

Corporate criminal liability in Islamic banks in Malaysia

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Abstract

Purpose – This paper aims to highlight provisions that may attract corporate criminal liability (CCL) in legislation and regulations enacted in Malaysia. Further, this paper identifies gaps or obstacles in the implementation of CCL in Islamic banks (IBs) in Malaysia.

Design/methodology/approach – This research adopts the qualitative methodology. More specifically, it uses normative legal research by focusing on primary and secondary data obtained from legislation, regulations, decided case laws, guidelines, law textbooks and bank annual reports in relation to CCL provisions. It also conducts semi-structured interviews with different categories of experts, including legal practitioners (lawyers), regulators from Bank Negara Malaysia (BNM) and Securities Commission Malaysia, officers of the Attorney General's Chambers and officers from legal departments in IBs.

Findings – The results conclude that IBs should implement the law on CCL because they are considered corporations. It is also found that not all IBs complied with CCL provisions brought corporate offenders before the court.

Research limitations/implications – This research is restricted by its specialisation in CCL in IBs in Malaysia.

Practical implications – The CCL provision has to be implemented effectively by IBs to achieve the benefit. However, not all IBs implement CCL provision properly. The understanding created by the interview data illuminates the challenges in implementing CCL provisions. Thus, this paper seeks to change the approach in the implementation of CCL provisions by IBs in Malaysia.

Originality/value – The paper touches upon a new area, notably CCL in IBs, which is not well researched in past literature. Although there is a vast research on CCL, corporate crime in IBs in Malaysia is still an unexplored area. This study gives light on the implementation of CCL provisions in IBs.

Keywords Corporate criminal liability, Financial crimes, IFSA, Islamic banks, Islamic financial institutions, Legislation, Malaysia, Regulations, Shari'ah compliance

Paper type Research paper

Introduction

Islamic financial institutions (IFIs) in Malaysia have experienced rapid growth and become significant as Malaysia has now become an international Islamic financial hub. However, if banks were to commit criminal activities, it could imperil that growth and that position. Bank Negara Malaysia (BNM)'s Annual Report 2020 stated that there were six convictions in 2020 related to illegal money services business, illegal deposit taking and money laundering, resulting in criminal penalties amounting to RM1.3 bn and jail terms for the offenders. Furthermore, administrative monetary penalties have been imposed against two licensed institutions. BNM also imposed administrative orders against eight illegal money service



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business operators, and ten others are still under criminal investigations. [Table 1](#) illustrates the number of cases by the nature of the offences committed by all institutions governed by BNM in Malaysia.

One of the motivational factors driving the current research emanates from the introduction of corporate criminal liability (CCL) provisions in the [Islamic Financial Services Act \(2013\)](#) (IFSA), an act which regulates IFIs in Malaysia. This paper thus aims to highlight provisions that may attract CCL in legislation and regulations enacted for corporations, including Islamic banks (IBs), in Malaysia, particularly in the IFSA as well as the Central Bank Act, the Companies Act, and the Central Bank's guidelines. This study also explains the penalty of criminal liability under these regulations and legislation. It further seeks to identify gaps and obstacles in the exercise of CCL policies in IBs in Malaysia. As a consequence, the study explores the following questions:

- (1) What are the legislative acts and regulations on CCL that apply to IBs in Malaysia?
- (2) What are the associated penalties for criminal liability under these legislative acts and regulations?
- (3) What are the obstacles and gaps in the implementation of CCL provisions in IBs?

The paper is structured in the following way. The first section elaborates the literature review. It is followed by a description of the methodology of the research and then a presentation and discussion of the findings on CCL in Malaysia. The final section provides recommendations and concludes the paper.

Literature review

Defining corporate criminal liability

The concept of CCL requires an understanding of three issues: what is a corporation, what is a crime and what is criminal liability that is imposed upon a corporation. A corporation is defined by [Black's \(1968, p. 409\)](#) Dictionary of Law as follows:

an artificial person or legal entity created by or under the authority of the laws of a state or nation [...]

A corporation has its own legal entity as decided in the case of [[Salomon v Salomon & Co Ltd \[1897\] AC 22 HL](#)], where the court held that "Then, if the company was a real company, fulfilling all requirements of the Legislature, it must be treated as a company, as an entity, consisting indeed of certain corporators, but a distinct and independent corporation" (p. 27). It is a fundamental feature of company law that a company is a separate entity, distinct from its shareholders.

[Oxford Learner's Dictionaries \(2021\)](#) define a crime as "an illegal act or activity that can be punished by law". [Black's \(1968\)](#) Dictionary of Law defines a criminal act as "a term which is equivalent to crime; or is sometimes used with a slight softening or glossing of the meaning, or as importing a possible question of the legal guilt of the deed" (p. 447).

Offences	No. of cases
Submission requirements	2
Prudential and operational requirements	5
Business conduct	1
Foreign exchange rules	230

Source(s): [BNM \(2020\)](#)

Table 1.
Number of cases by
nature of offences

As for CCL, [US Legal.com \(2021\)](#) defines CCL as “the liability imposed upon a corporation for any criminal act done by any natural person. Liability is imposed so as to regulate the acts of a corporation”.

From these definitions, it can be concluded that a corporation is a legal entity created by or under the authority of the laws of a state. It is an association of persons created by statute as a legal entity. The law treats the corporation itself as a person who can sue and be sued. The corporation can commit criminal acts for which it has to bear criminal liability under specific laws and regulations which regulate this legal entity.

Development in the concept of corporate criminal liability

CCL is an area that is constantly being developed in Malaysia. Criminal liability is not just limited to man-made laws but also potentially applicable to all violations of criminal law, including financial offences. Man-made laws refer to laws that are made by humans, usually considered in opposition to concepts like natural law or divine law. The main objective of CCL is to prevent and punish corporate wrongdoing.

The notion of CCL has become one of the debatable issues among scholars. Some scholars support the principle of CCL while others oppose it. The main objection raised against it pertains to the fictional character of legal entities and their incapacity to take action ([Fischel and Sykes, 1996](#)). Moreover, they opine that it is not suitable to impose fines in order to punish shareholders, employees, committees and others for the non-compliant act of the corporation. Furthermore, opponents argue that corporations do not possess the element of *mens rea* or be guilty of a criminal offence. Every crime has two elements: *actus reus* and *mens rea*. The word *actus reus* indicates the result of human conduct, whereby an individual commits a crime which is prohibited by law. Meanwhile, *mens rea*, which constitutes intention and knowledge, means that such an act has been done with a guilty mind. *Actus reus* and *mens rea* are essential elements in criminal liability ([Simon, 1996](#)).

The concept of CCL came into existence after 1800. In particular, it emerged in 1846 in the case of [The Queen v. Great North of England Railway Co. 9 Q.B. 315]. In this case, Lord Denman ruled that corporations could be criminally liable for misfeasance. A corporation was criminally liable for violating the Elkins Act. Despite all criticisms, the English Court recognised the concept of CCL.

Corporate criminal liability and associated theories

Agency theory: The basic theory to determine corporate responsibility for crimes is agency theory. Agency theory is the best way to explain the relationship between agents and principals. An agent will represent a principal in a certain transaction, and the former is expected to act in the best interest of the latter. In the context of firms and institutions, company management is controlled by directors or executives (as agents) on behalf of shareholders (as a principal). Employees are also agents of the company and act on its behalf. Corporate agents – namely individuals, subsidiaries, divisions as well as independent contractors – may commit illegal acts while acting on behalf of the company that may give rise to CCL ([Mark and Brian, 1999](#)). Based on the principle of vicarious liability, a company becomes vicariously liable for acts committed by its employees.

Gradually, the English courts followed the doctrine of *respondeat superior* (which means “let the master answer”), which is similar to the notion of vicarious liability. In the case of Tesco Supermarkets Ltd v. Natrass [1972] A.C 153 (H.L) (appeal taken from Q.B), the House of Lords rejected the concept of CCL on the basis of the *respondeat superior* principle. The court found that the manager was not a part of the “directing mind” of the corporation. Thus, the act of the manager was not attributable to the corporation. Tesco had as its governing principle that only those who manage and control or manage the affairs of a company are

regarded as embodying the company itself. In practice, the principle of identification essentially meant that a company would be liable for a serious offence (only) where one of its most senior officers had acted with the stipulated guilt.

Michael (1996) criticised the decision in *Tesco Supermarket v. Natrass*, stating that the principles in this case may require reconsideration as it can often be difficult to determine or prove who represents the “directing mind and will” of a company. This is particularly so for large multi-national companies where the decision-making may take place in a variety of forms, within the hierarchy and governance of the organisation. Further, disputes and controversies arise as the principles encourage a corporation to decentralise responsibilities in order to avoid liability, which makes it challenging to find a senior person in charge of a specific criminal conduct with intention.

Corporate governance: Some studies found that CCL is positively associated with corporate governance. The importance of having good corporate governance is one of the tools to eliminate corporate misconduct and indirectly spur economic growth and development in a country (Suzanne, 2015). It is worth noting that if corporate governance is effectively maintained, CCL can be diminished. Bank criminal activities are mostly due to several factors, *inter alia*, lack of organisational culture, corporate governance failure, weak supervision performed by the central bank and a lack of coherence among governmental authorities, including public prosecution (Bojidar, 2015).

Corporations must have effective corporate governance to curb criminal activities in a corporation, especially fraud cases (Niall, 2006). Furthermore, criminal practice in financial institutions is a universal problem that requires some measures to tackle it (Olatunde, 2012). There are several ways in which courts find that the acts of employees are attributable to the corporations, namely, conspiracy, liability after mergers or dissolutions and misprision of felony (the offence of concealing and failing to report a felony) (Matthew *et al.*, 2020).

Corporate criminal liability in Malaysia

Since Malaysian law applies common law, the concept of CCL is also applicable in Malaysia. However, Hasani (2009) argues that application of the concept is still far behind. The author suggests that the law for corporate killing by body corporates should be enacted in Malaysia. Corporate killing means the crime of killing that is committed by an organisation. He also highlights some impediments in relation to the application of CCL and corporate killing, notably

- (1) The problem of identification. The doctrine of identification determines whether the crime committed by the company can be directed towards the directors/managers of the company who are the directing mind and will of the company. Under this approach, the court may also determine whether the crime or wrong action was done by a highly placed officer/employee, who could be considered an alternative representative of the company. The problem occurs when there is no person who can be identified as an embodiment of the company. In such a case, criminal action cannot be taken against the company.
- (2) The problem of who will deal with the charges. When a charge is made against a corporate body, the perpetrator is not necessarily the one who is going to answer the charges. The directors are those who would have to deal with the charges.
- (3) The problem with sanctions. Sanction means penalty or punishment. The problem occurs as to when to impose penalty or punishment to the company. If the penalty is a fine, then a fine could be extracted from the company. However, in case the penalty is either death or imprisonment, then how can a corporation be sent to jail?

Yaakub *et al.* (2015) discuss the prevention of Islamic financial crimes in Malaysia. The authors suggest that current practices on Islamic financial crimes in Malaysia need to be improved to support the Islamic financial legal system. Further, guidelines on Islamic financial crimes need to be developed as a reference. Meanwhile, Omar and Hassan (2019) focus on the treatment of Shari'ah non-compliance practices by IBs in Malaysia. In addition, Krishnan (2010) studies the legal position governing auditors under criminal law and suggests that the laws must be amended to ensure a more regulated environment such as that in the United Kingdom, Australia, Singapore and Hong Kong.

Even though there is increasing concern about CCL in Malaysia, there is remarkably little literature on this subject. There is also a gap in the legal literature relating to CCL cases in Islamic banking. To date, there is no literature on CCL in IBs in Malaysia. While there exists an extensive literature on the topic of CCL in financial institutions, no reference appears to be made specifically to IBs. In view of this reason, there is a need to study the degree of compliance and implementation of CCL provisions by IBs in the context of Malaysia.

Research methodology

The methodology adopted in this study is qualitative, involving normative legal research methods to examine legislation and principles related to banking, especially IBs. The legal research seeks to answer the research objective relating to examining the provisions that may attract CCL in legislation and regulations enacted in Malaysia.

The normative legal method is a method based on legislation, theories and concepts related to legal writing. In particular, library-based research is used. Primary data such as legislation, regulations, decided case laws and guidelines are examined. This study critically analyses statutory provisions on CCL in legislation, particularly IFSA 2013, Central Bank of Malaysia Act 2009 (CBMA, 2009) and Companies Act 2016, as well as regulations, including the Central Bank's guidelines, the Shari'ah Governance Framework (SGF) for Islamic Financial Institutions and so forth. In addition, the primary data are supplemented by secondary sources related to the topic of research from articles, law textbooks, seminar papers, speeches, company annual reports, economics reports, case commentaries and law committee reports. In gathering the relevant primary and secondary materials, some online research tools, such as Current Law Journal (CLJ), LexisNexis, Malaysian Law Journal (MLJ) and LawNet, have been used. Most of the databases contain massive collections of case laws, journals, legislation, legal articles and commentaries that are useful to this study.

To support the legal research, this study used semistructured interviews. Interviewees included a total of six practitioners, namely two legal practitioners (lawyers), one regulator (from Securities Commission Malaysia), one officer from the Attorney General Chambers and two officers from legal departments in IBs. An extremely large number of articles, book chapters and books recommend anywhere from five to 50 participants as being adequate for the semistructured interviews (Dworkin, 2012). Therefore, the number of six respondents was deemed sufficient. The interview was conducted over 11 months from July 2020 to March 2021 in the following manner: through teleconference, via Zoom meeting and Microsoft Teams, by telephone and via email. It was not possible to conduct face-to-face interviews because of the restrictions associated with the COVID-19 pandemic. In semi-structured interviews, the interviewer has a list of questions, with the flexibility to add on other topics that arise during the interview. The interviews were thus not limited to the prepared questions.

The purpose of the semistructured interviews was to answer the second research objective of the study, notably related to examining the obstacles and gaps in the implementation of CCL provisions in IBs. The questions included in the semi-structured interviews were not limited to the following:

- (1) What do you know about CCL?
- (2) Do financial institutions in Malaysia adopt the concept of CCL?
- (3) What are the obstacles and gaps in the implementation of CCL provisions in IBs?

Findings and discussions

Legal provisions on corporate criminal liability in Islamic banking

Contemporary banking crimes are committed not only through conventional banking but also through Islamic banking, which conducts business based on Islamic principles. IFSA 2013 (Act 759) is the main source of law for IBs, beside many other legislative acts. Passed on 10 March 2013 and gazetted on 22 March 2013, IFSA 2013 introduced the concept of CCL with the imposition of liability on corporations and their associated persons for Shari'ah non-compliance. Section 28 stipulates the duty of the institution to ensure compliance with Shari'ah. Under Section 28(5) of IFSA 2013, subsections 1 and 3, breaches of statutory duties may attract criminal liability, which provides maximum imprisonment of eight years and a maximum fine of RM25 m. The section states that

Any person who contravenes subsection (1) or (3) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding eight years, or to a fine not exceeding twenty-five million ringgit, or to both.

Further, Section 29 of the same Act provides for the obligation of IFIs to comply with the standard on Shari'ah matters issued by the BNM. Failing to do so, the person (IFIs) shall be liable to imprisonment for a term not exceeding eight years or to a fine not exceeding RM25 m or to both. Section 15 of IFSA 2013 provides for the offence of an authorised person carrying on unauthorised business. This carries imprisonment for a term not exceeding eight years or to a fine not exceeding RM25 m or to both upon conviction. Meanwhile, Section 259 of IFSA 2013 provides for the offence in relation to false entries in documents such as books, records, reports, slips and statements. This carries a penalty of imprisonment for a term not exceeding eight years or to a fine not exceeding RM25 m or to both.

Besides, CBMA 2009 also provides CCL provisions against IBs. It is mandatory for IBs to follow all circulars, guidelines and notices on Shari'ah matters issued by BNM. Failing to do so, IBs shall be liable to a fine not exceeding RM3 m as stipulated under Section 59(3) of CBMA 2009.

Corporate criminal liability and governance aspects

Sound and effective corporate governance as well as Shari'ah governance help to prevent the criminal liability of IFIs. The laws in Malaysia are adequately promulgated to ensure both.

Section 6 of IFSA 2013 states its principal regulatory objective to be: "to promote financial stability and compliance with Shariah". The importance of Shari'ah compliance is stressed further in the case of [JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Bhd; President of Association of Islamic Banking Institutions Malaysia and Anor (Interveners) [2019] 5 CLJ] where Mohd Zawawi Salleh FCJ in this Federal Court case held that

One of the unique characteristics of Islamic banking and finance is compliance with Shariah principles and rulings. Shariah compliance distinguishes an Islamic bank from a conventional bank, as the former observes certain rules and prohibitions not observed by the latter. Hence, Shariah compliance is the backbone of the Islamic banking and finance industry and Shariah principles are the *raison d'être* of all Islamic financial contracts.

In addition, David Wong Dak Wah CJ (Sabah and Sarawak) in the same case held that

Islamic banking is regulated under the Islamic Financial Services Act 2013 ("IFSA"). Any licensed institution under IFSA must operate its business in a way that does not involve any element that is

not approved by the religion of Islam. In short, all financial transactions of the respondent must be Shariah-compliant.

[BNM \(2019a\)](#) also introduced the “SGF for Islamic Financial Institutions” (Ref No: BNM/RH/PD 028–100), which took effect on 1 April 2020. It states at Para. 1.1:

Shariah governance is integral to Islamic financial system stability. The institutionalisation of a sound Shariah governance framework strengthens public confidence in the integrity, management and business operations of the Islamic financial institutions.

With regard to corporate governance, [Ismail and Abdul Razak \(2014, p. 2\)](#) define it as “the methods by which a corporation is directed, administered, or controlled”. The Islamic Financial Services Board ([IFSB, 2006, p. 16](#)) states that good corporate governance in IFIs should encompass

[...] a set of organizational arrangements whereby the actions of the management of Islamic financial institutions are aligned, as far as possible, with the interests of its stakeholders; provision of proper incentives for the organs of governance such as the board of directors, Shariah board and management to pursue objectives that are in the interests of the stakeholders and facilitate effective monitoring, thereby encouraging Islamic financial institutions to use resources more efficiently; and compliance with Islamic Shariah rules and principles.

As mentioned by [Miskam and Nasrul \(2017\)](#), the following laws and legislation are to ensure adequate corporate and Shari’ah governance in IBs in Malaysia:

- (1) Part VII of CBMA 2009 (Section 51–58).
- (2) Part IV of IFSA 2013 (Section 28–38).
- (3) The SGF for Islamic Financial Institutions ([BNM, 2019a](#)).
- (4) Financial Reporting for Islamic Banking Institutions ([BNM, 2018](#)).

Legal provisions on corporate criminal liability in Malaysia

Since Malaysia applies common law, the doctrine of CCL is adopted by Malaysia as well. Since 1948, Malaysian courts have recognised the concept of CCL concerning strict liability pursuant to the case of [PP v Ginder Singh and Chet Singh [1948] 1 MLJ 194b]. The court expounded on the attribution of liability to the company in the following words:

It matters not that their vehicles be overloaded by an employed driver or even on the direction of a third party as in this case; or that the overloading be done without the knowledge of the owner; it may even be against his express commands. If the motor vehicle is found carrying a load in excess of the permitted maximum set out in the haulage permit, then the owner bears the responsibility. His only safeguard is to ensure that his vehicle is in the charge of a responsible person who appreciates the regulations and conditions of transport. If a third party interferes, then the owner can only cease in future to do business with that third party; he cannot evade his absolute liability.

In the case of [Yue Sang Cheong Sdn Bhd v. Public Prosecutor [1973] 1 LNS 182], the court applied the identification principle. In this case, the applicant was charged under s. 135(1)(d) of the Customs Act 1967. The Federal Court held that

When a company is prosecuted for a criminal offence, the *mens rea* of the company is to be ascertained from those who were entrusted with the exercise of the powers of the company. This is qualified by the proposition that such persons must have been acting in the course of the company’s business. In other words, such persons act as the directing mind and will of the company.

In the case of [Kumpulan Wang Persaraan (Inc) v. Meridian Asset Management Sdn Bhd [2012] 1 LNS 316], the court applied the vicarious liability principle and held that

[...] a company could be held liable for the criminal acts of its employees. However, employees must act within the company's control and authority.

In the recent case of [Yue Chi Kin v PP [2019] 1 LNS 1874], the accused (the appellant herein) was charged for an offence of abetting another who had knowingly permitted the making of a misleading statement to the stock exchange under Section 122B(b)(bb) of the Securities Industry Act 1983 read together with Section 122(c) of the same Act. The issue was whether the *mens rea* of the principal offence of Section 122B, said in the charge to have been committed by the company, United U-Li Corporation Berhad, had been proven. The court held that

[...] the guilty mind or knowledge of a company must refer to the directors or managers of a corporation as they are the directing mind and will of a company, without which, a corporation could not be said to have committed an offence. This is an important ruling reiterating the rules of attribution in company law, which is that, in essence, the state of mind of the directors is the state of mind of the company because the former are the directing mind and will of the company.

With respect to criminal cases in Malaysia, the recognition of corporations as legal persons and as the subject of criminal law is by virtue of Section 130T of the Penal Code, which states that

Where an offence under section 130N, 130O, 130P or 130Q has been committed by a body corporate, any person who, at the time of the commission of the offence, was a person responsible for the management or control of the body corporate, which includes a director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly unless he proves that

(a) the offence was committed without his consent or connivance; and

(b) he had exercised all such due diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

Further, the adoption of this concept is carried out through the introduction of various acts of legislation that include provisions to penalise companies that are responsible for the act or omission of their officers. To name a few, Section 12(1) of the Biosafety Act 2007, Section 5 of the Trade Descriptions Act 2011 and Section 37 of the Franchise Act 1998 deal with CCL and provide for the individual liability of the person in charge of the proceedings and conduct of the company or the body corporate unless it is established by the person that it was beyond his control or that he was not in charge of the affairs of the company at the relevant time. [Table 2](#) shows corporate criminal offences under various acts of legislation.

In addition, other criminal laws which impose criminal liability on corporations (besides those mentioned in [Table 1](#)) are the Securities Commission Act 1993, Consumer Protection Act 1999, Communications and Multimedia Act 1998, Customs Act 1967, Registration of Engineers Act 1967, Private Healthcare Facilities and Services Act 1998, Allied Health Professions Act 2016, and Direct Sales and Pyramid Scheme Act 1993.

Corporate criminal liability in Islamic banks in Malaysia

Overall, the study finds that some studies have been conducted on CCL in the context of Malaysia but not in the case of IBs. To date, there have been no reported cases of CCL by IBs in Malaysia. However, as indicated in [Table 3](#), there are unreported cases of misconduct involving CIMB Malaysia Berhad (CIMB) and CIMB Islamic Bank Berhad (CIMB Islamic) as reported by the Enforcement Action Publication Notice 01/2019 (PN 01/2019) ([BNM, 2019b](#)).

Thus, in the absence of reported cases that show IBs involvement in criminal offences, this research is important to answer the existing gaps in the literature.

Legislation	Offences	Punishment
Penal Code (among the offences, <i>inter alia</i>): Section 405 of the Penal Code	Criminal breach of trust	Imprisonment for a term not exceeding 10 years, and whipping, and shall also be liable to a fine.
Sections 463 and 465 of the Penal Code Section 130N of the Penal Code	Forgery and punishment for forgery Providing or collecting property for terrorist acts	Imprisonment for a term of up to two years, or a fine, or both. Imprisonment for a term of not less than seven years but not exceeding 30 years, and shall also be liable to a fine.
Section 130N of the Penal Code	Providing services for terrorist purposes	Imprisonment for a term of not less than seven years but not exceeding 30 years, and shall also be liable to a fine.
Companies Act (among the offences, <i>inter alia</i>): Section 168 of the Companies Act	Criminal liability for misstatement in prospectus	Imprisonment for a term not exceeding five years, or a fine not exceeding RM1 million, or both.
Section 591 of the Companies Act	False and misleading statements	A fine not exceeding RM3 million.
Section 592 of the Companies Act	False report	Imprisonment for a term not exceeding 10 years, or to a fine not exceeding RM3million or both.
Section 592 of the Companies Act	Fraudulently inducing persons to invest money	Imprisonment for a term not exceeding 10 years, or a fine, not exceeding RM3 million or both.
Section 17A of the Malaysian Anti-Corruption Commission Act 2009	Offence of giving and accepting gratification by a commercial organisation	A fine of not less than ten times the value of the gratification in question or RM1 million, whichever is higher, or imprisonment for a term not exceeding twenty years, or both.
Section 317A of the Capital Market Services Act 2007	Prohibited conduct of director or officer of a listed corporation with the intention of causing wrongful loss to the companies	A fine of not less than RM10 million or imprisonment for a term not exceeding 10 years.
Section 4 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001	Offence of money laundering	A fine not exceeding five million ringgit, or imprisonment for a term not exceeding five years, or both.
Section 5 of the Personal Data Protection Act 2010	Offence for failure to comply with the seven Personal Data Protection Principles	A fine not exceeding RM200,000 (USD1 = RM3.80) and/or imprisonment not exceeding two years.
Section 5 Trade Descriptions Act 2011	Offence for prohibition of false trade description.	A fine not exceeding RM250,000.
Section 27 of the Accountants Act 1967	Offence for falsely misrepresenting that the body corporate is a chartered accountant.	A fine not exceeding RM20,000.
Section 12 of the Biosafety Act 2007	Offence for release activity, or any importation of living modified organisms, or both without the prior approval of the Board.	A fine not exceeding RM500,000.

Source(s): Authors' own

Table 2.
Corporate Criminal
Offences in Various
Acts of Legislation

Interviewee responses on challenges in implementing corporate criminal liability provisions

During the interviews conducted in this study, the respondents were asked about any challenges in implementing CCL provisions. This research reveals that not all IBs complied with the CCL provisions brought corporate offenders before the court. Based on the interviews, several weaknesses were identified explaining the failure of IBs in implementing CCL provisions, as summarised in the following discussion.

First, ignorance of the law was noted. Theoretically, it is possible for IBs in Malaysia to implement CCL provisions by applying the principle of criminal law. IBs come within the meaning of corporations as they meet the definition of a corporation as mentioned above. However, IBs in Malaysia rarely exercise or implement CCL provisions in the case of Shari’ah non-compliance. In other words, there is no prosecution against IBs for Shari’ah non-compliance in court. This is evident from the fact that there are zero reported cases within CCL provisions relating to Shari’ah non-compliance by IBs in Malaysia.

Second, there are administrative issues. There is a large gap between the law on paper and enforcement in practice. As reality has shown, the most prominent trend is that those responsible for enforcing the law – that is enforcement officers – rarely take steps to impose legal punishments where non-compliant offenders are found. Most of the time, they take a different course of action rather than criminal action. The formal sanctions imposed by them are primarily administrative in nature. Criminal penalties hardly take place even if there is strong evidence that the law has been infringed.

Third, this failure can be seen in the complex procedural arrangement to bring the company offender before the court of justice. Corporate crimes are not taken seriously by enforcement officers. As with any criminal justice system, the CCL system will be ineffective without relevant investigative and procedural capabilities. There are challenges involved in prosecuting corporate criminals as internal assistance from their own officers and staff would often be required. While corporate prosecutions can be more complicated, the obstacles that are likely to arise in certain aspects are the same as those commonly encountered by criminal courts. Due to the corporate nature of the accused, there are some unique challenges in the effort to bring corporations before the court. These include provisions as to who is a legal representative of the corporation that would need to appear in proceedings.

Fourth, there is a higher standard for the prosecution of CCL. The burden of proof is much higher in a criminal case, i.e. “beyond reasonable doubt”, compared to civil cases, which rely “on the balance of probabilities”. Criminal cases impose more severe penalties than civil cases due to the fact that crimes have different degrees of seriousness. Thus, this could be the reason for civil actions instead of undertaking criminal proceedings.

Table 3.
Unreported cases on
misconduct by
corporations

Corporation	Provision	Penalty
CIMB	Section 48(1)(a) of the Financial Services Act 2013 (FSA) (read together with rules under the Policy Document on Management of Customer Information and Permitted Disclosures (MCIPD Policy Document))	Administrative Monetary Penalty (AMP) of RM3.4 m
CIMB	Section 133(1) of the FSA	A penalty of RM6.4 m
CIMB	Section 58(1)(a) of IFSA 2013 (read together with rules under the MCIPD Policy Document)	AMP of RM1.7 m
CIMB Islamic	Section 145(1) of IFSA 2013 (read together with section 261 of IFSA 2013)	A penalty of RM3.2 m

Source(s): Authors’ own

Conclusion and recommendations

A critical change in the legal and regulatory climate related to CCL in Malaysia has been observed in the past few years. CCL is important because it promotes better practices to be followed, more ethical corporate actions and deterrence from potential misconduct. Corporations may be regarded as being bound by the same laws and social norms as any other individual. With the implementation of CCL provisions, IBs in Malaysia have found themselves obliged to comply with regulations and guidelines. All these provisions and guidelines on CCL are highly suggested to be enforced in IBs in an attempt to protect them. However, some IBs have failed to implement CCL provisions. It must be borne in mind that such a failure will not only create crucial compliance problems by banks but also have a possible effect on the stability of the financial system. Thus, IBs should find techniques to solve this problem. There must be checks and balances to identify deficiencies in the administration of the bank. As such, effective cooperation between regulators and IBs is essential to curb the problems faced by banks and thereby ensure adequate implementation of the laws on CCL. More importantly, the laws and regulations on CCL should be accepted and be implemented by all players. In addition, the laws and regulations on CCL must be supplemented and associated with an effective compliance program. Among the suggested strategies to be put in that program are reporting any misconduct or Shari'ah non-compliance to the relevant government authority, conducting internal corporate investigations and ensuring cooperation between IBs and the relevant government authority when necessary.

References

- Black, H.C. (1968), *A Dictionary of Law*, 4th ed., West Publishing, St. Paul, MN.
- BNM (2018), "Financial reporting for Islamic banking institutions", available at: <https://www.bnm.gov.my/documents/20124/938039/Financial+Reporting+for+IBIs.pdf/7f6b99c1-d82b-5763-387d-913306fd8f98?t=1592214472906> (accessed 1 July 2022).
- BNM (2019a), "Shariah governance", available at: <https://www.bnm.gov.my/documents/20124/761679/Shariah+Governance+Policy+Document+2019.pdf> (accessed 20 February 2021).
- BNM (2019b), "Enforcement action publication notice", available at: https://www.bnm.gov.my/documents/20124/62604/12072019_master.pdf (accessed 1 April 2021).
- BNM (2020), "BNM annual report 2020", available at: <https://www.bnm.gov.my/ar2019/> (accessed 1 October 2021).
- Bojidar, A. (2015), "Corporate illegalities related to the failure of the fourth biggest bank in Bulgaria", *Procedia Academics and Finance*, Vol. 28, pp. 85-91.
- Central Bank of Malaysia Act (2009), Government of Malaysia, available at: <https://www.bnm.gov.my/documents/20124/277ebcd5-9c21-209b-3984-170ba28351d6>
- Dworkin, S.L. (2012), "Sample size policy for qualitative studies using in-depth interviews", *Archives of Sexual Behaviour*, Vol. 41 No. 6, pp. 1319-1320.
- Fischel, D.R. and Sykes, A.O. (1996), "Corporate crime", *Journal of Legal Studies*, Vol. 25 No. 2, pp. 319-323.
- Hasani, M.A. (2009), "Corporate killing for Malaysia: a preliminary consideration", *Malaysian Journal of Law and Society*, Vol. 13 No. 1, pp. 144-157.
- IFSB (2006), "IFSB-3: guiding principles on corporate governance for institutions offering only Islamic financial services (excluding Islamic insurance (takāful) institutions and Islamic mutual funds)", available at: <https://www.ifsb.org/published.php> (accessed 16 June 2022).
- Islamic Financial Services Act (2013), Government of Malaysia, available at: <https://www.bnm.gov.my/documents/20124/8102422b-e6dd-d149-8db0-e3637e89ed5c>
- Ismail, N.A. and Abdul Razak, S.H. (2014), "Shariah governance framework: gaps and issues", *International Journal of Financial Economics*, Vol. 3 No. 1, pp. 1-10.

- Krishnan, L. (2010), "Criminal liability of auditors for financial statements", *Malaysian Journal of Syariah and Law*, Vol. 2, pp. 119-134.
- Mark, A.R. and Brian, F.S. (1999), "How corporations can avoid or minimize federal criminal liability for the illegal acts of the employees", available at: http://www.klgates.com/files/Publication/2ddc7f0b-92d6-4d25-b51b-e845d32b3c01/Presentation/PublicationAttachment/98788628-f44c-43f4-aa04-1e92459b954c/Article_on_Corporate_Criminal_Liability.pdf (accessed 20 February 2021).
- Matthew, A., Alexandra, B., Jackie, C. and Ashley, A. (2020), "Corporate criminal liability", *American Criminal Law Review*, Vol. 57 No. 3, p. 513.
- Michael, J. (1996), "Corporate criminal responsibility — ascription of criminal liability to companies", *Journal of Financial Crime*, Vol. 3 No. 3, pp. 275-277.
- Miskam, S. and Nasrul, M.A.D. (2017), "Towards enhancing corporate and Shari'ah governance of Islamic financial institutions in Malaysia: a legal analysis", *3rd Muzakarah Fiqh and International Fiqh Conference (3rd MFIFC)*, 15 November, Shah Alam.
- Niall, F.C. (2006), "Corporate investigations", *Journal of Financial Crime*, Vol. 13 No. 3, pp. 348-368.
- Olatunde, J.O. (2012), "An investigation of the financial criminal practices of the elite in developing countries", *Journal of Financial Crime*, Vol. 19 No. 2, pp. 175-206.
- Omar, H.N. and Hassan, R. (2019), "Shariah non-compliance treatment in Malaysian Islamic banks", *International Journal of Management and Applied Research*, Vol. 6 No. 4, pp. 220-233.
- Oxford Learner's Dictionaries (2021), available at: <https://www.oxfordlearnersdictionaries.com/definition/english/crime?q=crime> (accessed 10 October 2021).
- Simon, P.R. (1996), "A fresh insight into the corporate criminal mind", *Journal of Financial Crime*, Vol. 3 No. 4, pp. 362-366.
- Suzanne, C.F. (2015), "Corporate governance as a mechanism for the deterrence of economic crimes in the Commonwealth Caribbean", *Journal of Financial Crime*, Vol. 22 No. 3, pp. 347-353.
- US Legal.com (2021), "Corporate criminal liability law and legal definition", available at: <https://definitions.uslegal.com/c/corporate-criminal-liability/> (accessed 20 February 2021).
- Yaakub, E., Husin, A., Yaakob, M.A.Z., Khalid, M.M., Che Omar, A.B.M.F., Shahrudin, M.S. and Yaakub, E. (2015), "Framework to prevent Islamic financial crime in Malaysia", *World Applied Sciences Journal*, Vol. 33 No. 1, pp. 80-85.

Legal cases

- Kumpulan Wang Persaraan (Inc) v. Meridian Asset Management Sdn Bhd [2012] 1 LNS 316
JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Bhd; President of Association of Islamic Banking Institutions Malaysia and Anor (interveners) [2019] 5 CLJ
PP v. Ginder Singh and Chet Singh [1948] 1 MLJ 194b
Salomon v. Salomon & Co Ltd [1897] AC 22 HL
Tesco Supermarkets Ltd v. Nattrass [1972] [1972] A.C 154
The Queen v. Great North of England Railway Co. 9 Q.B. 315
Yue Chi Kin v. PP [2019] 1 LNS 1874
Yue Sang Cheong Sdn Bhd v. Public Prosecutor [1973] 1 LNS 182

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