



## CRIME OF ARBITRARINESS OF CORPORATE FUNDS IN SAUDI LEGISLATION

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### Abstract

*When tracking legal texts in the Saudi law, it is apparent that the Saudi legislator did not provide an explicit definition for the crime involving abuse of corporate funds, , the legislator would rather settle with identifying practices that represent misuse of corporate funds, also briefly mentioned liabilities involving some companies, managers and partners in such crimes as stated in article 229 in the Saudi Corporate System, however, when taking into account the material element of the abuse using corporate funds, in a wider range, which will lead to major expansion of incriminating practices as prescribed by the legislator, and punishable under the same Article.*

**Keywords: Crime, Arbitrariness, Companies, Saudi legislation.**

### INTRODCUTION

Penal code comprises a protective shield to the remaining branches of the Criminal Law, both public and private sections of the law, since it forms a protective barrier of security for all types of civil rights and social interests.

With regard to Penal code's ties to commercial Law, it is apparent that the latter regulates most commercial and monetary papers like checks, differed payment and promissory notes, where it was also tackled by the Commercial Law as a center piece of its legislation (Alshareef, 2008).

The status quo in Saudi Arabia, on the other hand, is in complete contrast to other countries, since it lacks a legislated Penal code, and the fact that Saudi Arabia applies Islamic Shania Law with regard to criminal infractions like Hudud or Bounds, Qisas or retributions, blood money and discrecautionary punishments.

Yet, despite the nonexistence of a legislative Penal Code in the Kingdom, the legislator was able to designate a specific regulatory system to deal with commercial and financial institutions named the Saudi Corporate System (Saudi Corporate system, 1965).

which was given a great deal of attention by the Saudi regulator, who was preoccupied by the importance of such companies at the present time, convincingly, believing that, although nations may apply different economic ideologies and regulations, they all rely on them to improve their economic standards while raising the productivity level.

Building a sound economy that has a competitive edge, able to attract investors, provide investors with the appropriate environment, ensure transparency and disclosure, has become a key priority.

Saudi legislator is not discouraged, that nations, with a penal code, may have basic clauses in their penal codes that address criminal activities within commercial laws in general terms, and for commercial firms specifically, in a timid manner, which does not give the penal code sufficient power to confront internal infractions of some companies, collectively and in a preventive manner, therefore, the need for an autonomous commercial corporate law that possesses substance and procedural clauses, as seen in the previously mentioned Saudi Commercial Corporate System.

Corporate funds were also found to require protection and security as to their importance, since



legislations addressing the issue, were never in harmony with one another, thus, some legislations rendered protection to corporate funds exceeding that given to public funds<sup>1</sup>. while others gave equal protection to both<sup>2</sup>, apparently, to increase public confidence in commercial corporations for variety of considerations, like promotion of investments in corporations, where the level of confidence is determined by the quantity of oversight, monetary securities, corporate executives and management and the commitment to disclosure and transparency, since, in the same manner, is considered to be a protection mean against criminal liabilities as stipulated in corporate governance list of principles<sup>3</sup>.

As for Corporate management and executives, Saudi legislator has confirmed the development of a prescribed mechanism, to guide corporations through the process of how management must be assumed and regulated its practices, since management represents the heart and soul of the corporation, thus, its efficiency will be felt throughout the corporation, resulting in greater achievements, and opposite to this is also true.

Relative to the above, disclosure and transparency had the Saudi legislator avid commitment to incriminate all forms of obscure activities and mendacity, whether by forgery, fraud or a lie that does not elevate to either (Izbawi, 2007).

When tracking legal provisions in the Saudi corporate system, professional firms and the system of the corporate court, one would find that the Saudi legislator did not provide explicit texts that will deal with crimes involving abuse (arbitrariness) of corporate funds<sup>4</sup>, thus, the legislator settled with

listing penalties for such crimes in section thirteen, using generalized terms that dealt with all firms, while avoiding any specificity in article 229.

We begin by identifying the definition of a corporation in the Saudi system, types of corporations listed in the Saudi Corporate System, as we move on to the second topic titled “arbitrariness of Saudi corporate funds crime”.

## FIRST TOPIC

Defining a Corporation and arbitrariness of corporate funds in the Saudi legal system.

According to the Saudi Corporate system, a corporation is “a binding contract between two individuals or more, to erect a business, when each and every individual is committed to contribute to his/her shares in finances or work, and divide profits and losses among them<sup>5</sup>, therefore, considered by the organizing authority, as a legally binding contract between the willing parties (Alarainy, 2002), in accordance with the explicit text in the article mentioned in the law, this meant that, a group of two or more, must have the will, along with the general requirements for the contract,

Such as, agreement among parties, skills, qualifications, location and common purpose (Sanhoury, 1997), in addition to the basic arrangement regarding shares of financial or work contribution, and disbursement of profits or losses, available or not, and the intention to participate.

## SECOND TOPIC ARBITRARINESS OF CORPORATE FUNDS FIRST DEMAND

that may contain debt information, lending of other articles, concealing of papers for the purpose of giving them away and release of information about the contents of such, that may jeopardize the helpers status, cause harm....etc.

Also stated in Article 140, those who misuse any certificate, authenticated document in a commercial log, by eliminating or adding words or statements to embezzle or forge, will be penalized....etc.

<sup>5</sup> First article in the corporate system, which coincided with the text stated in the French civil Law, defining corporate contract.

<sup>1</sup> As stated in the French Law that will incriminate misuse of funds and the abuse of fidelity, see Lynn Matar Salamah, Encyclopedia of the French Penal Code public and private, Halabi publications, Lebanon, 8<sup>th</sup> Volume, P336 & what follows.

<sup>2</sup> As the Egyptian legislator has done, extending a form of guarantees and protection to corporate firms far more than that given other firms.

<sup>3</sup> The Saudi legislator has implemented corporations governance through the issuance of “Corporate Governance List”, texts were printed and published in the official Gazette, Um Alqura, issue No. 4124, dated 3/11/1427 AH, in 19 articles.

<sup>4</sup> Saudi legislator stated in the text pertaining to misuse, in article (139) of the commercial court that “ Misuse by any merchant of the needs of a distinguished helper, to release to the merchant a document in any format by deceiving,



First: Abuse (Arbitrariness) of corporate funds in the Saudi legal system

When tracking legal texts in the Saudi law, it is apparent that the Saudi legislator did not provide an explicit definition for the crime involving abuse of corporate funds, whether the texts of the Corporate System or the Commercial Court, as mentioned in previous paragraphs, the legislator would rather settle with identifying practices that represent misuse of corporate funds, as stated in article 229 in the Saudi Corporate System, however, when taking into account the material element of the abuse using corporate funds, in a wider range, which will lead to major expansion of incriminating practices that are based solely, on ill intent as prescribed by the legislator, and punishable under article 229.

## **SECOND DEMAND ELEMENTS OF COMMISSIONING THE CRIME**

### **A- MATERIAL ELEMENT OF THE CRIME:**

The legislator had limited the acts punishable under Article 229 to the following:

1. Anyone who, deliberately and knowingly, presented falsified documents or contradicting statements to provisions of the Corporate Law, used in the company's contract, underwriting, publications, share holding, or during licensing application for the corporation, signed and distributed such documents.  
As when partners in a corporation would declare full payments of their shares in a corporation, when submitting the licensing application to the Commercial Registrar, while they never did, or exaggerates expenses for the commencement of the corporation, or declares in company's stocks publications, delusional guarantees regarding the value of its shares and profitability, to build the shareholder's confidence in the corporation.
2. Any of the founders or member of the board of directors, who extended an invitation to public's subscription to buy into the stocks or the shares of the corporation, although, in violation of the terms of the Corporate system.
3. Any of the partners or others who exaggerates, with ill intents, the valuation of the company's shares and its advantages.

The Corporate system stated that, shares of partners in a company can be paid in cash, in kind or work. If shares were paid shares In Kind, it must be appraised by experts in the

field, who are licensed and regulated by the state. Each share In Kind, must have accurate, detailed report, describing the item or items used, any guarantees, restrictions and litigations by other parties and the basis used to calculate the value of share in kind, indicating the monetary value in accordance to procedures used to appraise it them.

It is also worth mentioning that the expert must take into account the full ownership of the item or items offered as share in kind, was not mortgaged prior to entry into the company, if it was so, the share considered non existence. If the share in kind is mortgaged for more than its value, and the owner or any of the participants, exaggerated the share in kind valuation and advantages, will be subjected to prosecution under terms of the article.

Share in kind holder shall be responsible above all, of the appraised valuation of the holding in the contract, and any proven exaggeration in the appraised value of share in kind; the difference must be paid in cash to the company, while it is worth mentioning that, the precedence set forth by the share in kind exaggerated value at the time it was appraised, without effecting its appreciated or depreciated value, as the original share holder will remain responsible for any difference in value, even if conceded to others or one of the partners.

4. Anyone who erected a corporation contrary to provisions of the corporate system, any member of the Board of Directors or Internal auditor who recently assumed the post with prior knowledge of the violations committed.

Saudi legislator with similar manner as the French, will compel internal Auditors in the accounting department, to report any infractions that come to the department's knowledge, although auditors are the primary specialists to detect any illegal practices, as stated in Article 132, therefore, internal auditors shall present to the General Assembly, an annual report that includes board of Directors stance on accessing company's data records, clarifications to issues on hand, whether they were responsive to auditor's requests, disclosure of any violations to the system or company's procedures and policies, that were detected, auditor's opinion on company's accounting data and the extent of matching them to the actual data. The report



will be recited before the assembly for ratification, if the assembly opted to ratify the board of director's report without the auditor's opinion, it will be considered void.

5. Each manager or member of the board, who received or distributed mocked earnings among the partners:

This may be displayed when a company claims a profitable annum, while posting growth or stability and equitability in its earnings, also give the impression that the company is on the right track to growth and success, which will be reflected positively on its shareholders and employees, also it may post profits that existed only on papers, and may also distribute them. That was the intent of the legislator to call it "Mocked profits".

6. Each and every manager, board member, auditor or liquidator who have contributed intentionally, false data with regard to company's budget, earnings, losses, reports provided to partners or to the general assembly, neglected to include true information in the reports, to conceal true financial status of the company from partners, shareholders and others.

Therefore, the image of the company would give a sense of normalcy; procedures seem to satisfy statutory preconditions, at the expense of company's capital, or cuts from the capital, distributed without compensations to previous losses, while true earnings are consistent with terms of the law, distributed among partners after covering deficits from previous budgets, and not deducted from company's capital. True or mocked earnings, are generally distributed in cash or share in kind increments, per recommendations by the Board of Directors, and discretions by the Shareholders association, proportional to the nominal valuation of the capital. Earnings are calculated based on certain percentage from the nominal value of the capital, not from other values.

7. Any public employee who, is being briefed about company's secrets by virtue of his/ her post, revealed to unauthorized party:

The legislator in this situation is aware of the damages inflicted on companies due to disclosure of their secret by public employee, as they may lose transactions, revenues and may even bankrupt companies, therefore, the

legislator promised to prosecute any public employee to the full extent of the law, with severe penalties handed down on perpetrators.

#### **B- MORAL ELEMENT**

Crime of arbitrary use of corporate funds is intentional, where the perpetrator is, knowingly, directed by general intent and will to commit such an act (Tawfik, 2009), thus, distinguishes premeditated crimes from unintentional ones that compelled the Saudi legislator to state on numerous occasions of its legislative texts, to precondition knowledge and premeditation, saying "as he had prior knowledge of the violation", "any of the partners who exaggerated ill intent", this meant that both elements of knowledge and intent must be present (Alsaeed, 2009), as for the importance of presenting evidence of intent, since it is the fine line that differentiates that separates the crime of arbitrary use of corporate funds from other crimes, which leads to the next question of, who is the responsible authority to burden presenting evidence of intent for this crime?

The norm in this situation is for the Attorney General to burden presenting the evidence that all elements were present for the commission of the crime, to bring charges against the perpetrators. In the Saudi Kingdom, prosecution of such cases are not referred to the Attorney General's office or the District Attorney, they are rather referred to disputes settlement Committee, belonging to the Commerce Department instead of the Department Justice, via commercial venues, in turn increases the mounting burden on the department to generate evidence of ill intent and to present list of charges, which is proven to be difficult task, as it requires specialist in the field and experienced investigators, to present an undisputed evidence to the prosecution, therefore, it is recommended that similar crimes are to be referred to the Attorney General or the District Attorney's office rather than to the above mentioned committee.

#### **PROBATION VIOLATION**

Meant to identify an individual who return criminal activities, while a verdict in another crime is pronounced against the individual (Mohammad, 2013). Consequent to repeated offenders, most Penal Codes, including the Saudi stated that, it is permissible to increase the severity of punishment for offender who violate their probation, that increase may vary, according to numerous texts, also, dependant on the degree of the violation, since some probations are



bounded to a time period after conviction, as prescribed by the probation authority, where legislators limit probation periods to either 3 or 5 years.

However, in cases of probation violations for crimes under Article 229 & 230, where a verdict was pronounced against a suspect, and a repeated offense was committed by the latter, it has been noticed that the legislator did not limit the probation to a time period, as to intensify the severity of the punishment, due to calamities from such crimes, therefore, as stated in Article 231 that "Any probation violation with repeated offense means doubling of the incarceration period stated in the previous 2 articles."

### **DIFFERENCE BETWEEN CRIME OF ARBITRARY USE OF CORPORATE FUNDS AND THEFT**

Saudi legislator did not address theft in its laws, since the Saudis did not have a penal code. While reviewing some of the legislative laws in the kingdom, it was found to have a definition for the crime that stated the following, "Theft is acquiring someone else's money without prior consent by the owner, for permanent ownership of that money" (Jordanian Penal Code, 1961: Albahr, 2009).

The essence of theft, is the permanent ownership of the stolen money, while arbitrary use of corporate fund ultimate objective is not, which may take place in various methods of usage, with no intent to own the money or inflict any harm to the company's current financial status, however, it can subject the company's economic and financial interests to some forms of threats, as, when one of two partners in a company withdraws two checks from company's account, without prior consent from the second partner, authorizes for a mocked salary payment to the manager's wife who happened to be on the company's payroll, board of directors head conceding a patented invention conducted by the affected company for the interest of others, or personal benefit, withdrawals of cash from the company's account to fund physical activities by the manager.

In conclusion to the above, it is apparent that the Saudi legislator did not address the Crime of arbitrary use of corporate funds to all types of firms, while settling with only the texts in Article 229 of the Corporate System that outlines briefly, penalties limited to crimes and violations listed in the article,

also, mentioned liabilities and penalties that can be applied to partners and managers of some firms.

### **RESULTS:**

1. There are no explicit texts pertaining to Arbitrary use of corporate funds, when taking into account, the material evidence of arbitrary use of corporate funds on a larger scale, one will find that any act listed by the legislator in article 229 may fall under suspicion of being a criminal act.
2. Saudi legislator consolidated all types of firms mentioned in the corporate system, with one punitive system, stated in Article 229, with the exception of Mutual firms, had no mention of companies type.
3. Despite that all elements for this types of crimes can be referenced to elements of a general crime, which are as follow: Material, Moral and legitimate, but the Saudi legislator preconditioned, prior knowledge and ill intent in several instances with an explicit text, as "His prior knowledge of the offense" and "Any of the partners who exaggerated with ill intents".
4. Cases for crimes that do not fall under texts of the Corporate System, are built on the general basis of the system, by prosecuting perpetrators of crimes like fraud using the company's name and manipulation of financial data to conceal the actual status of the company.
5. Saudi legislator consolidated punishment for all types of offenses and all types of firms without exceptions, thus, giving justices in the commercial court enough space to estimate prison terms between 3 months to one year and a fine between 5 thousand and 20 thousand SR, and for justices to use the authority vested in them to estimate the sentencing phase, however, the sentence for these types of offenses are not adequate and need to be reviewed.
6. Saudi Arabia lacks a legislated penal code that deals with discretionary offenses, therefore, increases the burden on the presiding justice to due diligence in the absence of a legislated text to deal with commercial matters.
7. While Saudi Arabia has always been seeking to develop its legal system by creating specialty courts as prescribed by the prosecution system, to have an independent commercial court to resolve all commercial and financial disputes, as to the status quo, which established in



accordance with the Corporate System, a committee called ( Committee to resolve commercial disputes), consists of a panel of three specialist in the field, and specializes in resolving disputes derived from the implementation of the Corporate System and the penalties prescribed by it.

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