

# Corporate Manslaughter and Islamic Law in Afghanistan and Pakistan

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## Abstract

Corporate manslaughter has become a well-known concept in the developed world, especially in the UK. Unfortunately, the legal systems of Afghanistan and Pakistan, though they have many laws dealing with corporations, their employees and workplace safety, still does not provide an adequate remedy to the victims of incidents where government agencies and corporations are the direct or indirect cause of the fatal incidents. However, corporate manslaughter is a criminal offence and the existing Islamic law can provide a solution for Afghanistan and Pakistan that cannot be matched by UK law. Both states do not need to introduce a new law for this purpose. The Pakistan Penal Code provides for the payment of *diyat* and other types of compensation where life and limb are destroyed. The Penal code of Afghanistan states that the Hanafi religious jurisprudence will apply in the cases relating to *Diyat* (blood money). Therefore, there is no real need of amendment in the existing laws of Afghanistan and Pakistan. The amount of *diyat* is also fixed by the Pakistani Law, and for Afghan Law it can be assessed according to the Hanafi school.

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## 1. Introduction

The corporation as a business form has come to dominate modern life. Not only has it come to be the dominant organization, it has acquired different shapes and structures, the foremost of which is the multinational corporation (MNC), also referred to as the transnational corporation (TNC) or the multinational enterprise (MNE).<sup>2</sup> These giant organizations have the ability to move resources from one corner of the planet to another with relative ease and to set up plants, factories as well as other structures in different countries through a complex web of parent and subsidiary companies. Developing countries like Pakistan and Afghanistan have their own domestic corporations that are gradually growing, but both countries are increasingly dependent on multinational corporations that bring in foreign direct investment (FDI) and contribute to the development of these countries.

Corporations, whether domestic or multinational, are present in Pakistan and Afghanistan in some form or the other. Some of these enterprises are operating multiple plants and carrying out other business activities, thus bringing great benefits to these countries, nevertheless they have the potential of generating disasters giving rise to the loss of life and limb. As these corporations employ hundreds and thousands of workers, there is every possibility that torts can be committed, especially those that threaten life.<sup>3</sup> This threat to life and the potential to cause disasters is not confined to Pakistan and Afghanistan. In recent times, disasters like the Bhopal tragedy (Union Carbide Case)<sup>4</sup> and in Nigeria (Kiobel case),<sup>5</sup> where the victims had to seek remedies through those provided by Alien Torts Act, have shown that other damages, even the loss of life, are not adequately and swiftly compensated. The potential for causing disasters is also not confined to developing countries alone. The United Kingdom, for example, faced with disasters caused by corporations in the recent past and the loss of life that resulted from these

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<sup>2</sup> Multinational Corporations (MNCs) are corporations that are incorporated in one country but operate in one or more other countries. Peter T. Muchlinski, *Multinational Enterprises and The Law* (2nd ed, OUP 2007) 5-8. Other terms found in literature include “transnational corporations” (TNCs), “transnational enterprises” (TNEs) and “multinational enterprises” (MNEs).

<sup>3</sup> In Pakistan, the law of torts left by the British has become shriveled acquiring a shrunken posture leaving the poor and the downtrodden without remedies enjoyed by the rest of the world. The law of torts in Pakistan needs to be resurrected from its grave and given a modern form if the rights of the less privileged citizens are to be protected and secured, especially against such powerful organizations as the MNCs. The situation in Afghanistan is surely the same or maybe more vulnerable.

<sup>4</sup> The world’s worst industrial tragedy began when poisonous gas silently leaked in the dead of night in northern India and a “highly toxic chemical called methyl isocyanate spewed out of a chemical plant owned by Union Carbide India Limited, a subsidiary of the giant American corporation Union Carbide.” This happened during the night between December 2-3, 1984. The chemical and fumes moved with the wind toward thousands of destitute squatters who lived in adjoining huts in the city of Bhopal. The chemicals killed several thousand people, injured hundreds of thousands more, and devastated local crops and cattle. See, Abhi Raghunathan, “The Grand Trunk Road from Salomon to Mehta: Economic Development and Enterprise Liability in India,” (2012) 100 *The Georgetown Law Journal* 572-573.

<sup>5</sup> *Kiobel* concerned the liability of particular multinational corporations for aiding and abetting the Nigerian Abacha regime, which perpetrated crimes against the Ogoni community in the heart of the Niger Delta. The key question facing the court was whether the Alien Tort Claims Act (otherwise known as the Alien Tort Statute, ATS), could ground a claim of Nigerian nationals in the US. The facts of the case are as compelling as the judgment. For details see, Meetali Jain and Bonita Meyersfeld, “Lessons from *Kiobel v Royal Dutch Petroleum Company*: developing homegrown lawyering strategies around corporate accountability,” (2014) 30 *SAJHR* 431.

tragedies had to make the Corporate Manslaughter and Corporate Homicide Act in 2007.<sup>6</sup> The impact of this law will emerge gradually, but one thing is clear that it can be applied in a sophisticated legal system like that of the United Kingdom probably requiring expensive litigation.

As the Bhopal and Kiobel cases, mentioned above, have shown that victims of such disasters or their families do not have the resources or the time to pursue remedies that are often available in foreign countries and at colossal expense, Pakistan and Afghanistan must develop an indigenous remedy that is more direct and less expensive for the claimants. Fortunately, such a remedy is available in Islamic criminal law as applied by the Hanafi school. Both countries have applied this law in their penal codes. Nothing more is needed to apply this law to corporations, except the political will to declare that the Islamic law of crimes pertaining to manslaughter and the loss of limbs will henceforth be applicable to corporations. This paper will discuss the manner in which this law can and should be applied. It will also be shown why this law will prove to be more efficient than any other law that deals with the problem anywhere in the world today.

In order to deal with the topic in a reasonably comprehensive manner at least three areas must be addressed. The first is that of criminal liability of corporations in the context of homicide and manslaughter. The discussion under this will focus on the criminal liability of corporations under common law and more recent developments that led to the promulgation of the Corporate Manslaughter and Corporate Homicide Act, 2007. It will also highlight why the corporate manslaughter law is necessary. The second area is that of the traditional law of homicide and the payment of blood money. The elaboration of this law will not only explain the Islamic law on the subject, but will also elaborate the difference between manslaughter in common law and Islamic law. The third section will deal with the way the traditional Islamic law has been implemented through the penal codes of Afghanistan and Pakistan. This discussion will also show how the traditional Islamic law interacts with the *ta'ziri* system or the discretionary provisions laid down by the state. After discussing these three areas, proposals will be made as to how the law of corporate manslaughter can be implemented highlighting the types of acts covered and the organizations and entities that can be held liable.

## **2. Criminal Liability of Corporations Under Common Law, Especially for Manslaughter**

A company is a legal person in the eyes of the law. Thus, it possesses a legal personality almost like a natural person, a human being. Most rules related to a corporation revolve around this attribute of being a legal person. In some jurisdictions corporations are treated more like citizens. In the US, for example, some of the rights available to human beings under various amendments

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<sup>6</sup> On 18<sup>th</sup> November 1987, a fire of catastrophic proportions occurred in the King's Cross underground station, killing 31 people. In July 1988, the Piper Alpha oil platform disaster in the North Sea resulted in 167 deaths. On 12<sup>th</sup> December 1988, the Clapham rail crash caused 35 deaths and nearly 500 people were injured when three rush-hour trains collided after a signal breakdown. On 6<sup>th</sup> March 1987, *the Herald of Free Enterprise*, a roll-on roll-off car ferry departed from Zeebrugge for Dover and shortly afterwards foundered with substantial loss of life. A judicial inquiry severely criticized P & O European Ferries (formerly Townsend Car Ferries Ltd). The jury gave verdict of unlawful killings in 187 cases that resulted in prosecution against the company and seven individuals. But the trial judge directed the jury to acquit the company and the five most senior individual defendants. In all these cases prosecution of manslaughter against corporations failed. The decision of the P & O European Ferries case was highly criticized and provoked the public. See, The UK Law Commission's Report on Legislating the Criminal Code Involuntary Manslaughter, (LAW COM No 237) 4-5.

to the Constitution are available to corporations as well. Nevertheless, the doctrine of separate legal personality of companies faces problems when it comes into contact with those parts of the general law where the mental state of the person is to be assessed for the purpose of imposing liability. In such cases the board and the officers are considered the brains, or the alter ego, of the company. It is their state of mind that is treated as the state of mind of state of mind of the company.<sup>7</sup> It is here that the fictional entity theory fails to offer a sufficient explanation of the nature of corporate personality. For the sake of imposing liability, the company has to be regarded in law as the people in it, thus lending support to the real entity theory of incorporation.<sup>8</sup>

In criminal law then, corporate liability determines the extent to which a corporation as a legal person can be liable for the acts and omissions of the natural persons it employs. Until 1944, companies had no general common law liability for crimes, although the principle of vicarious liability had been used to make companies liable for certain “strict liability” offences, where *mens rea* was not a required element of the offence. The situation changed with *DPP v. Kent and Sussex Contractors Ltd.*<sup>9</sup> Gradually, criminal liability has been imposed in certain forms. It was decided in this case that the state of mind of the officers of the company could be imputed to it for the purpose of establishing “intent” to deceive. Consequently, companies can now have direct criminal liability imposed on them. The technique used is that of “identifying” senior individuals whose state of mind can be regarded as that of the company for the purposes of establishing *mens rea*. The test for this approach arose in the case of corporate liability for manslaughter. This issue highlighted some of the limitations of this approach. It was established in *R v P & O European Ferries (Dover) Ltd*<sup>10</sup> that a company could be indicted for manslaughter, however, it was necessary to be able to identify one individual who had the necessary degree of *mens rea* for manslaughter, and so the prosecution against the company failed. The Law Commission, later, made recommendations for the introduction of a new offence of corporate killing where the conduct of the company falls below what could reasonably be expected. In such cases, death will be regarded as having been caused by the conduct of the company if it is caused by a failure in the way the company’s activities are managed and organised.<sup>11</sup> The Law Commission’s proposals were broadly implemented by the Corporate Manslaughter and Corporate Homicide Act 2007, which came into force on 6 April 2008. The Act creates a dedicated offence of corporate manslaughter and a company convicted of the offence will face an unlimited fine.

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<sup>7</sup> See, e.g., *Lennard’s Carrying Company Ltd v Asiatic Petroleum Co. Ltd.* [1915] AC 705.

<sup>8</sup> Denning LJ said in *Bolton Engineering v Graham*: “A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants or agents who are nothing more than the hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.” [1957] 1 QB 159.

<sup>9</sup> [1944] KB 146.

<sup>10</sup> (1990) 93 Cr App R 72. See also what has been said about corporate manslaughter above.

<sup>11</sup> Law Com. Report No. 237 *Legislating the Criminal Code: Involuntary Manslaughter* (1996). The area was subject to further consultation; see Home Office Consultation Paper (23 May 2000) *Reforming the Law on Involuntary Manslaughter: The Government’s Proposals* and a draft bill was published in the White Paper, *Corporate Manslaughter: The Government’s Draft Bill for Reform* (Cm 6498, 2005).

Manslaughter under English law, for some time, has been divided into two main types: *voluntary* manslaughter and *involuntary* manslaughter.<sup>12</sup> Voluntary manslaughter flows from murder when three defences are pleaded. The three defences are: diminished responsibility; loss of control; and suicide pact.<sup>13</sup> In these defences, the defendant does not deny killing the victim, nor does he deny malice aforethought, but asks to be excused from full liability. If successful, the defendant must be convicted of voluntary manslaughter.<sup>14</sup> This type of manslaughter is not relevant for corporations, therefore, we will not pursue it further.<sup>15</sup> “Involuntary manslaughter describes any form of unlawful killing where there is no proof of malice aforethought.”<sup>16</sup> There are three forms of involuntary manslaughter: constructive manslaughter or unlawful act manslaughter; gross negligence manslaughter; and reckless manslaughter.<sup>17</sup> The UK Law Commission focuses on the first two alone, calling the first as unlawful act manslaughter.<sup>18</sup> The UK Law Commission’s paper we are referring to states that the law of involuntary manslaughter as it has developed has problems. This is probably due to the fact that it is entirely a matter of common law, and it has to be pieced together from decided cases. “Even more than most parts of the criminal law which suffer from that handicap, involuntary manslaughter has always been notorious for its uncertainty, and its lack of any clear conceptual vocabulary.”<sup>19</sup> The report says that the conceptual position “has been made, if anything, worse by the efforts of courts in the last thirty years, to keep the law within something like decent bounds. These efforts have had to be undertaken on an ad hoc basis, without the support of a proper framework of policy and analysis.”<sup>20</sup> This is the position of unlawful act manslaughter, which is tainted by the doctrine of constructive liability which underpins this part of the law.<sup>21</sup> The law of “gross negligence manslaughter,” the report says is in “an even worse state.”<sup>22</sup> Finally, the Report adds that this “unpromising background makes it inevitable that it is difficult to state the law with any certainty, let alone succinctness. It is also virtually impossible to identify any governing

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<sup>12</sup> UK Law Commission, *Criminal Law: Involuntary Manslaughter: Consultation Paper No. 135* (London, Her Majesty’s Stationery Office 1994) 1.

<sup>13</sup> Jacqueline Martin and Tony Storey, *Unlocking Criminal Law* (4<sup>th</sup> edn, Routledge 2013) 306.

<sup>14</sup> *ibid.*

<sup>15</sup> UK Law Commission, *Criminal Law: Involuntary Manslaughter*, 2. This is what has been done by this Law Commission report. “The Paper is not concerned with those parts of the law of manslaughter (sometimes collectively called the law of voluntary manslaughter) which depend on the presence of the necessary *mens rea* for murder, and are therefore most easily regarded as partial defences to a charge of murder. The law of killing whilst under diminished responsibility, the law of killing whilst under provocation and killing by a survivor of a suicide pact are therefore not discussed in the Paper.” *Ibid.* 199.

<sup>16</sup> Martin and Storey (n 12) 306.

<sup>17</sup> *ibid.*

<sup>18</sup> UK Law Commission, *Criminal Law: Involuntary Manslaughter*, 2. It does, however, acknowledge the term constructive manslaughter. “The alternative name for this form of manslaughter, ‘constructive manslaughter,’ draws attention to the fact that this species of manslaughter is based upon constructive liability. The law ‘constructs’ culpability for manslaughter out of some lesser crime committed by the defendant which has accidentally caused death. Because of this feature of the offence, the accused’s mental state is not assessed with reference to the death which he has accidentally caused, but only in relation to his unlawful act.” *ibid.*, 10.

<sup>19</sup> *ibid.*, 8. That part of it which is now described as ‘unlawful act manslaughter’ has been from time to time “the object of complaint, not to say bewilderment, for over a century.” *ibid.*

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.*

principles or policy which inform it.”<sup>23</sup> It is for this reason that it has been recommended many times that the offence of involuntary manslaughter be abolished altogether.<sup>24</sup>

At one time it was thought that the commission of a tort was sufficient to ground a conviction of involuntary manslaughter if death resulted. For example, in *Fenton*,<sup>25</sup> where the defendant was convicted of manslaughter on the basis that he had committed the unlawful act of trespass to property.<sup>26</sup> This approach quickly changed and the law now requires that the defendant commit a criminal offence. In *Franklin*,<sup>27</sup> the court stated that “The mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is a necessary step in a criminal case.”<sup>28</sup> If there is no criminal offence, then there is no possibility of a manslaughter conviction regardless of how “dangerous” the defendant’s acts may have been.<sup>29</sup>

### 3. Reform in the United Kingdom for Corporate Liability for Manslaughter

In the last few decades of the twentieth century there were a number of high profile disasters in which people died as a result of poor practice by a corporation. Our purpose here is not to trace this history here, as a number of sources are available from which this history can be gleaned.<sup>30</sup> Briefly, these among others were: the Herald of Free Enterprise disaster in 1987, in which 192 people died; the King’s Cross fire in 1987, in which 31 people were killed; the Clapham rail crash in 1988 when 35 people died and nearly 500 others were injured; and the Southall rail crash in 1997 when seven people were killed and 150 injured.<sup>31</sup> The Law Commission’s consultation paper has the following to say:

At the same time we should not ignore what appears to be a widespread feeling among the public that in cases where death has been caused by the acts or omissions of comparatively junior employees of a large organisation, such as the crew of a ferry boat owned by a leading public company, it would be wrong if the criminal law placed all the blame on those junior employees and did not also fix responsibility in appropriate cases on their employers who are operating, and profiting from, the service being provided to the public. If the law is able to address these concerns, consideration also needs to be given to the question whether it is the law of manslaughter, as opposed to, for example, a regulatory offence, which is the appropriate response in such cases.<sup>32</sup>

Thus, initially it was thought that a corporation could not be liable for manslaughter, but the matter was resolved in *P & O European Ferries (Dover) Ltd* (1991) when, following the Herald

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<sup>23</sup> *ibid.*

<sup>24</sup> These recommendations are spread all over this report.

<sup>25</sup> (1830) 1 Lew CC 179.

<sup>26</sup> Martin and Storey (n 12) 330. “In 1830, for example, the defendant had thrown some stones down a mine. They broke some scaffolding which caused a wagon to overturn, killing the deceased. Tindal CJ directed the jury that the defendant’s act in throwing the stones was a trespass, and as such was sufficient for manslaughter.” UK Law Commission, *Criminal Law: Involuntary Manslaughter* 11.

<sup>27</sup> (1883) 15 Cox CC 163.

<sup>28</sup> As quoted in Martin and Storey (n 12) 330.

<sup>29</sup> *ibid.*

<sup>30</sup> See, e.g., UK Law Commission, *Criminal Law: Involuntary Manslaughter*, 89 *passim* and Jacqueline Martin and Tony Storey (n 12) 195 *passim*.

<sup>31</sup> Martin and Storey (n 12) 195.

<sup>32</sup> UK Law Commission, *Criminal Law: Involuntary Manslaughter* 89 (footnotes omitted).

of Free Enterprise disaster, P & O were charged with manslaughter. The problems highlighted here led to a general review of the law on manslaughter by the Law Commission.<sup>33</sup> After considerable deliberation and another report that we have relied upon here, Law Commission, *Reforming the Law on Involuntary Manslaughter*, in 2007, the Corporate Manslaughter and Corporate Homicide Act was passed by Parliament. The section dealing with the offence of corporate manslaughter reads as follows:<sup>34</sup>

(1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised—

(a) causes a person's death, and

(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

The section reads this way as the offence is based on the Law Commission's new proposal about an offence of manslaughter based on gross negligence rather than on unlawful act manslaughter. Section 2 of the Act widens the scope of the offence to include other organisations. These are: (a) a corporation; (b) a department or other body listed in Schedule 1; (c) a police force; (d) a partnership, or a trade union or employers' association, that is an employer.<sup>35</sup> Corporations may be held liable for manslaughter now, and there is legislation on the issue as well.<sup>36</sup>

We may, therefore, describe briefly the way Islamic law considers this offence.

#### 4. The Traditional Islamic Law of Homicide and Manslaughter

Afghanistan and Pakistan are both Muslim majority countries, and the majority in both countries are Sunnis following the school of Imam Abu Hanifah. The penal laws of both countries have adopted provisions from the law of this school. Accordingly, what is discussed in the present section applies to both. The major jurists for this school are Imam al-Sarkhsi (d. 483 AH), al-Kasani (d. 587 AH), and of course the author of *al-Hidayah*, al-Marghinani (d. 593). What we say below will mostly be from the works of these jurists, so that the basis of the discussion is reliable and authentic.

To begin with we may say that the distinction between torts and crimes is somewhat blurred in Islamic law. Many of the acts classified as offences under the law of bodily injuries can be designated as torts, especially those in which compensatory damages is the only remedy. Today, the real distinction would be based on whether the proceedings that follow the act are criminal or civil. The word *jarimah* is usually considered similar to the word offence, while crimes of a more serious nature are referred to as *jinayaat* (singular *jinayah*). Some of the *jinayaat* today would be classified as torts. Petty offences are denoted by the use of the word *ma'siyah*, which literally means sin. The emphasis in the words *hadd* and *ta'zir*, on the other hand, is more on the penalty provided rather than on the inherent nature of the act.<sup>37</sup>

On the whole, the characteristics of offences pertaining to life and bodily injuries are akin to torts. This may be the reason why such offences are classified as *jinayaat* by the Hanafi jurists.

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<sup>33</sup> Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com No 237) (1996).

<sup>34</sup> Corporate Manslaughter and Corporate Homicide Act 2007 (2007 CHAPTER 19), section 1.

<sup>35</sup> *ibid.* section 2.

<sup>36</sup> See, the UK Corporate Manslaughter and Corporate Homicide Act 2007.

<sup>37</sup> Imran Ahsan Khan Nyazee, *Islamic Jurisprudence*, (3<sup>rd</sup> edn, Federal Law House 2016) 429-430.

The term *jinayah* is applied by Hanafi jurists to mean homicide and bodily injuries as well as to torts. Al-Sarakhsi says:

Know that the term *jinayah* (delict) is used for an act that is forbidden the law irrespective of its being directed at property or life, but in the jargon of the *fuqaha* the term *jinayah* is applied to an act directed against life and limbs. They designated the act against property by the term *ghasb*, when the general usage is different from it.<sup>38</sup>

This shows that some of the torts would be designated as *jinayat*, while torts against property would fall under *ghasb*. It is to be noted, however, that the term *ghasb* includes certain acts that are pure crimes, for example, abduction and even rape after abduction.<sup>39</sup> We may mention, however, that the Pakistan Penal Code treats all bodily injuries and offences as crimes, and so does the new Afghan Penal Code.

Before we mention some of the details of the provisions of traditional Islamic law, it is important to mention that the broad manner in which the penal codes of both countries deal with the relationship between the fixed provisions and the discretionary provisions is that first an offender is tried under the Islamic provisions of *qisas* (retaliation). The procedural and evidentiary standards set for this law are very high. It often happens that the conditions laid down for *qisas* are not met. In such a case, the reduced standard of proof fixed for discretionary or *ta'ziri* penalties takes over. The difference between the two types of provisions is that *qisas* is treated as a combination of the right of the individual and the right of Allah, where the right of the individual is predominant, while the *ta'ziri* penalty is the right of the state. Blood-money or *diyat* is treated and has to be paid whatever the law applied. We may now turn to a brief description of the traditional law.

According to Kasani, homicide is of four types in Islamic law: murder (*qatl 'amd*); culpable homicide (*qatl shibh i 'amd*); *qatl khata'* (homicide by mistake); and *qatl* that is within the meaning of *khata'*.<sup>40</sup> A fifth type discussed separately is called *qatl bis-sabab*, which is indirect homicide as discussed below. Out of these we are primarily concerned with the two types of *khata'* and *qatl bis-sabab*.

Whoever causes *qatl-i-khata'* and *qatl* that is within the meaning of *khata'* is liable to pay *diyat*. The Holy Quran says about accidental or unintentional murder that:

Never should a believer kill a believer; but (if it so happens) by mistake, (compensation is due); If one (so) kills a believer, it is ordained that he should free a believing slave, and pay *diyat* to the deceased's family, unless they remit it freely. If the deceased belonged to a people at war with you and he was a believer, the freeing of a believing slave (is enough). If he belonged to a people with whom ye have a treaty of mutual alliance, *diyat* should be paid to his family, and a believing slave be freed. For those who find this beyond their means, (is prescribed) a fast for two months running: by way of repentance to Allah; for Allah hath all knowledge and all wisdom.<sup>41</sup>

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<sup>38</sup> Abu Bakar ibn Muhammad ibn Ahmad ibn abi Sahl Shams al-A'immah Al-Sarakhsi, *Al-Mabsut* (Karachi:Idarat al Quran wa-al-'Ulum al-Islamiyah, n.d.) vol.27, 84.

<sup>39</sup> Nyazee (n 36).

<sup>40</sup> Abu Bakr Kasani, *Bada'i 'al-Sana'i 'fi Tartib al-Shara'i'* (Urdu), 7 vols. (Lahore: Diyal Singh Trust Library, 1997) 434. See also the relevant sections in the Urdu translation of *Ahkam al-Qur'an* by Abu Bakr al-Jassas, published by the Shariah Academy, International Islamic University, Islamabad.

<sup>41</sup> Al Quran, (4:92)

The offender, as a rule pertaining to the hereafter, is required to free a Muslim slave or fast two months as expiation. As a legal rule pertaining to this world, he is required to pay blood money. Blood money is to be paid by the *aqilah* in all cases of *khata'* and the offender is also prohibited from inheriting property from the victim if he or she is an heir.<sup>42</sup> Unintentional indirect killing (*qatl bis-sabab*) leads to liability for blood money, however, the offender is not liable to *kaffarah* (expiation) nor is he debarred from inheritance.<sup>43</sup> As with all homicides, the victim's heirs have the discretion to pardon the offender.

We may now compare the position in UK law, earlier and in the Homicide Act, with the provisions of Islamic law. *Qatl 'amd* is murder, that is, intentional homicide with malice aforethought. This category is excluded by the UK law for purposes of corporate manslaughter. The next category is *qatl shibh al-'amd*, which is involuntary manslaughter of the UK law, the reason is that there is malice aforethought and an unlawful act in it, and the corporation cannot have such malice. When an act is committed with malice, it is the employee committing the act who is liable, while some senior official may be guilty of abetment. The confusions in this law in the UK, that is, common law have been described above. The Homicide Act was compelled to alter this law due to the confusions of malice aforethought, unlawful act manslaughter as well as negligence. The Homicide Act, therefore, identified two things as has already been described above. These are (1) causation, that is, the defendant has caused the death of the victim and (2) there has been a breach of duty of care. In Islamic law, we cannot include *qatl shibh al-'amd* as it includes malice aforethought or *mens rea* to harm the victim. All that is required for our purposes here is the *diyat* or blood money that has to be paid to the victim. This is possible through the two types of *khata'* mentioned above as well as *qatl bis-sabab*. After this explanation, it will be easy to examine the provisions of the Pakistan Penal Code as well as the Afghan Penal Code, both old (1976) and new (2017).

## 5. The Implementation of the Islamic Law Through the Penal Codes

It is beneficial to examine the provisions of the Pakistan Penal Code to see how the traditional Islamic law of homicide and injuries has been implemented. The reason for examining these provisions is that they are a faithful implementation of the Qur'anic provisions as seen through the eyes of the Hanafi school. In other words this would be the application in the Afghan Penal Code as well if they were implemented in detail.

### 5.1. Pakistan Penal Code 1860

We may now see how the Pakistan Penal Code (PPC) implements it. The following sections are relevant.<sup>44</sup>

318. *Qatl-i-khata'*.—Whoever without any intention to cause death of, or cause harm to, a person causes the death of such a person, either by mistake of act or by mistake of fact, is said to commit *qatl-i-khata'*.

*Illustrations*

<sup>42</sup> Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence*, (5<sup>th</sup> edn, Federal Law House 2012) 394.

<sup>43</sup> Ibid 395.

<sup>44</sup> See sections 318 to 323 of the Pakistan Penal Code 1860.

(a) A aims at a deer but misses the target and kills Z who is standing by. A is guilty of *qatl-i-khata'*

(b) A shoots at an object to be a boar but it turns out to be a human being. A is guilty of *qatl-i-khata'*.

319. *Punishment for qatl-i-khata'*.—Whoever commits *qatl-i-khata'* shall be liable to *diyat*:

Provided that, where *qatl-i-khata'* is committed by any rash or negligent act, other than rash or negligent driving, the offender may, in addition to *diyat*, also be punished with imprisonment of either description for a term which may extend to five years as *ta'zīr*.

320. *Punishment for qatl-i-khata' by rash or negligent driving*.—Whoever commits *qatl-i-khata'* by rash or negligent driving shall, having regard to the facts and circumstances of the case, in addition to *diyat*, be punished with imprisonment which may extend to ten years.

321. *Qatl-bis-sabab*.—Whoever, without any intention to cause death of, or cause harm to, any person, does any unlawful act which becomes a cause for the death of another person, is said to commit *qatl-bis-sabab*.

#### *Illustrations*

A unlawfully digs a pit in the thoroughfare, but without any intention to cause death of, or harm to, any person. B while passing from there falls in it and is killed. A has committed *qatl-bis-sabab*.

322. *Punishment for qatl-bis-sabab*.—Whoever commits *qatl-bis-sabab* shall be liable to *diyat*.

323. *Value of diyat*.—(1) The court shall, subject to the injunctions of Islam as laid down in the Holy *Qur'ān* and *Sunnah* and keeping in view the financial position of the convict and the heirs of the victim, fix the value of *diyat* which shall not be less than the value of thirty thousand six hundred and thirty grams of silver.

(2) For the purpose of sub-section (1), the Federal Government shall, by notification in the official gazette, declare the value of silver, on the first day of July each year or on such date as it may deem fit, which shall be the value payable during a financial year.

There may be slight differences in the way the above law has been implemented in Pakistan through the Penal Code and as it is found in the traditional Islamic law. For our purposes, the main point is that in whatever way death is caused the consequence is the payment of blood money or *diyat*. The only thing to be established is the causal link between the act, direct or indirect, and the consequential death. In short, someone has to pay the compensation when death is not due to natural causes or when death cannot be justified.

The complications associated with the nature of the law governing involuntary manslaughter in UK are avoided here. We may now turn to the Afghan Penal Code. We will briefly discuss the provisions of the old Afghan Penal Code, 1976 here as this law is still applicable till the time the new penal code replaces it next year.<sup>45</sup>

## **5.2. The Afghan Penal Code 1976**

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<sup>45</sup> The Afghan President Ashraf Ghani has endorsed the Afghanistan's new Penal Code 2017 in Decree No. 256. The code will soon be published in the Official Gazette and comes into force nine months after the date of publication.

#### Article 1 [Scope of Application]

The law regulates the “*ta’ziri*” crime and penalties. Those committing crimes of “*hudud*”, “*qisas*” and “*diyat*” shall be punished in accordance with the provisions of Islamic religious law (the Hanafi religious jurisprudence).

The other relevant provisions are under Chapter 2– Responsibility of Legal Persons<sup>46</sup>

#### Article 96 [Liability and Method of Punishment for Legal Persons that Commit Criminal Acts]

1– Legal persons, with the exception of State institutions, departments, and enterprises, shall be held responsible for the crimes that their representatives, chiefs, and deputies commit in the performance of duty in the same and on account of legal persons.

2– The court cannot sentence the legal person, except for cash punishment, to confiscation and security measures anticipated in this Law.

3– In cases where the law has anticipated the principal punishment for the crime committed something other than cash punishment, these punishments shall be substituted with cash punishment.

4– Conviction of legal person as above does not prevent application of the anticipated punishments of this Law in the case of the real person who has committed the crime.

#### Article 400

1– A person who kills another by mistake as a result of negligence, remissness, carelessness, or non-observance of rules and regulations, or a person who unintentionally becomes the cause for another person’s killing, shall be imprisoned for a period of up to 3 years and shall be fined an amount not exceeding 36,000 Afghanis, or one of the punishments stated, unless the provisions of the law have specified differently.

2– If the mistake is a grave violation or the principles related to his occupation or profession or if the mistake is done while under the influence of narcotics or intoxicants or if during an accident the person refuses to assist, even though he has the potential, the person against whom the crime is committed, the offender shall be sentenced to medium imprisonment of not less than 2 years, and shall be fined an amount not exceeding 50,000 Afghanis.

3– If as a result of commitment of the crimes specified under the above paragraphs more than one person are killed, the offender shall be sentenced to medium imprisonment of not less than 3 years, and if one of the cases specified under paragraph 2 of this article is also accompanied, the offender shall be imprisoned for a period of not less than 7 years.

### 5.3. The New Afghan Penal Code 2017

Article 2 of the Act states the scope of implementation:

(1) This law regulates *ta’ziri* crimes and punishments.

(2) Perpetrators of *hudud*, *qisas* and *diyat* shall be regulated in accordance with provisions of *Hanafi* jurisprudence.

In other words, the provisions laid down or spelled out in the Pakistan Penal Code may be taken to be the provisions of the Afghan Penal Codes as well according to article 1 and 2 of the old and new penal code respectively. Let us briefly discuss the classification of crimes in Islamic law

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<sup>46</sup> Other provisions relating to “legal persons” under the old Afghan Penal Code are Article 135, 136, and 140.

here. Muslim jurists classified crimes on basis of the right violated. These were the rights of Allah, the rights of the individual, and the rights of Allah mixed with the rights of the individual. The classification on the basis of rights is linked directly with procedure. The kind of right violated determines the procedure to be followed in courts. If the right of Allah is violated, the procedure followed is that for *hudud* and *qisas*. When the right of the state is violated, the procedure followed is that of *siyasah*. When the right of the individual is violated, the procedure followed is that prescribed for *ta'zir*.<sup>47</sup>

Jurists like al-Sarakhsi placed *hudud* penalties in the category of the pure right of Allah except *hadd* of *qadhaf*, which is mixed right of Allah and right of individual, but right of Allah is predominant in that case. Murder liable to *qisas* is a mixed right of Allah and the right of individual in which right of individual is predominant. Most Hanafi jurists have classified *ta'zir* and *diyat* as belonging to the area of the right of the individual.<sup>48</sup> According to article 2 of Afghan Penal Code *ta'ziri* punishments will be dealt under this law and matters of *hudud* and *qisas* under Hanafi law.

The new Afghan Penal Code 2017 has also added provisions relating to manslaughter (*qatl-i-khata'*) in Part Eleven Chapter three. We have already described *qatl-i-khata'* in the context of Hanafi jurisprudence in the sections above. Article 554 states that:

#### Manslaughter – Article 554

A person who kills another as a result of negligence, carelessness, recklessness or lack of obeying the law, regulations, or orders, or unintentionally causes the homicide, has committed manslaughter and shall be punished according to provisions of this chapter.

#### Punishment of the Manslaughter – Article 555

Perpetrator of manslaughter shall be punished to medium imprisonment up to three years or cash fine from 60,000 to 180,000 AFN.

It is to be noted that the provisions of Article 400 in the old code and Articles 554 and 555 are almost identical except with respect to the cash fine to be paid. It is not clear why this cash fine is to be paid when *diyat* is already being paid by the offender on the basis of the same proof or causation.

#### Aggravating circumstances of Manslaughter – Article 556

Commission of manslaughter is considered aggravating in any of the following conditions and the perpetrator shall be sentenced to maximum of the committed crime:

- 1- In conditions that the homicide is committed due to a grave violation of the principles related to his occupation or profession;
- 2- In conditions that the perpetrator during the accident refuses to assist the victim, even though he has the potential;
- 3- In conditions that as a result of homicide more than one person is killed;

The above provisions are *ta'ziri* provisions of the Afghan Penal Codes. This means that these punishments will be awarded over and above the provisions made by Islamic traditional law. This means punishment provided by the Imam or the state in addition to the Islamic penalty of

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<sup>47</sup> Imran Ahsan Khan Nyazee, *General Principles of Criminal Law: Islamic and Western*, (5<sup>th</sup> edn, Federal Law House) 57-58.

<sup>48</sup> *ibid*.

*diyat*. For our purposes we are not concerned with *ta'zir* offences as a corporation cannot be awarded imprisonment. Further, this offence will require proof of negligence and other matters leading to prolonged procedures and proofs. We are only interested in the payment of *diyat* to the heirs of the victim, and this requires causation alone and nothing more.

For the same reason we are not interested in the Islamic offence of *qatl shibh al-amd*, as that will require proof of *mens rea* for beating the victim in different ways. Our main interest is in the financial compensation through *diyat* that requires merely proof of causation.

The problem with article 555, however, is that while the punishment of imprisonment is understandable, the cash fine of 60,000 to 1,80,000 AFN is not understandable. The reason is that the offender is already paying *diyat* to the heirs of the victim to the extent of the value of 30,000 grams of silver. It is suggested that the lawmakers in Afghanistan may review this provision.

To explain this further, at the expense of repetition, that Article 1 of the Afghan Penal Code, 1976 and Article 2 of the Afghan Penal Code, 2017 have already stated that acts falling under *diyat* will be governed by Hanafi law. Therefore, it is only the state will that is required to implement these provisions according to the Islamic law. Apparently, the drafters of this code have not realized that the offender is already paying thirty thousand grams of silver or 100 camels of *diyat* to the victim. Imposing a fine in addition to the *diyat* sounds a bit harsh or extreme.

There appears to be no plausible reason that the above provisions of the Afghan Penal Code should not be applicable to corporations too as the code acknowledges the term legal person in various provisions.<sup>49</sup> It is also important to mention here that the Company Law of Afghanistan<sup>50</sup> does not deal with the criminal liability of the corporations or its punishment. The law makers should take the vulnerable situation of the country in to account and make necessary amendments in this law as well.

## 6. Corporate Manslaughter Law for Afghanistan and Pakistan

A corporation or a company is a legal person. The meaning of personality with respect to a company was affirmed in the well-known case of *Salomon v. Salomon & Co Ltd.*<sup>51</sup> A corporation, being a legal person, is criminally liable even *though* it has no physical existence.<sup>52</sup> This capacity of the corporation to be liable for statutory offences is set out in the UK Interpretation Act 1978. Defining the term “person” it says that in every Act, unless the contrary intention appears, “person” includes a body of persons, corporate or unincorporate. The rule, however, has existed for over a hundred years as it is also found in the previous Interpretation Act of 1889.<sup>53</sup> It is interesting to note that the interpretation also includes unincorporated bodies such as a partnership. Further, as well as being liable for statutory offences the law also recognises that a corporation can be criminally liable for common law offences.<sup>54</sup> The same rule applies in Pakistan. Section 11 of the Pakistan Penal Code defines the term “person” as follows:

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<sup>49</sup> Articles 83, 84, 280, 350, 373, 499, 514, 524, 543, 835, & 900.

<sup>50</sup> Corporations and Limited Liability Companies Law of Afghanistan.

<sup>51</sup> (1897) AC 22.

<sup>52</sup> UK Law Commission, *Criminal Law: Involuntary Manslaughter*, 90.

<sup>53</sup> Martin and Storey (n 12) 187.

<sup>54</sup> *ibid*.

“The word ‘person’ includes any Company or Association, or body of persons whether incorporated or not.”<sup>55</sup> The term “legal person” has also been recognized in the old and the new Afghan Penal Code under various provisions. The latter statute specifies punishments for various offences committed by these legal entities.<sup>56</sup> It is pertinent to point out that there is a disagreement in Islamic literature about the legality of a fictitious person other than a natural person. The more plausible argument is that it was not allowed.<sup>57</sup> This does not prevent the application of the existing criminal law to corporations, otherwise the officers and managers of the corporations will become directly liable. The rule about corporations is being followed as a reality that exists and cannot be avoided till such time that an alternate rule is available. The same is the position with respect to fiat currency and the rules of *riba* (interest), *zakat* (poor-due), *kaffarah* (expiation) and other matters. The liability of the corporation is applied through three principles and is subject to two exceptions, which may be mentioned and described very briefly here. The principles by which a corporation may be liable are: the principle of identification; vicarious liability; breach of statutory duty.<sup>58</sup> The principle of identification states that where an offence requires *mens rea* it is necessary to show that the corporation had the required *mens rea*. The corporation has no body and no mind, therefore, this causes problems in making corporations liable. To overcome this, the courts have sought to identify a person (or persons) within the company structure whose mind is the “directing mind and will”<sup>59</sup> of the corporation. The rule was established through a series of cases,<sup>60</sup> It may be mentioned here that in the sections of both Penal Codes we have listed above, *mens rea* is not required as the offences are those of strict liability. A simple rule would be to make the Managing Director (CEO), Directors and the Secretary of the corporation answerable, that is, all those who are deemed officers of the corporation; they may be arrested until the *diyat* is paid. In other cases, the same rule as that in English law may be followed. The second principle is that of vicarious liability, and the corporation can be made liable for the acts of omissions of its employees, that is, other than officers of the company. In the same way, the principle of breach of statutory duty are well known.<sup>61</sup>

The two general exceptions to corporate liability for criminal offences operate like parameters within which the corporation will be held liable. First, a corporation cannot be convicted of an offence where the only punishment available is physical, such as imprisonment or community service.<sup>62</sup> Thus, corporations cannot be convicted for murder. In cases of imprisonment fines may be substituted.<sup>63</sup> The second exception says that corporations cannot be liable as a principal for

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<sup>55</sup> Section 11 of the Pakistan Penal Code 1860.

<sup>56</sup> Articles 83, 84, 280, 350, 373, 499, 514, 524, 543, 835, & 900.

<sup>57</sup> For a detailed analysis and ruling on the issue see Imran Ahsan Khan Nyazee, *Corporations in Islam* (2<sup>nd</sup> edn, Federal Law House 2007).

<sup>58</sup> Martin and Storey (n 12) 187.

<sup>59</sup> In the Privy Council Lord Hoffmann pointed out that the phrase “directing mind and will” had first been used by Viscount Haldane in *Lennard’s Carrying Co. Ltd.* See next note.

<sup>60</sup> *Lennard’s Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*, (1915) AC 705; *DPP v. Kent and Sussex Contractors Ltd.*, (1944) KB 146; *ICR Haulage Ltd.*, (1944) KB 551; and *Moore v. I. Bresler Ltd.*, (1944) 2 All ER 515.

<sup>61</sup> The Companies Ordinance 1984 may be examined for a list of such offences.

<sup>62</sup> Martin and Storey (n 12) 187.

<sup>63</sup> Article 96 of The Afghan Penal Code 1976 has followed the same principle.

crimes such as bigamy, rape, incest or perjury, which by their physical nature can only be committed by a real person, but they can be held liable.<sup>64</sup>

The law in Afghanistan and Pakistan does not need such extensive deliberations for implementation. The corporation falls within the meaning of “person” found in the Pakistan Penal Code and the Afghan Penal Code has also recognized the legal persons to which its articles of manslaughter apply. The offences falling under *qatl-i-khata*’ and *qatl-bis-sabab* in Pakistan Penal Code and a similar provision in the traditional Hanafi law of *khata*’ are indirectly acknowledged by the Afghan Penal Code by acknowledging Hanafi law. The articles dealing with the law of manslaughter in Afghan Penal Code do not apply to this issue as we are concerned with the payment of *diyat*. Nevertheless, even these *ta’ziri* provisions do not need *mens rea* as they are strict liability offences. There is also no need to show breach of some duty or gross negligence. All that is needed is to prove a causal link between death and the act of the corporation through any of its employees. The defendants will be all the officers of the corporation, that is, CEO, directors and company secretary. In short, there is no real need of amendment in the law, but the state may make a suitable addition to show that henceforth corporations will be liable under these sections. There are other sections that may be used for other injuries. The value of the blood money for one person is 30,630 grams of silver, which at today’s rate is not more than US \$18000, which is the rough equivalent of two million Pakistan rupees and almost 1.2 million AFN. Under the Hanafi law the amount of blood money is also the same that is thirty thousand grams of silver or 100 camels. The same rule can be applied to MNCs. In any one case, if the value of the cumulative blood money that may have to be paid may exceed the assets of the subsidiary, then the excess may be recovered from the parent of this subsidiary.

This deals with the remedy for loss of life and limb caused by any corporation. The immunity given to the government departments will have to be removed even where they are acting in good faith. The proposal here thus includes the police force or other government bodies or even partnerships, also all government companies are included as they are corporations and cannot be exempted under Islamic law. In fact, the corporations as well as government departments and companies may be treated as the *aqilah* for their employees. This concept is well known and we may not pursue it further here.

## 7. Conclusion

In conclusion, it may be proposed that in Pakistan and Afghanistan, the concept of corporate manslaughter should be applied in accordance with the provisions of Islamic law. This law provides a simple and efficient way of compensating the heirs of the victims without indulging in the determinations of negligence and other sophistications. All that is required is the showing of causation and linking the death to an act of the corporation through one of its employees. As the *diyat* or blood money is fixed, there is also no need for the calculation of damages through the analysis of various variables and contributory factors. All that is needed is to declare that the penal provisions of the codes in both countries will henceforth be applicable to corporations as well, at least, as far as homicide and loss of limbs are concerned. Finally, it is to be noted that Islamic law can be used in modern times in beneficial ways.

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<sup>64</sup> *ibid.*