other relevant provisions include ultimate holding company (Sect. 5), wholly owned subsidiary (Sect. 6), and corporation related to each other (Sect. 7), respectively. These provisions demonstrate the relationship of corporate groups through ownership of shares and control forms. In Walker v Wimborne (1976) 3 ACLR 529, "group" is commonly employed to a number of companies connected through ordinary or interconnected shareholdings, combined with unified control or capacity to control.

3.2 Legal Attributes of Group of Companies

3.2.1 Separate Legal Personality of Group of Companies

This legal attribute is provided under section 20 of the CA 2016, which recognises a company as a body corporate having a legal personality separated from its members and continues to exist unless the register dissolves it. This section is embodied from the doctrine of corporate personality which was affirmed by House of Lord in Aron Salomon v Salomon & Co Ltd AC 22. The House of Lord held that the company was a separate legal entity from Mr. Salomon and that the other members were not founded on agency nor trust relationship. Hence, the former's unsecured creditors could not pursue their debt claims against him.

Mohd Sulaiman and Othman [13] argued that the this separate legal entity doctrine enables a corporation to incorporate another corporation by a group of companies setting. The companies enjoy separate legal entities within the group, despite their parents' and subsidiaries or affiliates' relationship with major ownership of shares or corporate control. This notion is supported in Singham Sulaiman Sdn Bhd v Appraisal Property Management Sdn Bhd & Anor [2018] 1 LNS 277 whereby Wong Kian Kheong J held

that Section 20 of the CA 2016 applies to a corporate group, which comprises related company, wholly owned subsidiary, holding company, and subsidiary. Moreover, the legal principle in the Salomon case is firmly applied to a corporate group setting as highlighted by the Federal Court in Sunrise Sdn Bhd v First Profile (M) Sdn Bhd [1996] 3 MLJ 533 as follows:

We are in complete agreement with the basic principle of the fundamental attribute of corporate personality, i.e. that the corporation is a legal entity distinct from its members, be they individuals or corporate bodies, a principle firmly established since Aron Salomon v Salomon & Co Ltd [1897] AC 22.

Equally, although the parent wholly owns its subsidiary, their separateness must be respected due to such legal doctrine. Walton J in The Gramophone and Typewriter Ltd v Stanley [1906] 2 KB 856 held that:

To my mind, there is no evidence that the business of the German company was the business of the English company except the fact that the English company has become the owner of all the shares in the German company. That does not extinguish the German company. The German company is an existing person and a different entity from the English company, and I think that the effect of the judgement of the House of Lords in the case Salomon v Salomon is that the fact that the shares of the German company all belong to the English company does not make the German company a mere alias, or a trustee, or an agent for the English company, or for the shareholders in the English company.

3.2.2 Distinct Legal Ownership of Assets and Liabilities of Group of Companies

By virtue of the doctrine of separate legal personality, the ownership of assets within a corporate group remains separated. This separation includes the separate treatment of the subsidiary's profit from its holding in respect of the declaration of dividend [13]. In Industrial Equity Ltd v. Blackburn (1955) 137 CLR 567, the court held that the parent plaintiff breached the rule of availability of profit in declaring the dividends to its shareholders in the expectation to receive the dividends from its subsidiary's profit. By a separate legal entity doctrine, the subsidiary's profits were its own and therefore did not belong to the parent plaintiff until it was declared. Similarly, in JH Rayner (Mincing Lane) Ltd & Ors v. Manilal & Sons (M) Sdn Bhd & Anor [1987] 1 MLJ 312, the court held that the undertaking given by the parent to the plaintiff to pledge the subsidiary's entirely the issued share capital and procure the creation of charges of the subsidiary's assets as security, did not bind the subsidiary due to separate legal entity.

The independent status of corporate entity forms a "corporate veil" between the related entities [13]. Such a concept gives rise to limited liability, a legal attribute derived from a separate legal entity of corporation [14]. Limited liability means the shareholders are not liable for the corporation's debts more than their remaining investment of unpaid-up capital [15]. This legal principle is covered under section 192(1) of the CA 2016, which illustrates that a member shall not be liable for an obligation of a company by reason only of being a member of the company. This legal principle firmly establishes the legal separateness of a corporate group regardless of their internal relationships. In

Theta Edge Bhd v. Infornential Sdn Bhd & Another Appeal [2017] 7 CLJ 53, Hasnah Mohammed Hashim JCA held as follows:

> *A company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence.*

Similarly, limited liability also applies to a corporate group which prevents the creditors of the subsidiary from claiming the debts against its parent, should the subsidiary fails to satisfy it or vice versa [16]. However, this general doctrine is exceptionally ignored through the corporate veil lifting or piercing. This principle means that the court would dismiss the legal personality of a corporate group to look behind the real person who controls the former [13, 17]. The two main grounds used for a corporate group are as follows:

Agency

Mohd Sulaiman and Othman [13] argued that the presence of agency among the holding and its subsidiary may be deemed as a ground for corporate veil lifting. The agency concept, therefore, reflects the agent subsidiary's properties, obligations, or undertakings to its principal parent [3]. In Smith, Stones and Knight Ltd v Birmingham Corporation [1939] 4 All ER 116, the court applied this concept and held that the compensation claim by the parent as the real occupier with the local council over its compulsory land acquisition was granted because although the subsidiary occupied the land, it factually carried business as the former's agent. The court underlined six principles to determine the presence of agency between both entities as follows:

1. The subsidiary's profits were treated as of the parent;
2. The parent appointed the persons to manage the subsidiary's business;
3. The parent functions as the brain and head of the subsidiary's business;
4. The parent governs the business and decides on actions and capital to be invested in the venture;
5. The subsidiary receives the profits because of the parent's expertise and guidance; and
6. The parent effectively and continually controls the subsidiary.

Single Economic Unit

Dix [18] described a single economic entity as an alternative to an economic organisation having no legal corporate body. This economic entity represents a collaborative and amalgamation of activities to gain a common undertaking or enterprises. DHN Food Distributors Ltd v Tower Hamlet London Borough Council [1976] 3 All ER 462 applies this theory whereby the Court of Appeal granted the compensation for compulsory land purchase owned by the subsidiary to the parent by lifting their corporate veil. Factually, they run as one single economic unit alike a partnership since they share similar directors, common business and its interest, creditors of the parent and the parent wholly owned the subsidiaries. Similarly the court in Hotel Jaya Puri Bhd v National Union of Hotel, Bar and Restaurant Workers [1980] 1 MLJ 109 applied this theory and held that in reality,

both the hotel and the restaurant were a single economic unit or enterprise. The court accepted the factual proof that the restaurant and hotel shared the same employees or workers and that the restaurant's business was run on the hotel's premises. The court also found the existence of functional integrality and unity of establishment between both entities through a single-management unit and sharing of similar managing directorship and senior management.

However, some cases reject this approach as it contradicts the separate legal entity principle. In Adams v Cape Industries PLC [1990] Ch 433, the Court of Appeal rejected the corporate veil lifting on the Cape group based on a single economic unit despite the the parent company controlled the subsidiary in an excessive degree. Hence, the economic unit of the corporate group did not validate the veil lifting nor depart from the principle in Salomon. In Ord v Belhaven Pubs Ltd [1998] 2 BCLC 447, the court held that merely depending on the economic unit to ignore the legal separateness of corporations by arguing that the shareholders should be made liable to pay if the company fails to pay is fundamentally peculiar to the entire concept of corporate personality and limited liability.

3.2.3 Separation of Ownership from Control Between Related Entities Within Corporate Group

The internal governance structure of a corporation describes the division of ownership and control between the shareholders and the board [19]. The structure bestows the dominant power in the management of the company to the latter and eliminates the former's participation in the said management [20]. The board of directors owe fiduciary duties to the company as its agent, acting in the company's best interest, not individual or collective shareholders specifically [13].

Such separation and fiduciary duty equally expand to corporate groups, particularly between the parent and the subsidiary. Thus, all corporate entities in a group are legally separated despite each entity having a common board of directors and factually relating to each other [13]. This principle is established by the court in People's Insurance Co (M) Sdn Bhd v People's Insurance Co Ltd [1986] 1 MLJ 68 whereby the plaintiff subsidiary'sclaim against its defendant parent for the shortfall of a policy claim was rejected, though the subsidiary's directors who made a resolution that the latter would guarantee the shortfall, were the parent's senior officers. By a separate legal entity principle, the parent's officers who sat on the subsidiary's board were the subsidiary's agent itself, not the parent's agent.

Additionally, each board's duties are to serve the best interests of their respective companies separately, not of other related companies in a group, except that their decision to other companies principally benefits its company that they serve. Pennycuick J in Charterbridge Corp Ltd v Lloyds Bank Ltd [1970] Ch 62, held that:

> *Each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of that company. This becomes apparent when one considers the case where the particular company has separate creditors. The proper test, I think, in the absence of actual separate consideration, must be whether an intelligent and honest man in the position of a director of*

the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company.

In Walker v Wimborne case, the director must put the company's interests above the group's interests. However, the directors of the parent may consider the interest of its subsidiary if it coincides with the former. It was held in *Equiticorp Financial Services Ltd v Bank of New Zealand (1993) 11 ACSR 642* as follows:

…Actions Carried Out for the Benefit of the Group as a Whole May, in Particular Circumstances, Be Regarded as Benefiting as Well One or More Companies in a Group.

4 Legal Framework of *Sharikah Al-Musahamah* and *Sharikah Al-Qabidhah* Under Shariah: References to Saudi Arabia and Kuwait Laws

4.1 The Concept and Principles of *Sharikah*

Literally, *sharikah* denotes *mukhalatah* (mingling), defined by Muslim scholars as the "blending one of two properties with other in a way that the two cannot be differentiated one from the other" [21].

Sadique [21] recorded the various technical definitions of *sharikah* among the four madhabs (Islamic schools of thought) as follows:

1. Hanafi scholars - "a contract between two partners in the capital as well as the profit".
2. Maliki scholars - "permission (granted) to each other to transact while retaining the right with each".
3. Shafie scholars - "every right established between two or more (parties) *a'la al-shuyu'* (in common)". *Shuyu'* means the identical nature of the portion between partners, which connotes their joint and common entitlement to a subject matter.
4. Hanbali scholars - "joining together in *istihqaq* (entitlement) or (the right of) *tasarruf* (action/transaction)".

Abd Ghadas and Engku Ali [22] extracted three aspects from the above definitions. First, *sharikah* is an agreement between more parties with a minimum of two parties. Second, it permits the partners to manage the capital or assets in the partnership. Third, they share profit as prescribed by the Hanafi scholars. These three aspects are relevant in establishing the *arkan* (pillars) of a valid *sharikah* contract, which are found in the scholars' classical *fiqh* literature.

Several Islamic authorities support the permissibility of *sharikah*. First, Allah says in the Qur'ān:

"…And certainly many partners wrong each other, except those who believe and do good—but how few are they…" (Al-Saad, 38:24).

The word *partners* (khulata' in Arabic term) mentioned in this verse connotes a partnership in a property. Next, Allah (swt) says in a Hadith Qudsi as follows:

"I make a third with two partners as long as one of them does not cheat the other, but when he cheats him, I depart from them".

Nyazee described the division of *sharikah* into two main types: *sharikah al-milk* and *sharikah al-'aqd*. The former is a co-ownership by the number of persons of an ascertained property or debt arising through inheritance, exchange, or other means. The term *property* illustrates "joint and exclusive ownership of two or more persons resulting from one of the causes of ownership, or by the mixing of their property in a manner that does not accept distinction or separation" [23]. The latter is a contract of partnership between two or more partners and is further divided into five categories: *sharikah al-'inan* (limited partnership), *sharikah al-mufawadhah* (equal partnership), *sharikah al-wujuh* (reputation partnership) *sharikah al-abdan* (labor partnership) and lastly *mudharabah* (partnership of profit between *rabbul mal* (capital provider) and *mudharib* (entrepreneur) [23]. Although *sharikah al-milk* and *sharikah al-aqd* are different in many ways, the scholars unanimously agree that co-ownership is a result of *sharikah al-aqd* [24].

Next, *sharikah al-'inan* denotes "a partnership of two or more partners who contribute different amounts of capital and share the profit and loss in different proportions". Meanwhile, *sharikah al-mufawadhah* connotes "a partnership in which two or more persons become partners in a venture on the condition that they equally contribute to the capital and management and equally share profits or losses". In *mudharabah*, only *rabbul mal* who invests his capital into the *mudharabah* business while *mudharib* is the one who only manages it and the former solely bears the losses in the *mudharabah* not the *mudharib* [25].

Sharing of profits and losses is the primary purpose of *sharikah. Wakalah* is a fundamental contract in *sharikah* [24]. Consequently, an agent is authorised to act nearly whatever the principal would do by himself. Acting as an agent, the partner has all the authorities, otherwise specifically limited by the principal. Essentially, all the acts with regard to third parties will bind the principal [24]. Thus, among the conditions of a valid *wakalah* is that the subject matter of *wakalah* is owned by the principal to enable the delegation of such disposition to the agent [26]. All the partners must share profits and losses, and this principle is in line with the *athar* (narration) of Sayyidina 'Ali (Allah bless upon him): "Profit is upon their agreement and losses are distributed in accord to their capital contribution" [27].

4.1.1 Opinions of Islamic Scholars on the Ruling of a New Sharikah Concluded by a Co-partner of the Existing Sharikah with a Third Party

The Islamic scholars discussed a condition where a partner of the existing *sharikah* may participate in a new *sharikah* or *mudharabah* with a new partner. In other words, the discussion pertains to a combination of more than one *sharikah* with multiple partners at the same time. According to Siddiqi [28], such arrangement is permissible subject to the consent of his co-partner.

Haidar [29] recorded several *fiqh* discussions derived from the Hanafi madhab under the relevant provisions of the Ottoman Mejelle. For example, Article 1379 states that.

"Each of the partners…may place it in a business where one person supplies the capital and the other the labour…he may not, however, mix the partnership property with his own property or enter into a partnership with some other person without the consent of the other partner."

Under this Article, Haidar [29] explained that each partner of *sharikah al-'inan* or *al-mufawadhah* has the right to enter into *mudharabah* in two situations:

(i) A partner provides the capital of *sharikah* to a third party as *mudharib* on the basis of *mudharabah*
Such a partner has the right to do so because *mudharabah* is a contract lower in status than *sharikah*, that is, a *sharikah* contract automatically implies this right. This is because *mudharabah* is a partnership of profit. However, he is not permitted to enter into a *sharikah* with the third party since *mudharabah*'s status is lower than *sharikah* and the losses are not borne by the *mudharib*. This right excludes other *sharikah* since the first *sharikah* does not include an automatic right to enter into the second *sharikah* equivalently.

(ii) A partner receives the capital of *mudharabah* from a third party as *rabbul ma*l for their *sharikah*
This situation is divided into two: first, if the capital is not for the same business in the *sharikah*, the profit is distributed between the *rabbul mal* and the co-partner as the *mudharib* individually and his co-partner is not entitled to it. Second, if such capital is the same business in the *sharikah*, then such profit will be distributed between the three; the *rabbul mal* gets half and another half is shared between the two partners of *sharikah* [29].

In addition, he also explained that each partner of *'inan* or *mufawadhah* cannot transact other *sharikah al-'inan* without his co-partner's consent because the first *sharikah* does not include the second *sharikah* equivalently. However, if he is authorised to do so by his co-partner saying that "do as you like", the profit is shared between them equally; the new partner takes the half, and another half is shared by the two co-partners [29]. This is inspired by Article 1382 of the Ottoman Mejelle which states that

If each of the partners authorises the other to act in accordance with his own judgement or to do as he likes, each of them may perform the work falling to his branch of commerce. Thus, each of them…may conclude a partnership with some other person.

4.2 Opinions of Contemporary Islamic Scholars on *Sharikah Al-Musahamah* and *Sharikah Al-Qabidhah*

4.2.1 Sharikah Al-Musahamah and Sharikah Al-Qabidhah as Sharikah Al-'inan Under Shariah

Generally, the contemporary scholars dispute on the ruling of *sharikah al-musahamah* under Shariah due to its peculiarity with the *sharikah* concept. Abduh and Al-Nabhani prohibited it entirely as its structures which are derived from the western capitalist

system contravene *sharikah* principles [24]. They further argue that it is not an agreement between two or more parties which require *sighah* (expression of offer and acceptance) alike the *sharikah* itself. Meanwhile, majority scholars such as Al-Khayyat, Al-Khafif, Al-Baqmi, Al-Zuhaili and others argue that *sharikah al-musahamah* is permissible akin to *sharikah al-'inan* or *mudharabah* and both *sharikah* and mudharabah principles are applicable to the former [30]. They also encountered that the *sighah* is duly met when the shareholders mutually agree to enter into *sharikah al-musahamah.* Furthermore, the board of directors act as the shareholders' agent who manages the company [30].

Nonetheless, this prevailing view has been recently criticised by other contemporary scholars. For instance, El-Gari [31] contended that both *sharikah al-musahamah* and *sharikah* share dissimilarities in many ways. First, the arabic word *sharika*h, which literally means participation as understood for *sharikah* under Shariah, does not correspond to company under the common law. The company is a distinct legal person from its members. Secondly, the component of participation among the shareholders essentially embedded to a valid *sharikah* is not necessary since the company can exist with one shareholder. Thus, *sharikah al-musahamah* is different from *sharikah* in terms of definition and other attributes. It is the western capitalism that originated the company peculiar to the *sharikah* concept from the Shariah perspective. Nur [32] similarly concurred this view by articulating that *sharikah al-musahamah* is alien to any kind of *sharikah* since the legal principle of corporate personality that remains the company and its members separated, does not exist in all these types of *sharikah.*

In parallel, the contemporary scholars deliberated the Shariah ruling of *sharikah al-qabidhah.* Al-Khayyat [33] noted that incorporating holding company is permitted under the principle of *taradhi* (consent) based on the following verse: *"Do not consume one another's wealth unjustly but only [in lawful] business by mutual consent"* (Surah Al-Nisa; verse 29) and a legal maxim: "*sharikah* is contracted based on the customary practice of traders". His basis of argument is that the concept of *sharikah al-'inan* or *mudharabah*, which iscontracted as a branch of *al-mufawadhah*, is discussed by the classical scholars. Also, Shariah does not forbid parent company to own shares in its subsidiary provided that other Shariah principles are observed, such as taradhi from all shareholders for such shareholding ownership is obtained, other stakeholders dealing with the parent are not affected and the interest of such incorporation is ascertained. Abu Ghuddah [34] also argued that *sharikah al-qabidhah* shares the identical ruling of *sharikah al-musahamah*, which is premised on *sharikah al-'inan*. Moreover, all modern companies do not differ from *sharikah* which adopts *wakalah* as its underlying contract. However, Sano [35] argued that it is pointless to compare both *sharikah al-musahamah* and *sharikah al-qabidhah* with any form of *sharikah.* This is because both are peculiar in terms of its characteristics and substances. Hence, examining both entities from other aspects such as whether *sharikah al-qabidhah* fulfils the general elements and conditions of *sharikah* and conforms with all Shariah principles of transactions is utmost necessary.

4.2.2 Al-Shakhsiyyah Al-'itibariyyah (Artificial Personality) and Limited Liability of Sharikah Al-Musahamah and Sharikah Al-Qabidhah Under Shariah

Contemporary scholars have also deliberated the issue of *al-shakhsiyyah al-'itibariyyah* as the main attribute of *sharikah al-musahamah* from Shariah perspectives. Majority of

them recognise the concept akin to other Islamic traditional organisations such as *bait al-mal* (public treasury), *masjid* (mosque), and *waqf* (endowment) [36]. Several scholars have also discussed this concept under the *fiqh* concept of *al-dhimmah.* According to Al-Zarqa' [37], *al-dhimmah* as originally embodied from human beings can also be extended to other than human beings, including *al-shakhsiyyah al-'itibariyyah.*

Majority contemporary scholars have also recognised the concept of limited liability as an attribute of *sharikah al-musahamah* under Shariah. The basis of this opinion is that this concept is equivalent to the principle of *mudharabah* whereby the *rabbul mal* is not liable for any debts incurred by the *mudharabah* fund above his capital contribution [24]. Uthmani [38] argued that such concept does not contravene any injunctions of Islam. However, several scholars have contested this concept. Al-Baqmi [39] argued that under Shariah, the shareholders are liable for the corporation's debts owed to the creditors because such debts are attached to their liability. In addition, the transfer of property by the shareholders to the corporation as a legal entity does not change their position as the actual owners of such property because the corporation, recognised as *al-dhimmah* under the Shariah, cannot be treated alike human beings since the corporation represents the members in managing their affairs in the corporation. Similarly, Fahmi [40] argued that invoking limited liability in *sharikah al-musahamah* is incompatible with the general principles of *sharikah* and surely gives harm to creditors in claiming their rights against the corporation. Al-Muhammad [41] clarified that *fiqh* does not recognise corporation totally separated from its members because their consent or delegation to the board in making transactions for the corporation must be obtained or otherwise their commitment or obligation to the corporation remains undue.

Similarly, contemporary scholars have discussed the rulings of group of companies under Shariah in various aspects other than the issue of *al-shakhsiyyah al-'itibariyyah* and limited liability. Al-Shubaili [42] explained that the scholars' understanding of *sharikah al-qabidhah* as a form of *sharikah* has affected the ruling of zakat on shares regardless of its status of personhood separateness. They apply the *sharikah al-'inan* principle into the former by arguing that the parent's shares in the subsidiary represent the former's undivided shares in the latter's assets that are subjected to zakat. In *sukuk al-musharakah* (Islamic commercial paper that is structured based on *sharikah*), the contemporary scholars prohibit a guarantee provided by the parent over the capital and profit amount of the sukuk issued by its subsidiary (or vice versa). This is because in *sharikah*, partners are not allowed to guarantee the capital and profit among themselves as it would trigger *riba'* (usury). Due to this principle, the parent company is still considered a related entity to the subsidiary as the issuer of sukuk alike partner in this sukuk structure, despite the law considering both as separate legal entities [43].

In relation to limited liability, El-Gari [44] highlighted that the separation of liabilities between *sharikah al-qabidhah* and its subsidiaries is essentially a main legal feature that makes *sharikah al-musahamah* or *sharikah al-qabidhah* and *sharikah al-'inan* different. Upon registration, the subsidiaries remain distinct from *sharikah al-qabidhah* in terms of liabilities, although they have similar members, directors, or financial accounts. Nur [32] concurs the same by arguing that limited liability is not present in the *sharikah* structure, particularly *mudharabah.* While acknowledging the detriment effect of applying this principle in the corporate group, El-Saadouni [45] proposed joining several liability

principles of *sharikah* to be applied into the parent-subsidiary relationship, inspired by Article 180 of the then Saudi Arabia Companies Law 1965. This provision illustrates that the shareholders of the limited liability company (LLC) shall incur several and joint liabilities for the company's losses exceeding 50% of the share capital if they fail to take action to dissolve the company or inject new capital thereafter.

Apart from the above, several scholars have debated the concept of control in corporate groups and its effects on the distinctness of their personalities and the application of *sharikah* principles into the groups from Shariah perspective. Bakar [46] argued that the shareholding ownership effecting control is the causal attribute affecting Shariah rulings, particularly certain transactions between corporate groups (typically between parent and subsidiaries). As such the legal principles of separate legal entity and limited liability as the default-legal attributes do not give effect to these Shariah rulings. In this regard, the parent company is prohibited from guaranteeing the capital amount of its subsidiary because Shariah prohibits capital guarantee in the *sharikah*. El-Gari [44] viewed management as the paramount consideration in a corporate group relationship inter se, not the shareholding ownership. Al-Qarahdaghi [47] highlighted that the parent is prohibited from providing capital guarantee to its wholly owned subsidiary, although both are deemed strangers because of the legal features of separate legal personality and limited liability. This is because both entities are considered as one. El-Saadouni [45] suggested that "decisive influence" be considered in imposing liability on a parent over its subsidiaries. When the parent exercises it,, the subsidiary does not act independently but with the parent's will despite of their separate legal entities status.

4.3 Legal Framework of *Sharikah Al-Musahamah* and *Sharikah Al-Qabidhah* Under Saudi Arabia and Kuwait Laws

4.3.1 Saudi Arabia

In Saudi Arabia, company law matters are governed under the Saudi Arabia's Companies Law 2015 (Saudi Law). Corporation is defined in Article 2 as follows:

> *A contract under which two or more persons undertake to participate in an enterprise for profit, by contributing a share in the form of money, work, or both, and share profit or loss resulting therefrom.*

Article 3(3) further states that "the provisions of the Saudi Law shall not apply to companies known in Islamic jurisprudence, unless they take the form of one of the companies set forth in Paragraph 1 of this Article". Article 11 further states that "a partner's share in profits or losses shall be proportionate with his contribution to the capital. However, the company's articles of incorporation may provide otherwise, subject to the Shariah". Article 14 states that "except for a partnership, a company shall acquire a legal personality upon registration in the commercial register. However, a company shall have a legal personality during the incorporation period, to the extent necessary for its incorporation, provided the incorporation process is completed".

Article 182 defines a holding company as:

> *A joint-stock or a limited liability company that aims to control other joint-stock or limited liability companies, called subsidiaries, by owning more than half of*

the capital of such companies or by controlling the formation of their boards of directors.

Article 183 further mentions that a holding company shall have the following purposes:

a. managing its subsidiaries or participating in the management of other companies in which it owns shares and providing support thereto;
b. investing its funds in shares and other securities;
c. owning real property and movable assets necessary for its operations;
d. providing loans, guarantees and financing to its subsidiaries;
e. owning and utilizing industrial property rights, including patents, trademarks, franchises and other intangible rights, and leasing the same to its subsidiaries or third parties; and
f. any other legitimate purpose in conformity with the nature of the company.

4.3.2 Kuwait

Article 3 of the Kuwait's Law No. 1 of 2016 on the Promulgation of the Companies Law (Kuwait Law) also defines a commercial corporation as follows:

"The company is incorporated by virtue of a contract by which two or more persons undertake to participate in a profit-making project with each of them offering a contribution in assets or labour, to divide what is generated from the project in profits and losses."

As far as the general provisions are concerned, Article 8 further states that "the company's incorporators or partners – as the case may be–shall be held jointly liable towards the company, its partners or third parties for damages incurred due to the invalidity of the Company Contract". Article 9 also states that "the company's manager or members of its board, as the case may be, shall be jointly liable for the damages caused to third parties due to their failure to proclaim the company." Article 18 states:

All partners shall share the profits and losses in proportion to their share in the capital in accordance with the following principles."

(i) *If the Company Contract does not specify the portion of a partner's participation in the profits and losses, each partner shall participate in the profits and losses in proportions equal to their respective share in the capital.*
(ii) *If the Company Contract includes a provision that excludes a partner from sharing in the profits or exempts a partner from sharing in the losses of the company, such provision shall be null and void and the Company Contract shall remain valid.*
(iii) *If the Company Contract only specifies a partner's share in the profit, such partner's share in the loss shall be equal to that in the profit. The same shall apply if the Company Contract only specifies the partner's share in the loss.*

Any provision granting a partner fixed interest income for his share in the company shall be null and void.

Article 23 also mentions that "except for a joint venture company, the company shall be vested with legal capacity (personality) as of the date of Registration". Every company established in the State of Kuwait shall be of Kuwaiti nationality and shall have its domicile in Kuwait, the details of which shall be recorded in the commercial register. This provision shows that a corporation registered under this law that has legal capacity is a separate legal entity.

For group of companies, Article 243 defines holding company as follows:

A company whose objective is to invest in shares, membership interests, or investment units in Kuwaiti or foreign companies or funds, or to participate in establishing and lending to such companies and guaranteeing their obligations towards third parties.

Article 244 states that a holding company shall take the form of either a shareholding company, an LLC, or a single-person company. Furthermore, Article 245 expresses that the holding company shall be established by one of the following ways:

(i) *Establishing a company whose objectives are circumscribed by any one of the activities set forth in Article 243;*
(ii) *Establishing subsidiary companies or owning shares or membership interests in companies in order to carry out such objectives;*
(iii) *Amending the objectives of an existing company into those of a Holding Company in accordance with the provisions of this law.*

Article 246 states that a holding company may carry out some of all of the following activities:

(1) Management of its subsidiary companies or participation in the management of other companies in which the Holding Company is a stakeholder and providing the necessary support of these companies;.
(2) Investing its assets in the trading of its shares, bonds and securities.
(3) Owning real estate and movable property necessary to carry out its operations within the limits permitted under the law
(4) Financing or lending to companies in which the Holding Company hold shares or membership interests and guaranteeing their obligations towards third parties. In such case, the shares of the Holding Company in the capital of the borrowing company shall be no less than twenty per cent.
(5) Owning intellectual property rights, including patents, trademarks, industrial designs, concession rights and other such intangible rights, and exploiting them and licensing them to its subsidiaries or third parties, whether inside or outside Kuwait.

Article 248 states that the holding company shall be jointly liable for fulfilling the obligations of its subsidiary companies in the following cases:

1. *If the subsidiary company has insufficient funds to fulfil its obligations.*
2. *If the company holds in the subsidiary company a percentage of its capital enabling it to appoint most of the members of the board of directors or managers or to control decisions issued by the management.*
3. *If the subsidiary company takes decisions or performs acts aimed at the interest of the parent and controlling company, which negatively affecting the interest of the subsidiary company or its creditors, and which constitute the main reason for the subsidiary company's inability to fulfil its obligations.*

   This is unless the Holding Company is liable for the subsidiary Company's obligations for other reasons.

5 Discussion and Analysis

5.1 Comparison of the Legal Framework of Corporate Group Between Common Law and Shariah

The discussion in this paper has revealed that regardless of the corporate group relationship based on shareholding ownership or control structures, they are separate legal entities under the common law. Combined with limited liability, such a legal framework constitutes not only a change of form but also a change of substance (*Gaiman v National Association for Mental Health [1971] Ch 317*). Furthermore, the corporate group setting cannot be legally nor practically considered a partnership unless it could be factually proved before the court on any reasonable grounds, such as agency, a single economic entity, or others. Nevertheless, lifting the veil based on these grounds is an equitable remedy depending on the courts' discretion. Adopting this exceptional principle does not in any way recognise a corporate group as a partnership. Indeed, applying the corporate veil lifting on the basis of justice is insufficiently justified since it must be supported with other special circumstances of the cases [11].

In contrast, under Shariah, *sharikah* is a contract of partnership between partners in the capital, profit, and losses. Their *wakalah* relationship to do *tasarruf* on their behalf due to the consent given by them both constitute the *muqtadha al'aqd* (objective of contract) of *sharikah* [48]. Also, they share profit based on mutual agreement and losses in percentage of their respective capital investment. Backed by the Islamic concept of justice, their liabilities are always joint and several [49]. With regard tomultiple *sharikah* contracts, Siddiqi [28] highlighted the views of the Hanafi scholars that a co-partner's action to transact a second *sharikah* with a third party is subjected to the consent of his co-partner in the first *sharikah* effects into adding the third party as a new partner in the joint enterprise, despite of having two similar *sharikah* contracts simultaneously. In addition, the permissibility of the co-partner to enter into *mudharabah* with a third party, which falls under the *tabi'* or branches of commerce in the first *sharikah*, simply means that the *mudharabah* may be concluded without his co-partner's consent since it is lesser than the *sharikah*. Notwithstanding, an arrangement requiring his co-partner's consent eventually implies that *sharikah* or *mudharabah* businesses are inseparable from the co-partners as their *tasarruf* binds each other based on the *wakalah*.

The contemporary scholars' discussion of several issues relating to corporate group from *sharikah* perspective also indicates that the *sharikah* principles applied in corporate group disregard the latter's legal attributes. Nonetheless, it is observed that such direct application contradicts the legal framework of group of companies. First, for zakat on shares by the parent over its subsidiaries, the parent's shares do not legally nor equitably represent undivided shares in the latter's assets under the company law as compared to *sharikah al'inan*. This is ruled by Rohana Yusuf FCJ in *Public Bank Bhd v. New Age Digital Print Sdn Bhd & Anor [2019] 5 CLJ 1* that due to the doctrines of limited liability and separate legal entity, the shareholders do not own any legal nor equitable rights over the corporate assets. Second, for the prohibition of guarantee by the parent over its subsidiary in *sukuk al-musharakah*, the total or majority shareholding ownership does not make the parent a partner of the subsidiary based on *sharikah* due to their separate legal personalities that becomes the substance of their legal framework.

Lastly, it is observed from the above argument that the concept of control or management makes the application of *sharikah* possible in a corporate group. This likely implies the application of *wakalah* by which the action of parent's control over the subsidiary via management attributes them both relatively. However, the concept of complete shareholding ownership, legal control, or decisive influence does not legally alter the legal framework of corporate group as separate legal entities under the concept of agency, partnership, or the like. Contrastingly, *wakalah* in the *sharikah* connotes that any action of a co-partner, both as an agent or a principal, binds and is attributed to the other co-partner since they equally own the right to participate in the business affairs and are consequently the co-owners of the assets in the *sharikah*.

5.2 Comparison of the Legal Framework of Corporate Group Between Malaysia, Saudi Arabia and Kuwait Laws

The similarity of the legal frameworks of corporate group of the three countries demonstrates that they adopt the legal attributes of separate legal personhood and limited liability as a legal framework of group of companies, including the legal relationship of shareholding ownership and control structures. The differences are enumerated below:

(i) Malaysian company law is based on the CA 2016, which is derived from the common law, whereas both Saudi Arabia and Kuwait laws mainly adopt both the French civil code and the Ottoman Mejelle which govern the definition of company equivalent to *sharikah* and its principles [24]. These provisions apply to all types of companies mentioned in their respective laws. In the event of lacuna in their companies laws, Shariah will be made as a reference [50].

(ii) The existence of corporate group as a separate legal entity or body corporate is resultant from the incorporation under the CA 2016. Under the Saudi and Kuwait laws, although *sharikah al-qabidhah* has these legal features, such existence is founded mainly upon a contract between its members inspired by the definition of company as *sharikah*. In other words, the status of a body corporate and other legal features inherent to *sharikah al-qabidhah* are derived from this contract [51], and such definition could be inferred to cover *sharikah al-qabidhah* as well.

(iii) The CA 2016 does not clearly define corporate group, except by several legal cases. Meanwhile, the definition of holding company is clearly provided in Article 182 of Saudi Law and Article 243 of Kuwait Law. The difference in definition between both laws is that the former focuses on shareholding ownership and control relationship, whereas the latter consists of a wide range of holding company objectives.

(iv) The CA 2016 does not mention the main objectives or activities of the parent company. This is opposed to Article 183 of the Saudi Law and Article 246 of the Kuwait Law which governs the purposes of a holding company. The difference between both laws is that the latter provides a provision that the holding company will guarantee the obligations toward third parties.

(v) Under the CA 2016, corporate group takes the form of a company limited by shares whereas corporate group in Saudi Arabia and Kuwait Laws may be structured either as *sharikah al-musahamah* or LLC.

(vi) Section 4 to section 7 of the CA 2016 govern the numerous types of corporate group relationship, whereas Article 182 of the Saudi Companies Law and Article 245 of the Kuwait Companies Law govern expressly parent-subsidiary relationship and are silent on other types of relationship.

(vii) In imposing the liability of the parent toward its subsidiaries, the Malaysian company law governs the exceptional doctrine of corporate veil lifting to the general ruling of limited liability within the group upon proof of the grounds, as highlighted above. Yet, this exceptional doctrine is not specifically governed under the CA 2016 as it is a judicial discretion of the court. Saudi Law, on the other hand, is silent on this matter, leaving the matter to the court to decide in accordance with Shariah principles. In contrast, in the Kuwait Laws, this matter is governed under Article 248, which imposes the joint and several liabilities on the parent toward its subsidiaries upon fulfilment of the conditions as stipulated above. The writer observes that this legal feature resembles *sharikah*, which governs joint and several liabilities among its partners. Saadallah [51] viewed that the phrase *managing the subsidiary* assumes liability. This view possibly could be similarly applied in Saudi Law since it shares the same provision and it is silent on the matter.

(viii) From the internal governance structure, under Malaysian company law, each board of directors owe duties to act in the best interest of their respective companies within the group, not the group as a whole unless the group's interest intersects with the former. Otherwise, they are liable for breach of duties toward the company should their decision to act in the best interest of other group has caused detriment to the company that they serve. Similarly, Article 248(3) of the Kuwait Companies Laws shows that the subsidiary's board of directors can act in the best interest of the parent if it coincides with the former provided that such action does not affect its inability to fulfil its obligations toward the creditors. However, the provision states that in the event of the contrary occurs, the parent shall be liable for the subsidiary's decisions. By contrast, this matter is silent in the Saudi Companies Laws.

Overall, the outcomes of this article show that the legal framework of corporate group under the common law differs from *sharikah* in that the partners and *sharikah* itself are not separated, despite the conclusion of multiple *sharikah* contracts. Hence, these findings support Ghadas Abd Aziz's view (2018) that *sharikah* is a single business entity inseparable from its partners except that it discusses such comparison only for a single corporation, not the corporate group context. Further scrutiny of the comparative statutory analysis between the three sampling countries showed that the CA 2016 does not apply *sharikah* in the corporate group setting but both Saudi and Kuwait Laws apply the *sharikah* principles and other legal attributes of corporate group concurrently. This observation was not reported by El-Saadouni [45] in his research studies.

6 Conclusion

In summary, the legal framework of corporate group under common law is incompatible with the *sharikah* concept and cannot be applied to the latter or vice versa. This is mainly because multiple *sharikah* contracts are not separate legal entities among the partners. In multiple *sharikah* businesses, the contracted parties remain as co-partners based on a *wakalah* contract. All three countries adopt the same legal features of group of companies peculiar to the concept of *sharikah*. However, given the definition and application of *sharikah* in the companies laws of Saudi Arabia and Kuwait, their legal framework of *sharikah al-qabidhah* is uniquely structured in resemblance to *sharikah*. This is proven by a provision that *sharikah al-qabidhah* will participate in the management of its subsidiaries. In fact, the LLC, which is based on *sharikah*, can also be structured as *sharikah al-qabidhah* in either owning another LLC or *sharikah al-musahamah*. For Kuwait, the *sharikah al-qabidhah*'s liability towards its subsidiary's debts clearly adopts the principle of joint liability embodied in the *sharikah* under Shariah.

The findings suggest the need for a new legal framework for group of companies that is structured in accordance with the *sharikah* concept, particularly for Shariah-compliant businesses. The legal framework of Saudi and Kuwait laws could be used as a benchmark for exploring how the *sharikah* concept and principles can be applied in a group of companies so that the application can be governed by its own legal structures or framework. This dimension surely requires further research on the subject matter.

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