

## WHO NEEDS TO PAY ZAKAT: A FOCUS ON LEGAL ENTITIES<sup>1</sup>

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### INTRODUCTION

The obligation to pay zakat is, among others, a thing that has become “ma’lum min al-din bi al-dharurah”. Hence, refusal to perform this obligation, if coupled with the intention to rebel against its obligation, may lead to disbelief. The issue on the obligation of zakat, from the Shariah standpoint, is relatively easier to resolve when such is directly related to individual entity (individual entity, natural person, shaksiyyah ‘adiyah). However, the matter gets more complicated when it is extended to shaksiyyah I’tibariyyah (legal entity). Such is due to the fact that a corporate institution does not possess the characteristics of an “individual” in totality, as does an individual entity. In fact, the “individuality” that it owns is conferred through legal recognition by ascribing the status of ‘legal entity’ to it (juristic person, legal entity<sup>3</sup>). Thus, the primary concern is on how the obligation of zakat would be determined and imposed upon these legal entities. Some of the questions which require close observation are as follows:

- 1) Does Islam acknowledge the current concept of ‘legal entity’?
- 2) If the above question is answered in the affirmative, what then, is the suitable method of implementing zakat on these corporate institutions? What is the position when such institutions have a ‘mixed ownership’ between individuals (or organisations) that are obliged to pay zakat and individual that are not obliged to pay zakat, such as ownership of non Muslim or the owners are organisations which are not obliged to pay

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<sup>3</sup> May sometimes be referred to as legal person.

zakat like government owned companies or waqaf and charitable institutions . How would these issues be treated as? Should zakat be imposed on the ownership of those who are obliged to pay zakat only, or zakat should be imposed on all ownerships, treating the company as an entity and diluting the nature of the owner, as if the individuality of the owner is no longer relevant here.

- 3) Also, is it important to also identify the status of the company for the purpose of paying zakat, since zakat is not imposed on non Shariah compliant activities or non Shariah compliant business. If the answer is in affirmative, what are the criteria to be followed in determining whether a company is Shariah compliant or otherwise?

### **FIRST ISSUE: DOES ISLAM ACKNOWLEDGE THE CONCEPT OF LEGAL ENTITY?**

Even though the formation or establishment of corporate institutions with the current criteria<sup>4</sup> may, on its surface, appear to be a new subject that was not mentioned under the classical Shariah writings, the basic characteristics of a modern company, which in fact, share significant resemblance to those of a corporate institution's, have been extensively discussed by the earlier jurists. It is crucial to note, at this juncture, that despite having explicit authority from the Holy Quran and Sunnah containing the word "association" and the alike, the detailed elaboration on companies as to its types, characteristics, and etc have resulted from the observation of the earlier jurists on the company which existed during their time. Therefore, when a type of company has not been specifically mentioned by the jurists, it does not automatically mean that the company is prohibited under the Shariah.<sup>5</sup> The legality of the company, as far as Shariah is concerned, must be determined based on the characteristics of each company; that they do not transgress the principles and teachings of Shariah. As mentioned, a number of relevant principles may be deduced from the writings of the earlier

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<sup>4</sup> Among the criteria include one that says the rights and responsibilities of the corporate entity are separated from the rights and responsibilities of the shareholders. Therefore, the liabilities of the shareholders are limited to the amount of the shares they possess.

<sup>5</sup> To have a better understanding on the best method to evaluate and analyze the writings of the classical jurists, see: Hasan, Aznan, The Role of Shariah Advisors in the Development and Enhancement of Islamic Securities, Colloquium on Islamic Securities, jointly organized by Securities Commission and the International Islamic University Malaysia, Securities Commission, 4<sup>th</sup> June 2007.

jurists. Nevertheless, this does not deny the importance to produce more current and contemporary Shariah rulings that can cater or respond to the needs of today's corporate institutions or companies.

It is neither the aim of this paper to scrutinize the history behind the establishment of the modern company of today nor to observe its basic characteristics. Rather, this paper specifically focuses on the concept of 'legal entity' conferred upon the company through the Shariah's viewpoint. Based on its definition, the term 'legal or juristic person' is used to differentiate the positions between the legal entity conferred to an institution to the individual entity or natural person.<sup>6</sup> For instance, a human being has the attributes of a natural person. He is accorded with all the rights bestowed upon a normal human being, like the human rights, the laws and etc. Legal person, on the other hand, is established when several individuals whom each possesses the characteristics of individual entity form a new entity (with certain common objectives) as though they are individual entities that merge together along with their 'individual' characteristics and these are reflected through their newly formed entity. Despite not owning all of the attributes attached to the individual entities, the new entity is given several rights which are originally owned by natural persons (individual entities) by the law, such as the right to instigate a legal action i.e. to sue (or being sued), the right of ownership, the right to enter into a contract, and etc.<sup>7</sup>

Viewing these criteria from the Shariah's angle, it is clear that a company of this type is not an unknown practice. Such concept of legal entity can be seen from several practices that have long existed, like the institution of wakaf (charity).

Among the essential principles of wakaf, is that the ownership of the wakaf property immediately ceases to be of the wakaf creator (waqif). However, the property is not transferred to any person including the beneficiaries of the wakaf property.<sup>8</sup> Hence, such property cannot be sold, given away as gift (hibah) and etc. for its ownership is not vested in anybody. The wakaf manager (mutawalli) is, nonetheless, allowed to perform necessary transactions on behalf of the wakaf property which include matters related to debt and etc, as

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<sup>6</sup> [http://en.wikipedia.org/wiki/Juristic\\_person](http://en.wikipedia.org/wiki/Juristic_person).

<sup>7</sup> Ibid.

<sup>8</sup> Ibn Qudamah, *al-Mughni*, vol 6, p.187; Al-Dasuqi, *al-Hashiyah*, vol.4, p.85.

if the said wakaf is an entity. Any pecuniary responsibility concerns only the wakaf property and not the wakaf manager. This shows that the wakaf property is given the attributes of a legal entity as practiced by the current companies or institutions.

Another example may be seen through the practice of bayt al-mal wherein the elements of legal entity are clearly present. Such is due to the fact that bayt al-mal is accorded with the authority to make demands against any breached rights. Besides that, it too must bear other pecuniary responsibilities like in the case of being sued and etc. Hence, bayt al-mal, like wakaf, has been given the same characteristics of a legal entity as adopted by the modern corporate companies.

These two examples are cited in proving that the concept of legal entity, as practiced today, is not an alien concept to the classical discussions of the Shariah. Although there never formed and shaped like our modern days corporate entities, the features and principles of legal entity are nonetheless very obvious in the two examples.

The concept of zhimmah, ahliyyah and fard al-kifayah, the notion of ummah in the establishment of state, the practice of al-‘aqilah, institution of masjid and al-qada’ are also cited as evidence that support the acceptance of the concept of al-shaksiyyah al-I’tibariyyah in Shariah. I do not intend to expand on that<sup>9</sup>.

Nevertheless, the modern jurists are not in consensus on this matter. Majority of the contemporary jurists are of the view that the conferment of attributes related to legal entity upon a company is not against the Shariah, thus recognising that these legal entities are also accepted as an entity, separate from the entity of their owners and nothing in Shariah that hinders or impedes the practice of legal entity and duly implement it.

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<sup>9</sup> For further reading. Please refer to: al-Khuli, Ahmad Muhammad, *Nazariyyat al-Shaksiyyahal-I’tibariyyah*, Dar al-Salam, 1<sup>st</sup> Edition, 1423-2003, pp. 69ff, al-Khafif, Ali, *al-Sharikat fi al-Fiqh al-Islami*, p. 22, al-Khayyat, *al-Sharikat fi al-Shari’ah al-Islamiyyah*, vol. 1, pp. 208-230, al-Qurrahdaghi, *al-Shaksiyyah al-I’tibariyyah wa Ahakmuhafi al-Dawlah al-Mu’asirah*,

## SECOND ISSUE: HOW TO IMPLEMENT ZAKAT ON SUCH LEGAL ENTITIES?

When compared to the first issue that was quite easy to resolve, the second issue needs a greater scrutiny. This is due to the reason that despite reaching the conclusion that Islam does recognize the existence of a company's legal personality, as discussed above, the question on whether the company is obligated to the payment of zakat is indeed one which requires a more detailed explanation.

The complexity is caused by three of the most important conditions to zakat obligation, which is, the individual involved must profess the religion of Islam and the property to be subjected to zakat shall be owned by a particular individual (mu'ayyan) and his ownership over that property should be full ownership (al-milkiyyah al-tamah)..

Any discussion on the obligation to pay zakat on legal entity would not be sufficient without reference to the concept of khultah in zakat. In a hadith, the Prophet said<sup>10</sup>:

"لا يجمع بين متفرق ولا يفرق بين مجتمع خشية الصدقة وما كان من خليطين فإنهما يتراجعان بينهما بالتسمية"

The separate assets should not be joined together not the joint assets should be separated to avoid zakat and whatever that belongs to two persons, they must settle their account in proportion to their ownership."

Al-Khutlah means an admixture of things, whether after the mixing, the things can be distinguished from one another or not. al-Qur'an has also used the word. Al-Qur'an says:

"وإن كثيرا من الخطاء ليبيغي بعضهم علي بعض إلا الذين آمنوا و عملوا الصالحات و قليل ما هم"

<sup>10</sup> Narrated by al-Bukhari, Kitab al-Zakat, hadith no. 1382.

Ibn Manzur, in explaining the word al-khulata' in this verse said: "The meaning of al-Khulata' in this verse means partners who mixed their assets in a way that their ownership is no longer distinguishable except by way of al-qismah (apportionment). The word al-khulata' as said by al-Shafi'i may also denote the notion of mixing of two distinguished things, like a stable that has 10 shelters. Each owner of the shelter owns several animals and the mixing of their animals happen in a way that it is taken care of by one cattleman who herds the livestock together and feed them together<sup>11</sup>.

The juristic meaning of khultah does not differ greatly from the linguistic meaning. Al-Shirazi explains that khultah happens when a livestock of two persons (or more) are mixed with each other and be seen as if the livestock belong to one person only. It denotes the meaning of a combination of livestock belong to two or more persons for the whole period of the hawl (completion period to pay zakat) and it attains the nisab (zakat payable amount)<sup>12</sup>. Almost the same meaning can be found in the explanation made by al-Bahuti<sup>13</sup> and Ibn Muflih<sup>14</sup>.

Based on this hadith, majority of jurists view khultah in livestock will affect the zakat obligation on the persons who owned the animals on khultah basis<sup>15</sup>. If the livestock are mixed, they shall not be separated from the purpose of reducing (or adding) the obligation to pay zakat, irrespective whether this khultah is khultah al-A'yan or khultah al-Awsaf (al-jiwar)<sup>16</sup>. Similarly, it is also impermissible for us to count them together if they are, in actual fact separated. On the other hand, the Hanafis<sup>17</sup> and Ibn Hazm believe that khultah in animal

<sup>11</sup> Ibn Manzur, Lisan al-'Arab, vol. 7, p. 291.

<sup>12</sup> Al-Shirazi, al-Muhazzab.

<sup>13</sup> Ibn Muflih, al-Furu', vol.2, p. 293

<sup>14</sup> Al-Bahuti, Kashshaf al-Qina', vol. 2, p. 192

<sup>15</sup> Al-Hattab, Mawahib al-Jalil, vol. 2, p. 266, al-Majmu', vol. 5, p. 388, al-Sharbini, Mughni al-Muhtaj, vol. 1, p. 376, Ibn Qudamah, al-Mughni, vol. 2, p. 248, al-Bahuti, Kashshaf al-Qina', vol. 2, p. 196, Ibn Hazm, al-Muhalla, vol 6, p. 52

<sup>16</sup> This opinion has largely been attributed to the Shafi'i school of law. In actual fact majority of jurists do not differentiate the two. Nevertheless, I found that Ibn al-Qudamah (from Hanbali) differentiate the effect of khultah on these two. Whilst he accepts the concept of khultah in khultah al-A'yan, he believed that khultah al-awsaf shall not give any effect to the individuality to pay zakat. Nevertheless, the Hanbali School of law in general agree with the opinion of the Shafi'is. See: al-Nawawi, al-Majmu', vol. 5, p. 389, al-Sharbini, Mughni al-Muhtaj, vol. 1, p. 376, Ibn Qudamah, al-Mughni, vol. 2, p. 248, Ibn Muflih, al-Furu', vol. 2, p. 293

<sup>17</sup> Al-Sarakhsi, al-Mabsut, vol. 2, p. 153, Ibn 'Abidin, al-Hashiyah, vol. 2, p. 304, al-Samarqandi, Tuhfat al-Fuqahak, vol. 1, p. 292

has no effect on the individuality of zakat. Since vast majority of scholars are in agreement with the opinion of majority jurists, I would not argue further on this.

Nevertheless, the acceptance of the concept of khultah subjects to certain conditions:

1. Islam. It is accepted by way of consensus that the obligation to pay zakat is only on Muslim. The jurists unanimously agree that zakat is not mandatory to non Muslims, though they will be questioned about that in the Hereafter<sup>18</sup>. This is based on the hadith of Mu'az, when the Prophet sent him to Yemen<sup>19</sup>. As reported in authentic hadith, when the Prophet (SAW) sent Muaz to Yemen, He told him: "You are going to folks who are of the people of the Book. The first thing you call them to should be to testify that there is no god but God and that Muhammad is the Messenger, of God. If they accept that, tell them that God has made it obligatory on them to pray five times every day and night. If they accept that then tell them that God has imposed zakat on them, to be taken from the rich among them and given to the poor among them."<sup>20</sup>

The non recognition of al-khultah between Muslim and Non Muslim has been considered by many jurists<sup>21</sup> as a consensus among the jurists. Nevertheless, I found one opinion from Ibn al-Majishun<sup>22</sup> in Maliki school of law that<sup>23</sup> even if the khultah happens between a Muslim and non Muslim, the khultah will still have its effect. Nevertheless, the non Muslim shall not pay zakat.

<sup>18</sup> Al-Qardhawi, *Fiqh al-Zakat*, vol. 1p. 95. Ibn al-Humam, *Fath al-Qadir*, vol. 2, p. 153, Ibn 'Abidin, *Hashiyah Radd al-Muhtar*, vol. 2, p. 259, *Mawahib al-Jalil*, vol.2,p. 366, *Sharh Mukhtasar Khalil*, vol. 2, p. 157. al-Sharbini, *Mughni al-Muhtaj*, vol. 2, p. 121, Ibn Qudamah, *al-Mughni*, vol. 4, p. 69

<sup>19</sup> Narrated by Ibn 'Abbas.

<sup>20</sup> The hadith is narrated by al-Bukhari and Muslim.

<sup>21</sup> Al-Nawawi, *al-Majmu'*, vol. 5, p. 391

<sup>22</sup> Abd al-Malik ibn Abd al-Aziz ibn Abi Salamah (various narrations on his real name). Mawla to Bani Haitham (in one opinion, Bani Tamim). A faqih. He was known for fatwa and was referred a lot for that. He was dharir (has problem with his eyes) and said to be blind during the end of his life. Al-Majishun is referred to his grandfather Abu Salamah. The word is originally Persian, mean red because the grandfather has some redness in his face. He was known for his passionate to hear song. Imam Ahmad said: "He arrived at our place and with him someone who will sing for him". Mus'ab bin Abdullah al-Zubayri said: "During his time, he was a Mufti for the People of Madinah. Hedied around year 214H.

<sup>23</sup> al-'Abdari, *Al-Taj wa Iklil li Mukhtasar Khalil*, vol. 2, p. 266. His writing on that:

"(وكل حر مسلم ) ابن عرفة : لا أثر لخلطة عبد أو ذمي خلافا لابن الماجشون"

There are a lot of quotations from jurists on this issue. Among others are:

1) Minah al-Jalil<sup>24</sup>:

"وكل من الخليطين أو الخطاء حر فلا أثر لخلطة رقيق مسلم فلا أثر لخلطة كافر ملك نصابا وخالطه بجميعه أو ببعضه....."

2) Sharh Muntaha al-Iradat<sup>25</sup>.

"فصل في الخلطة وإذا اختلط اثنان فأكثر من أهلها أي أهل وجوب الزكاة فلا تأثير لخلطة كافر....."

2-Nisab. The jurists differ on the calculation of nisab. The Shafi'is and the Hanbalis 'Ata, al-Awza'i and al-Laith ibn Sa'ad uphold that the zakat in case of khultah is calculated as one nisab<sup>26</sup>. On the other hand, the Malikis, maintain that each and every partner in khultah shall reach their nisab for the purpose of calculating zakat<sup>27</sup>. Whilst the majority relies on hadith relates to khultah, the Malikis rely on the hadith which mentions about the need for the assets subjected to zakat to reach nisab. Since the hadith on the reaching of nisab is about nisab in general, and the hadith on khultah is about a specific situation, I believe the opinion of the majority is more accurate based on the principle of takhsis al-'amm as known in usul fiqh.

It should be noted that the jurists also differ on the nature of khultah, is it khultah al-'ayn or khultah al-milk. If we say that the situation of khultah here is khultah al-'ayn, the partner shall only pay zakat on khultah basis on the assets that are in fact in the khultah situation. It is not allowed for him to include other assets that he has, but not in the khultah to the assets in the khultah. He has to pay zakat differently. On the other hand, if we say that his zakat is payable on khultah al-milk, he will include other assets that he has to the assets that are in the khultah for the purpose of calculating zakat. According to majority of jurists from Maliki<sup>28</sup>, Shafi'i<sup>29</sup>,

<sup>24</sup> Vol.2, p.17

<sup>25</sup> Vol. 1, p. 407

<sup>26</sup> al-Shafi'i, al-Umm, vol.2, p.14, al-Sharbini, Mughni al-Muhtaj, vol. 1, p. 377, Ibn Qudamah, al-Mughni, vol. 2, p. 249, al-Bahuti, Kashshaf al-Qina', vol.2, p. 198

<sup>27</sup> Ibn Rush, Bidayat al-Mujtahid, vol. 1, p. 264, al-Hattab, Mawahib al-Jalil, vol. 2, p. 267

<sup>28</sup> Al-Qarafi, al-Zakhirah, vol. 3, p. 133

<sup>29</sup> Al-Nawawi, al-Majmu', vol. 5, p. 444



and Hanbali<sup>30</sup> Schools of law, the khultah is based on khultah al-milk. On the other hand, some Malikis<sup>31</sup> and another opinion narrated from Imam Shafi'i<sup>32</sup> uphold that the khultah is khultah al-'ayn. Therefore, he is not allowed to include other assets which do not subject to khultah to the khultah for the payment of zakat. Whilst these opinions are largely based on ijtiḥad, I believe the second opinion is stronger for several reasons. The most important reason is that the ḥadīth on khultah mentions specifically on the assets that are under khultah. Therefore we should only limit its application to the assets which are in fact in the khultah, and not to include other properties that are outside the khultah. Moreover, the reason why Shariah recognizes the concept of khultah is to appreciate the concurrence of the parties to have khultah. If we allow for the inclusion of other properties, the sanctity of the arrangement has been broken, as if the arrangement that they have entered has not been honoured and useless<sup>33</sup>

3- al-Hawl. The zakat that reaches the nisab shall be in the possession of the person for certain period of time, i.e. one year. This condition is also applicable in the case of khultah. Nevertheless, the jurists differ on the requirement of haul, is it the haul for each and everyone of them, or the haul of the khultah. Whilst some jurists uphold that the requirement of haul in khultah dictates that the mixing shall happen throughout the period of haul. Any interval will nullify the situation of khultah. This is the opinion in Shafi'i School of law and one opinion of the Hanbalis<sup>34</sup>. On the other hand, the Malikis<sup>35</sup> uphold that the condition of khultah is not a requirement for the whole haul. In fact, it is enough that al-khultah happens in the period of haul with a condition that the khultah did not happen very near to the period of haul like a month or so. What is important is that when the time to pay zakat come and the zakat collector finds that the khultah has happened between them, then he will just take the zakat based on that situation. The ḥadīth on khultah is also silent on that. A lot of arguments and counter arguments have been forwarded to support their opinions. I am more inclined towards accepting the opinion of the Malikis. Based on this, the calculation of haul will start with the time that the livestock reached its nisab for zakat.

<sup>30</sup> Al-Bahuti, Sharḥ al-Muntaha al-Iradat, vol. 1, p. 385

<sup>31</sup> Al-Qarafi, al-Zakhirah, vol. 3, p. 132

<sup>32</sup> Al-Nawawi, al-Majmu', vol. 5, p. 401.

<sup>33</sup> إعمال الكلام أولي من إعماله

<sup>34</sup> Al-Nawawi, al-Majmu', vol. 5, p.404, al-Sharbini, Muḡni al-Muhtaj, vol. 1, p. 376, Ibn Qudamah, al-Muḡni, vol. 2, p. 249, al-Bahuti, Kashshaf al-Qina', vol. 2, p. 196

<sup>35</sup> Al-Dardir, al-Sharḥ al-Kabir, al-Qarafi, al-Zakhirah.

The jurists also differ as to whether the concept of khultah applies to other than livestock. The Shafi'i and an opinion from Imam Ahmad maintain that the concept of khultah, if fulfilled will also be applied to other types of zakatable items as well. This is the later opinion of al-Shafi'i (al-Qawl al-Jadid)<sup>36</sup> and this is the opinion that is acceptable in the School<sup>37</sup>. It is also an opinion narrated from Imam Ahmad<sup>38</sup>. On the other hand, other jurists from Maliki and Hanbali School of law uphold that the concept of khultah is only applied to animal<sup>39</sup>. They cite another hadith which they believe in support of the previous hadith. The hadith reads<sup>40</sup>:

"الخليطان ما اجتمع علي الحوض و الفحل و الرعي"

"The two mixing (al-khalitaan) can only happen when it involve using together the well (pond), the same male and the pasture".

Without going into details on the arguments of both fractions, it is safe to say the first opinion is stronger for two reasons. First, the hadith on khultah was general without specifying certain type of property. Second, the hadith that the second opinion relies on their specificity (takhsis) on this generality (umum) was weak (da'if). Perhaps due to that, almost all contemporary scholars accept the opinion that khultah can happen in other types of property. As such I would not extend on this.

The above discussion on khultah and various differences that have been forwarded intend to establish several principles which are very important to our discussion later. The conclusion of this discussion can be summarized in these points:

- 1- The acceptance of the concept of khultah in the obligation of zakat
- 2- The concept of khultah is not only confined to livestock

<sup>36</sup> Al-Shafi'i, al-Umm, vol. 2, p. 14

<sup>37</sup> Al-Nawawi, al-Majmu', vol. 5, p. 408, al-Sharbini, Mughni al-Muhtaj, vol. 1, p. 377

<sup>38</sup> Ibn Qudamah, al-Mughni, vol. 2, p. 254. In actual fact, the opinion of the Hanbali on this matter is so varied. Please refer to al-Mughni, vol. 2, pp 254 ff and al-Furu', vol. 2, p. 304.

<sup>39</sup> Al-Hattab, Mawahib al-Jalil, vol. 2, p. 267, al-Qarafi, al-Zakhirah, vol. 3, p. 79.

<sup>40</sup> The hadith is narrated by al-Bayhaqi and al-Daruqutni.

- 3- Since the concept of khultah signifies the combination of the property, the khultah will have only one haul and one nisab for zakat. This nisab and haul for khultah may be different from the haul and nisab of the individual in the khultah for their other properties that do not fall under the khultah.
- 4- The concept of khultah has been argued by many as the basis for the acceptance of legal entity. Nevertheless, it should be noted that the concept of legal entity may not be applied totally if reference were to be made to the concept of khultah.
- 5- This is because the concept of khultah does not totally negate the individuality of the persons in khultah. This can clearly be seen in their exclusion the property of non Muslim from the khultah in zakat obligation.

## **METHODOLOGY TO PAY ZAKAT FOR BUSINESS CORPORATION.**

In order to make simpler this discussion, it is best for us to view the opinions given by the contemporary jurists concerning the methods of zakat endowment imposed on a legal entity.<sup>41</sup>

They are as follows:

- 1) The obligation of zakat remains restricted to the individuals. Hence, the company is not required to pay zakat on behalf of the shareholders or owners, whichever the case may be. This view in its fact, does not accept the concept of *shakhsiyyah iktibariyyah* in the obligation to pay zakat. Each owner shall give out zakat when he has fulfilled his own nisab and hawl. This is the opinion of some scholars like al-Buti<sup>42</sup>
- 2) The company has taken the nature of *shakhsiyyah iktibariyyah*. Therefore, the company is required to give out zakat as required from an ordinary human being or natural person. In this regards, the personality and individuality of the shareholders who

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<sup>41</sup> For further discussion see <http://www.islam-qa.com/ar/ref/69912>

<sup>42</sup> Al-Buti, al-Shakhsiyyah al-Iktibariyyah, Ahalliyatuhawa Hukm Ta'aluq a;-Zakat Biha

owned the company will be diluted. This opinion is largely attributed to Dr. Shawki Ismail Shahatah<sup>43</sup>.

- 3) Though the company has taken the nature of shaksiyyah iktibariyyah, the obligation to pay zakat as that of an ordinary human being or natural person will only be imposed upon the presence of one of following situations:
- a) There is a law from the country compelling the company to give out zakat.
  - b) The company's article of association incorporates a clause to that effect.
  - c) The general meeting of the Company has determined as such.
  - d) The payment of Zakat by the company is duly authorized by all or some of the shareholders of the company.

As has been put forward by the First Zakat Conference, that:<sup>44</sup>

### أولاً: زكاة أموال الشركات والأسهم

#### زكاة أموال الشركات:

- 1 - تربط الزكاة على الشركات المساهمة نفسها لكونها شخصاً اعتبارياً، وذلك في كل من الحالات الآتية:-
    - أ - صدور نص قانوني ملزم بتزكية أموالها.
    - ب - أن يتضمن النظام الأساسي ذلك.
    - ج- صدور قرار الجمعية العمومية للشركة بذلك.
    - د- رضا المساهمين شخصياً.
- ومستند هذا الاتجاه الأخذ بمبدأ (الخلطة) الوارد في السنة النبوية بشأن زكاة الأنعام، والذي رأت تعميمه في غيرها بعض المذاهب الفقهية المعتمدة والطريق الأفضل وخروجاً من الخلاف - أن تقوم الشركة بإخراج الزكاة، فإن لم تفعل فاللجنة توصي الشركات بأن تحسب زكاة أموالها وتلحق بميزانيتها السنوية بياناً بحصة السهم الواحد من الزكاة.

<sup>43</sup> Shahatah, Shawki Ismail, Muhasabat Zakat al-Mal, 'Iman wa Amalan, 1<sup>st</sup> Edition, 1970, p. 92.

<sup>44</sup> First Zakat Conference, Kuwait, Rejab 29, 1404/ April 30, 1984. See <http://zakat.al-islam.com/def/default.asp?l=arb&filename=Quest/desc/item6/item2/desc2>

First: Zakat of the Company and its Shares.

Zakat of the Company:

i) The duty of to pay zakat on the company (by shares) is imposed on the company itself based on the concept that such company possesses *shakhsiyyah iktibariyyah* (legal entity) in the following situations:

- a) There is a law compelling the company (to give out zakat)
- b) The company's article of association provides for such.
- c) The General Meeting of the company has issued a resolution on that matter.
- d) The shareholders of the company have consented to it.

This view is based on the underlying concept of "khultah" which is found in the hadith regarding the zakat on the livestock, where some schools of law are of the view that this concept should be expanded to include other situations. Therefore, the best way to get out from disagreement of the views (khuruj min al-khilaf), it is recommended that the company pays zakat. And if the company does not pay the zakat, then the Committee proposes that the company to calculate the zakat which the company is obliged to pay and to announce it in their financial statement. The company should also mention the amount of zakat to be paid by each and every share.

The results were similar as to what have been decided in resolution of Majma' al-Fiqh al-Islami:<sup>45</sup>

بعد الاطلاع على البحوث الواردة بخصوص موضوع زكاة أسهم الشركات قرر  
مجلس المجمع ما يلي:

أولاً: تجب زكاة الأسهم على أصحابها، وتخرجها نيابة عنهم إذا نص في نظامها  
الأساسي على ذلك أو صدر قرار من الجمعية العمومية، أو كان قانون الدولة يلزم

<sup>45</sup> Fourth Conference, Resolution no 3, 4/08/88, Jeddah, 18-23 Jamadil Akhir, 1408, 6-11 February 1988

الشركات بإخراج الزكاة, أو حصل تفويض من صاحب الأسهم لإخراج إدارة الشركة زكاة أسهمه.

ثانيا: تخرج إدارة الشركة زكاة الأسهم كما يخرج الشخص الطبيعي زكاة أمواله, بمعنى أن تعتبر جميع أموال المساهمين بمثابة أموال شخص واحد وتفرض عليها الزكاة بهذا الاعتبار من حيث نوع المال الذي تجب فيه الزكاة, ومن حيث النصاب, ومن حيث المقدار الذي يؤخذ, وغير ذلك مما يراعى في زكاة الشخص الطبيعي, وذلك أخذاً بمبدأ الخلطة عند من عممه من الفقهاء في جميع الأموال. ويطرح نصيب الأسهم التي لا تجب فيها الزكاة, ومنها أسهم الخزانة العامة, وأسهم الوقف الخيري, وأسهم الجهات الخيرية, وكذلك أسهم غير المسلمين. ثالثاً:....."

"Following a long deliberation on the papers presented relating to the issue of the obligation of corporate zakat, Majma' al-Fiqh has issued the following resolution:

First: Zakat on the shares of the company is compulsory for the owners, and the company will pay zakat on behalf of the owners if such is stated in the company's article of association, or agreed upon during the company's general meeting, or if there is any existing law requiring the company to pay zakat, or if there is an authorization from the shareholders for the company to pay zakat on their behalf.

Second: The Company should pay zakat the same as any other ordinary individual. This means that the company shall treat the shares of the shareholders as a property owned by one individual upon which zakat is obligated upon the property, and the calculation is like the property is owned by one person in the types of the properties, its nisab or the amount of zakat payable on the property. The same goes to other matters that are material to the obligation of zakat imposed upon an individual person. All the above are based on the concept of "al-khultah" which, as opined by several fiqh jurists, should be applicable in other properties as well (i.e. not only restricted to livestock).

It must, however, be reminded that in obtaining the exact value of property amounting to the prescribed zakat, the calculation must exclude properties that are not subjected to zakat, which

among others, include the government-owned properties, waqf khairi, properties belonging to charitable organizations as well as shares owned by the non-Muslims.

Both of the abovementioned resolutions have almost the same results. The only different is that in the Resolution of First Zakat Conference, it did not spell out clearly on the exclusion of ownership of those who are not obligated to pay zakat as did the Resolution of International Fiqh Academy. Nevertheless, it has been accepted by many that the both resolutions confer the same meaning. These resolutions, despite assuming that the company will pay zakat as legal entity<sup>46</sup>, thus, possesses several basic characteristics of legal entity, it does not wholly dilute the individuality of persons who own the shares in the company. Hence, the Resolution explicitly mentions that the company is to pay zakat on behalf of the shareholders. This is clearly stated in the resolution:

"....تجب زكاة الأسهم على أصحابها, وتخرجها نيابة عنهم...."

"...zakat is obligated upon the shareholders, and the company's management will meet such payment on their behalf ..."

Therefore, the resolution of International Fiqh Academy clearly mention that any ownership that is not subjected to zakat shall be deducted from the total amount of property to be evaluated for the payment of zakat. The Resolution stipulates:

"ويطرح نصيب الأسهم التي لا تجب فيها الزكاة, ومنها أسهم الخزانة العامة, وأسهم الوقف الخيري, وأسهم الجهات الخيرية, وكذلك أسهم غير المسلمين."

"Excluded from the portion of shares taken as a form of property upon which zakat is obligatory, are all the shares that are exempted from the payment of zakat, such as the shares owned by the Public Treasury, waqaf property, property belonging to charitable organizations as well as property owned by the non-Muslims."

ثانيا: تخرج إدارة الشركة زكاة الأسهم كما يخرج الشخص الطبيعي زكاة أموال<sup>46</sup>

Second: The management of the company pays zakat of the shares in the very same manner as a natural person pays zakat on his wealth.

This indicates the fact that although the company will pay zakat as an entity, it does not become an entity in its entirety, without having any regard to the entity of its owners. Hence, the ownership of those which are not subjected to zakat, will not be counted.

For the above reason, Bayt al-zakat of Kuwait in its effort to compile fatwas related to zakat, has inserted further additions which resulted in the Resolution having similar effects to the Resolution of Islamic Fiqh Academy. After mentioning the Resolution of the First Zakat Conference (which does not include the exclusion of zakat from individual that are not obligated to pay zakat), the Fatwa mentions<sup>47</sup>:

هذا و لا زكاة فى الأسهم التى تخص مال الدولة (الخزانة العامة)، أو الأوقاف الخيرية، أو مؤسسات الزكاة، أو الجمعية الخيرية."

"zakat shall not be imposed on shares owned by the State (public treasury), or waqaf Khairi, or zakat institutions, or charitable organizations"

The Accounting, Auditing and Governance Standards For Islamic Financial Institutions issued by Accounting and Auditing Organisation for Islamic Financial Institutions also upholds the same.

This opinion is also the opinion of majority of contemporary scholars like Shaikh al-Darir, Wahbah al-Zuhayli, al-Buti etc, though their arguments are varied. As correctly suggested by al-Qurrahdaghi<sup>48</sup>: "This opinion in actual fact does not recognize the concept of legal entity as envisaged by the legal fraternity, at least in the context of obligation to pay zakat. Nevertheless, they have the right to delegate the obligation to pay zakat to the company, at the outset (in the Article of Association), or after the company has operated (during the general assembly), or by way of delegating that to the management, or due to the obligation imposed upon the company by the state".

<sup>47</sup> See Ahkam wa Fatawa al-Zakat wa al-Sadaqat wa al-Nuzur wa al-Kafarat, 1425 H – 2004M, p. 53, and see Ahkam wa Fatawa al-Zakat wa al-Sadaqat wa al-Nuzur wa al-Kafarat, 1428 H – 2007M, p. 56

<sup>48</sup> Al-QurrahDaghi, al-Shakhsiyyah al-I'tibariyyah wa Ahkamuha fi al-Dawlah al-Mu'asirah.



- 4) The company should pay zakat as if it is an individual. Hence, there is no need to have the four situations for the company to pay zakat. The company should pay zakat in all circumstances except when it has clearly mentioned in its Article of Association that it would not pay zakat<sup>49</sup>. Nevertheless, in paying zakat, the company shall consider all the necessary requirement to pay zakat for individual. Therefore, when the company wants to pay zakat, it should consider all the requirement of an individual to pay zakat like Islam, nisab, al-nama' and complete ownership. Therefore, in the payment of zakat, the company should exclude the ownership of non Muslim, the public ownership etc<sup>50</sup>.

The Sudanese Law on Zakat has also adopted this opinion. It mentions<sup>51</sup>:

" 4 (1) تجب الزكاة علي كل شخص:  
 (أ) سوداني مسلم يملك داخل السودان أو خارجه مالا تجب فيه الزكاة مع مراعاة عدم الازدواجية في دفع الزكاة  
 (ب) غير سوداني مسلم يعمل في السودان أو يقيم فيه ويملك مالا في السودان تجب فيه الزكاة ما لم يكن ملزما بموجب قانون بلده بدفع الزكاة ودفعها فعلا.  
 (2) تشمل كلمة شخص الواردة في بند (1) الأشخاص الاعتبارية علي أن لا يخضع مال غير المسلمين من الأشخاص الاعتبارية للزكاة"

The amendment made to the law in 2001 did not change the content, except that it change the word **بجّت** to **دخّوت**.

<sup>49</sup> He said:

"أن الأصل: أن الزكاة تجب علي الشخصية الاعتبارية نفسها و بالتالي فلا تحتاج إلي وجود نص في النظام، أو إلزام من الدولة، أو نحو ذلك إلا إذا نص النظام الأساسي أن لا تدفع الشركة الزكاة عن موجوداتها"

<sup>50</sup> He said:

"....و من المعلوم في هذا الباب أنه كما يشترط في الشخص الطبيعي أن يكون مسلماً، و أن تتوافر في المال شروط الزكاة من بلوغ النصاب و الملكية التامة، و النماء...، كذلك يشترط في الشخصية الاعتبارية، فمعنى كون الشخصية الاعتبارية مسلمة أن يكون مكوناتها مسلمين، وهنا تخرج أموال غير المسلمين، أو الأموال العامة، وأما الملكية التامة فتطبق علي أموالها بنفس المعايير الخاصة بأموال الشخص الطبيعي، وهكذا الأمر في بقية الشروط."

<sup>51</sup> Article 4 of Sudanese Law on Zakat, Year 1990

In my opinion, it is hard to find any supportive evidence that suggest the company should pay zakat (as an individual) without looking at the shareholders who owned the company. If the analogy is to be made to the concept of khultah, it is even more obvious in considering the shareholders. As what has been discussed before, the khultah of non Muslim is not calculated at all. In other texts, the mentioning was more general. For instance, the author of al-Insaf said<sup>52</sup>:

"إحداهما: قوله: وإذا اختلط نفسان و أكثر من أهل الزكاة في نصاب من الماشية حولا لم يثبت لهما حكم الانفراد في بعضه فحكمهما في الوكاة حكم الواحد"

Nevertheless, I believe that imposing the same amount of payment from non Muslim shareholders can be accepted, especially when the business that the company engaged with is so much related to Islamic business like Islamic banking, finance and takaful, provided that these conditions are fulfilled:

- 1- It has been stipulated that the company will pay an amount of money as payment of zakat. The non Muslim investors are also aware that the company will pay the amount from all the shareholders. If they are agreeable to that condition, they the amount will be paid from the shareholdings as well.
- 2- Or there is a law from the state that obligates the company to pay the amount from all shareholders. For instance, if the state decrees (in its law, like Islamic banking act etc), that as the company involves in a very specific business that relates directly to Islam, it is compulsory for the company to pay zakat (for Muslim) or its equivalent amount (for non Muslim).

Though there is no specific evidence to support this opinion, the practice of ‘Umar can be used as rules of thumb (isti’nasan) to this. Abu ‘Ubayd<sup>53</sup> reported that when Umar intended to take jizyah from the Christians of Bani Taghlib, al-Nu’man bin Zar’ah (or Zar’ah bin al-Nu’man) said to Umar: “Oh Amirul Mukminin, Bani Taghlib are Arab. They are dismayed at the word jizyah. They do not have money. They are people of

<sup>52</sup> Al-Mardawi, al-Insaf, vol. 3, p. 58

<sup>53</sup> Abu ‘Ubayd, Kitab al-Amwal, Dar al-Kutub al-‘ilmiyyah, Beirut, 1<sup>st</sup> Edition, 1986, p. 33

agriculture and cattle and they can be instigated by our enemy. Please do not help your enemy by drifting them away.” Umar then reconciled with them on the condition that they pay double the amount of zakat.” As said by al-Zayla’i, this payment of sadaqah is not jizyah<sup>54</sup>:

واستثنى في البدائع نصارى بني تغلب لأن عمر صالحهم من الجزية على  
الصدقة المضاعفة فإذا أخذ العاشر منهم ذلك سقطت الجزية

Even al-Kasani has gone further by stating that what was taken from Bani Taghlib took the same ruling like zakat. The only different is that the amount is more<sup>55</sup>. He noticed<sup>56</sup>:

".... لأن المأخوذ من بني تغلب يسلك به مسلك الصدقات لا يفارقها إلا في  
التضعيف

“For whatever that was taken from Bani Taghlib, it took the rules of zakat except the additional amount”

To conclude this discussion, I believe that it is allowed for Islamic financial institutions to pay the whole amount as zakat without even deducting the portion of non Muslim. Whilst on the portion of the Muslim the payment is considered zakat, the portion of non Muslim, though does not take the rules of zakat, in term of rewards, but as said by al-Kasani, can still take the rules of zakat in term of distribution, etc. A question that may possess itself here is what is the suitable name to be given to this payment?

In my humble opinion, for the purpose of consistency in the financial reporting and to give the effect of legal entity on the corporate involved, I believe it would not be a problem to take the whole amount and be channeled to zakat channels<sup>57</sup>. Again, the analogy can be made to the story of Bani Taghlib. In another narration by al-Bayhaqi, when 'Umar refuse to accept from them zakat because it is an obligation upon Muslim, they said to him: “Impose whatever you

<sup>54</sup> al-Zayla’I, al-Bahr al-Ra’iq, vol. 2, p. 250.

<sup>55</sup> It should be noted here that this opinion is a matter of dispute among the jurists. Some jurists disagree to this opinion and maintain that the money shall be distributed to others, not the beneficiaries (asnaf) of zakat (see: Abu Ubayd, Kitab al-Amwal, p. 540. I believe whilst this amount can be used for other things as well, there is no harm in distributing the amount to the beneficiaries of zakat.

<sup>56</sup> Al-Kasani, Bada’i al-Sana’I, vol. 2, p.38

<sup>57</sup> Besides that the amount can also be used for other purposes like CSR etc.

want, but under that name, not under the name of jizyah. Umar then agreed and they settled on doubling the amount due from them<sup>58</sup>. In some version, Umar said: "Name it whatever you like"<sup>59</sup>.

Al-Shirazi, when arguing on the additional amount imposed upon Bani Taghlib, rationalizes that the addition is because they have changed the name from jizyah to zakat. Therefore, if they agree on the name jizyah, the additional amount should be deducted<sup>60</sup>. He said:

" لأن الزيادة وجبت لتغيير الاسم، فإذا رضوا بالاسم وجب إسقاط الزيادة"

Al-Nawawi also concurred to this opinion<sup>61</sup>. Here, the jurists agree that the name used is sadaqah (zakat) and not jizyah.

Even some jurists have gone further by stating that the amount taken from them was under the name of zakat. Al-Samarqandi, for example said<sup>62</sup>:

" استدلالا بصدقة بني تغلب لما كان يؤخذ منهم باسم الزكاة"

The same opinion is also narrated from Ibn Qudamah<sup>63</sup>, Ibn Rushd<sup>64</sup>, Ibn 'Abd al-Barr<sup>65</sup>.

In this regards, Abu Ubayd says<sup>66</sup>:

" وأما الآخر ، فإنه حين درأ عنهم القتل ، وقبل منهم الأموال ، لم يجعلها جزية كسائر ما على أهل الذمة ، ولكن جعلها صدقة مضاعفة ، وإنما استجازها فيما

<sup>58</sup> Al-Bayhaqi, al-Sunan al-Sughra, vol. 3, p.142.

<sup>59</sup> See: al-Amwal and its footnote, p. 538. Ibn Hazm upholds that the hadith is weak (al-Muhalla, vol. 6, p. 111). Shaikh Ahmad Shakir refutes this condemnation and says: "This athar is narrated from various chains of narration and we feel comfortable that the hadith has an authentic narration". See: Al-Qardhawi, Fiqh al-Zakat, vol. 1, p. 100

<sup>60</sup> Al-Shirazi, al-Muhazzab, vol.2, p. 251.

<sup>61</sup> See: Al-Nawawi, al-Majmu', vol. 19, pp. 392 ff.

<sup>62</sup> Al-Samarqandi, Tuhfat al-Fuqahak, vol. 1, p. 316

<sup>63</sup> Ibn Qudamah, al-Mughni, vol 10,p.581

<sup>64</sup> Bidayat al-Mujtahid, vol. 1, p. 245

<sup>65</sup> Ibn 'Abd al-Barr, al-Istizkar, vol 1, p. 1610. See also al-Zuhayli, Wahbah, al-Fiqh al-Islami Wa Adilatuhu, vol. 3,p.161

<sup>66</sup> Abu Ubayd, Kitab al-Amwal, p. 540

نرى وترك الجزية مما رأى من نفارهم وأنفهم منها ، فلم يأمن شقاقهم واللاحق بالروم ، فيكونوا ظهيرا لهم على أهل الإسلام ، وعلم أنه لا ضرر على المسلمين من إسقاط ذلك الاسم عنهم ، مع استبقاء ما يجب عليهم من الجزية ، فأسقطها عنهم ، واستوفاهما منهم باسم الصدقة حين ضاعفها عليهم ، فكان في ذلك رتق ما خاف من فتقهم مع الاستبقاء لحقوق المسلمين في رقابهم . وكان مسددا وأما الآخر ، فإنه حين درأ عنهم القتل ، وقبل منهم الأموال ، لم يجعلها جزية كسائر ما على أهل الذمة ، ولكن جعلها صدقة مضاعفة ، وإنما استجازها فيما نرى وترك الجزية مما رأى من نفارهم وأنفهم منها ، فلم يأمن شقاقهم واللاحق بالروم ، فيكونوا ظهيرا لهم على أهل الإسلام ، وعلم أنه لا ضرر على المسلمين من إسقاط ذلك الاسم عنهم ، مع استبقاء ما يجب عليهم من الجزية ، فأسقطها عنهم ، واستوفاهما منهم باسم الصدقة حين ضاعفها عليهم ، فكان في ذلك رتق ما خاف من فتقهم مع الاستبقاء لحقوق المسلمين في رقابهم . وكان مسددا"

It seems that Umar (rd) took from them the amount under the name of sadaqah (zakat).

Though some jurists tend to limit this application on the case of Bani Taghlib only<sup>67</sup>, I believe there is no harm of extending the same principle to the payment of zakat on Islamic financial institutions, simply because there is a need for that, and there is no harm in doing so.

Some contemporary jurists have also arrived at this conclusion like Yusuf al-Qardhawi<sup>68</sup>, al-Qurrahdaghi<sup>69</sup>, Dr Hannan ‘Abd al-Rahman Abu Mukh<sup>70</sup>. The writer says<sup>71</sup>:

<sup>67</sup> For example, Ibn Rushd maintains that this ruling should be confined to Bani Taghlib only, for according to him, to impose such payment in that manner (additional amount) to a non Muslim is against the practice of Shariah. See: Ibn Rushd, Bidayat al-Mujtahid. In my opinion, the ‘Umar’s action on imposing sadaqah on Bani Taghlib is not only to be limited to Bani Taghlib. Whenever the need arises, the government can also apply the same.

<sup>68</sup> Fiqh al-Zakat. It should be noted that Shaykh Yusuf al-Qardhaqi did not directly discuss this matter. He did not discuss the issue of al-shakhsiyyah al-I’tibariyyah in his important book, fiqh al-zakat. Nevertheless, he did discuss the imposition of the equivalent amount of zakat to be paid by non Muslim under different name. He is of the opinion that nothing wrong in Shariah to impose such a payment. He referred extensively to the story of Bani taghlib in supporting his argument on that. If we were to apply the same on our case, we can use the same argument. Whilst zakat is imposed on the Muslims shareholders, the same amount is also imposed on the non-Muslim shareholders, by whatsoever name. To ensure consistency in the financial report and the give the effect of shakhsiyyah I’tibariyyah, I believe there is no harm to use only one term, i.e., zakat in the financial reporting for both the ownership of the Muslim and the non Muslims alike.

<sup>69</sup> Al-Qurrahdaghi, al-Syakhsiyyah al-I’tibariyyah wa Ahkamuha fi al-Dawlah al-Islamiyyah.

<sup>70</sup> Abu Mukh, Hannan ‘Abd al-Rahman, Zakat al-Sharikat fi al-Fiqh al-Islami, Dar al-Ma’mun, Amman, 1<sup>st</sup> Edition, 2007, p. 137.

"علي أن للشركة التي تريد أن تزكي أموالها أن تضع ضمن شروط عقد المساهمة معها أنها تأخذ مقدار الزكاة من جميع أموال المساهمين في الشركة، وعندئذ إذا وافق المساهم غير المسلمين علي هذا الشرط فلا حرج أن تؤخذ من المساهمين غير المسلمين ولا حرج أن تصرف في مصارف الزكاة، وإن لم تسم الزكاة بالنسبة لهم شرعا".

### **THIRD ISSUE: INCOMPLETE OWNERSHIP IS NOT SUBJECTED TO ZAKAT UNDER THE CORPORATE ZAKAT?**

In the previous discussions, among the issues that have been highlighted, include the fact that several types of ownerships are excluded from the payment of zakat, for they lack the fundamental conditions of zakat. Among others, is the ownership of the non-Muslims (payer must be a Muslim), properties owned by the State (Public Treasury), waqaf property, property owned by charitable organizations, and etc (due to the requirement of complete ownership (al-milkiyyah al-tammah)

Generally, ownerships in Islam are divided into two categories i.e. private ownership (which can be subdivided into milkiyyah tammah and milkiyyah naqisah) and public ownership (al-milkiyyah al-'Amah).

Public ownership refers to an ownership wherein the benefits are used for public purposes or the welfare of the State in general, and are not categorized as personal or individual rights. It follows that no individuals may claim the ownership over such properties. This is in accordance with the interpretation made by Imam al-Sharqawi on public property as the *mubham* property<sup>72</sup>. For example, Qanun Muamalat Maliyyah Imarati defines public property as<sup>73</sup>:

<sup>71</sup> Ibid

<sup>72</sup> see Hashiyah al-Sharqawi 'Ala al-Tahrir, 1, 332. The writer is of the view that the underlying meaning here is *mubham* from the angle of ta'yin (specific), despite the fact that it is clear (mu'ayyan) from its characteristics (awsaf).

<sup>73</sup> Article 25, Qanun a-Muamalat al-Maliyah al-Imarati.

"وهو كل شيء تملكه الدولة أو أي شخص اعتباري آخر، ويكون مخصصا للنفع العام  
بالفعل أو بمقتضى القانون، فلا يجوز التعامل فيه، ولا يجوز الحجز أو وضع يد  
الغير عليه"

"Are all things owned by the government or other legal entities, and such are dedicated for the public benefit (either in reality or via the provisions of the law). These properties cannot be transacted. They also cannot be owned or controlled."

In general, zakat shall not be imposed on public ownership and charitable organizations. It is stated in Matalib Uli al-Nuha<sup>74</sup>:

"ولا تجب زكاة في مال فيء، ولا في خمس غنيمة، لأنه يرجع إلي الصرف في  
مصالح المسلمين، ولا في نقد موصي به في وجوه البر، أو موصي ليشترى به  
وقف؛ لعدم تعيين مالكة"

"No zakat is obligated upon mal fay' (the booty surrendered by the enemy without actual fighting), the same goes to khums ghanimah (property which has been acquired from non-Muslims after the war) for they are used for the benefit of Muslims as a whole. Similarly, no zakat is imposed on money bequeathed to charities or for the purpose of purchasing waqaf properties, because they do not fall under the ownership of any particular individual."

It is clear from the above text, that, the primary reason why zakat is not obligated over the abovementioned properties lies in their lack of 'perfect ownership' (al-milk al-tam li al-mu'ayyan) which is the main condition required of properties before submitting to zakat. Nevertheless, it shall be reminded that, the understanding on the general nature of property is not static but instead it is dynamic, and changes with the change of time, place and practice (custom). It is the responsibility of the jurists to find out whether the properties that are categorized under 'public property' are really public ownership and consequently shall not be subjected to zakat. Or are there circumstances in which, though the properties belongs to the

<sup>74</sup> Matalib Uli al-Nuha, 2, 16 onwards.

public, zakat should still be paid from that properties. Among the modern properties that have been disputed to either belong under the tag of public property or otherwise, include:

#### 1. Ownership of the Public Treasury and Government:

Generally, all properties that belong to the government or its institutions are not subjected to zakat. This is because there is no individual ownership in such properties. The same has been clearly expressed by Prof. Dr. Wahbah Zuhayli<sup>75</sup>:

"وذلك مثل موارد الدولة من أراضيها وعقاراتها الاستثمارية وشركاتها الصناعية، والزراعية والتجارية، والضرائب على القطاع الخاص، ورسوم الجمارك وغيرها من الرسوم التي تفرض على الخدمات وضرائب الدخل والمهن الحرة"

"Such are like the resources (pecuniary) of the State, including lands and real properties that are used for investment, manufacturing companies, agriculture and business entities. The same goes to the taxes collected from corporate entities, the customs taxes as well as other kinds of taxes that are imposed on services, including the income tax and individual taxes"

I think if the properties of the government are not used in business to gain profit, that properties should not be subjected to zakat.

#### 2. Government Fully-Owned or Partly-Owned Companies:

The issue relevant here, is the clashing of two essential requirement of zakat. On one hand, zakat shall not be imposed on such companies because they are not privately owned companies which lack the requirement of a perfect ownership. On the other, they are categorized under the types of property that are subjected to zakat for the nama' (potential growth) characteristics they possess. Hence, what is the view of the Shariah with regard to the imposition of zakat obligation unto this type of corporate companies? Are these companies taken as public owned companies by the government and thus exempting them from zakat, or are they regarded as ownerships that are subjected to the payment of zakat? The latter

<sup>75</sup> Al-Zuhayli, Wahbah, Zakat al-Mal al-'Am, Abhas wa 'Amal al-Nadwah al-Thaminah li Qadhaya al-Zakat al-Mu'asirah, Qatar, 23-26 Zul Hijjah 1418 – 20-23 April 1998, p. 350



approach will broaden the funds of zakat for the sake of public interest. Or is there a need of an ijtihad to rule such companies as a hybrid or cross between public companies and the corporate companies that are succumbed to the obligation to pay zakat.

There are two views related to the above:

The first view states that although the government-owned companies are formed for profit, as long as the profit is submitted back to the government either directly or indirectly, zakat should not be imposed on such companies. If the government and private sector joint forces or co-create certain business, the part owned by the government should be excluded from the whole part that is to be subjected to zakat. The fact that the companies are profit-based, do not change their status as the properties belonging to the government. Such is due to the fact that the profits are generated from the government's own property hence, exempting them from the imposition of zakat as based on the jurisprudence method of: "التابع تابع"<sup>76</sup> and also لا التابع<sup>77</sup>. This is the view accepted by Abu Hanifah, Abu Yusuf, Malikiyyah, Syafi'iyyah, and Hanbaliyyah in general. The same is also the view of the contemporary jurists, and with regard to the government-owned companies, Prof. Dr. Wahbah al-Zhayli expressed that<sup>78</sup>:

"وبما أن هذه الشركات مملوكة للقطاع العامة أو الدولة، فهي مال عام، لا تجب فيه الزكاة، وإن حث الربح، لأن النماء أحد شروط الزكاة، وإن توافر، فإن شرط كون المال المزكي مملوكاً لمالك معين لم يتوافر....."

"These companies probably belong to the public sector or the State. Hence, they are included under the category of public property and such, are not subjected to zakat despite being based

<sup>76</sup> Al-Zuhayli, Wahbah, *Hukm al-Zakat fi Amwal Manshaat al-Qita' al-Amm al-Hadifah li al-Ribh wa Hukm Zakat al-Sharawat al-Batinah wa al-Sanadat al-Hukumiyyah*, Abhas wa 'Amal al-Nadwah al-Thalithat 'Ashara li Qadhaya al-Zakat al-Mu'asirah, Khourtum, Sudan, 8-11 Safar 1425/ 29 March - 1 April 2004, p. 234-236. See also, Shubayr, Muhammad 'Uthman, *Hukm al-Zakat fi Amwal Manshaat al-Qita' al-Amm al-Hadifah li al-Ribh wa Hukm Zakat al-Sharawat al-Batinah wa al-Sanadat al-Hukumiyyah*, Abhas wa 'Amal al-Nadwah al-Thalithat 'Ashara li Qadhaya al-Zakat al-Mu'asirah, Khourtum, Sudan, 8-11 Safar 1425/ 29 March - 1 April 2004, p. 273.

<sup>77</sup> Al-Zarakhsi, al-Manthur fi al-Qawa'id, vol. 1, p.234

<sup>78</sup> Wahbah al-Zuhayli, *Zakat al-Mal al-'Am*, m/s 352

on profit. This is because, even if nama' which is made a condition fundamental to the imposition of zakat (and is duly fulfilled by the companies), the companies do not satisfy certain requirements of ownership."

This is the opinion of the vast majority of classical jurists such as Abu Hanifah, Abu Yusuf, the Malikis, the Shafi'is and the Hanbalis<sup>79</sup>.

Al-Sarakhsi, after citing the opinion of Muhammad ibn al-Hasan al-Shaybani who imposed zakat on kharaj if it used to buy sheep for business<sup>80</sup>:

"وفي هذا الفصل نظر: فإن الزكاة لا تجب إلا باعتبار الملك والمالك، ولهذا لا تجب في سوائم الوقف، ولا في سوائم المكاتب ويعد في إيجابها صفة الغنى للمالك، إلا أن يكون مراده أنه اشتراها لنفسه حينئذ تجب عليه الزكاة باعتباره وجود المالك وصفه الغنى له)"

Another quotation from al-Ramli<sup>81</sup>:

"وقوله<sup>82</sup>: "أهل الزكاة" علي أنه قيد في خليطين، فلو كان أحد المالين موقوفاً أو لزمى أو مكاتب أو لبیت المال لم تؤثر الخلطة شيئاً، بل يعتبر نصيب من هو من أهل الزكاة؛ إن بلغ نصاباً زكاه زكاة المنفرد، وإلا فلا زكاة عليه"

There are a lot of arguments in supporting this opinion.

The second view provides that zakat can still be imposed on the public properties that are aimed at gaining profits. Such is the view put forward by Muhammad Ibn Al-Hasan Al-Shaybani<sup>83</sup>. He said:

فإن اشترى بمال الخراج غنماً سائمة للتجارة، وحال عليها الحول، فعليه فيه الزكاة. وهذا بخلاف ما إذا اجتمعت الغنم المأخوذة في الزكاة في يد الإمام وهي

<sup>7979</sup> See al-Sarakhsi, al-Mabsut, vol. 3, p. 52, al-Dasuqi, Hashiyah al-Dasuqi, vol. 1, p.487, al-Sharbini, Mughni al-Muhtaj, vol. 1, p.412, Matalib Uli al-Nuha, vol. 2, p. 16

<sup>80</sup> Al-Sarakhsi, al-Mabsut, vol. 3, p. 52

<sup>81</sup> Al-Ramli, Nihayat al-Muhtaj, vol. 3, p. 59

<sup>82</sup> Al-Nawawi

<sup>83</sup> Al-Sarakhsi, al-Mabsud, 3/52

سائمة فحال عليها الحول؛ لأن هناك لا فائدة في إيجاب الزكاة، فإن مصرف الواجب والموجب فيه واحد. وهنا في إيجاب الزكاة فائدة، فإن مصرف الموجب فيه المقاتلة، ومصرف الواجب الفقراء، فكان الإيجاب مفيداً فلهذا تجب الزكاة

This opinion is also shared by Dr. Muhammad Nu'aym Yasin<sup>84</sup>, Dr. Rafiq al-Misri<sup>85</sup>, Dr 'Abd al-Hamid al-Ba'li<sup>86</sup>, Dr. Hasan al-Bily<sup>87</sup>, Dr. Muhammad Sir al-Khatm<sup>88</sup> and Dr. Muhammad bin 'Aqil<sup>89</sup>. Similarly, Article 37 of Qanun Zakat Sudan states that public properties are exempted from the payment of zakat only when such properties are not used for profit gaining. If the properties are used for the purpose of generating profit, that properties are subjected to zakat.

One of the interesting arguments presented is that the imposition of zakat will increase the amounts or value that will be channelled to needier people whilst the public properties, in the general sense, are used for the benefits of the public as a whole. By rendering the payment of zakat of this type of properties as obligatory, the zakat funds will be widened, making a more specific help to the needy possible<sup>90</sup>. In furtherance to that, it can also be argued that when the government has set up such companies and when they received the title of 'legal entity', the companies have become distinctive companies altogether. Their positions, then, are akin to those of ordinary corporate companies. It seems unfair to impose the payment of zakat on private companies whilst exempting the same from companies with the same modes and nature of business.<sup>91</sup>. It seems that the notion of al-Shaksiyyah al-I'tibariyyah has been used as one of the arguments.

<sup>84</sup> See his commentary in Abhas wa 'Amal al-Nadwah al-Thaminah li Qadhaya al-Zakat al-Mu'asirah, Qatar, 23-26 Zul Hijjah 1418 – 20-23 April 1998, p. 420-421

<sup>85</sup> See his commentary in Abhas wa 'Amal al-Nadwah al-Thaminah li Qadhaya al-Zakat al-Mu'asirah, Qatar, 23-26 Zul Hijjah 1418 – 20-23 April 1998, p. 422-424

<sup>86</sup> See his commentary in Abhas wa 'Amal al-Nadwah al-Thalithat 'Ashara li Qadhaya al-Zakat al-Mu'asirah, Khourtum, Sudan, 8-11 Safar 1425/ 29 Mac - 1 April 2004, p. 310.

<sup>87</sup> See his commentary in Abhas wa 'Amal al-Nadwah al-Thalithat 'Ashara li Qadhaya al-Zakat al-Mu'asirah, Khourtum, Sudan, 8-11 Safar 1425/ 29 Mac - 1 April 2004, p. 317-318

<sup>88</sup> See his commentary in Abhas wa 'Amal al-Nadwah al-Thalithat 'Ashara li Qadhaya al-Zakat al-Mu'asirah, Khourtum, Sudan, 8-11 Safar 1425/ 29 Mac - 1 April 2004, p. 320-321

<sup>89</sup> See his commentary in Abhas wa 'Amal al-Nadwah al-Thalithat 'Ashara li Qadhaya al-Zakat al-Mu'asirah, Khourtum, Sudan, 8-11 Safar 1425/ 29 Mac - 1 April 2004, p. 322-323

<sup>90</sup> Al-Kasani, Bada'i al-Sana'i, 2/ 68

<sup>91</sup> Commentary of Dr. Hasan al-Bily, p. 317-318

The 13<sup>th</sup> Nadwah Zakat Mu'asirah has arrived at the following Resolutions<sup>92</sup>:

1- يندرج تحت مسمى المال العام أنواع منها:  
(أ) المال المخصص لتقديم خدمات ومنافع يحتاجها المجتمع دون استهداف الربح، وسد كل عجز يتعرض له هذا النوع من المال العام وهذا النوع لا تجب فيه الزكاة

(ب) المال العام الذي يستثمر ليدر ربحاً عن طريق مؤسسات عامة مملوكة بالكامل للدولة، يراد لها أن تعمل على أسس تجارية و أن تحقق أرباحاً، وهذا النوع غير خاضعاً للزكاة في رأي الأكثرية، مع وجود رأي آخر يرى أن هذا المال يخضع للزكاة وهذا ما ذهب إليه الإمام محمد بن الحسن الشيباني، صاحب أبي حنيفة.

(ج) إذا اختلط المال العام مع مال الأفراد في مؤسسة هادفة للربح يكون نصيب المال العام خاضعاً للزكاة مثل المال الخاص، وهناك رأي بعدم وجوب زكاة المال العام في مثل هذه الخلطة.

"Included under the category of public property are:

- 1- Public property which is used to be of service and provides benefits to the public at large, without having the slightest aim to generate income from it. This type of property is not be subjected to zakat.
- 2- Public property that is invested in order to gain profit through subsidiaries that are fully owned by the government. These subsidiaries are aimed for business and generation of profit. Jurists, in the majority, are of the view that this type of property is not subjected to zakat. Nevertheless, there is another view that holds otherwise. The latter opinion is expressed by Imam Muhammad bin Hasan al-Shaybani, the disciple of Imam Abu Hanifah.

<sup>92</sup> Al-Bayan al-Khitami, wa al-Fatawa wa al-Tawsiyyat, al-Nadwah al-Thalithat 'Ashara li Qadhaya al-Zakat al-Mu'asirah, Khourtum, Sudan, 8-11 Safar 1425/ 29 March - 1 April 2004, p. 414

- 3- When public property is combined with the private property in a company whose main objective is to obtain profit, the public property will then be subjected to the obligation of zakat, as does a private property. However, some jurists insisted that the imposition of zakat shall not be placed upon such kind of property, despite its mixed nature.”

It follows that several issues have been raised from this Resolution:

- 1- It deems the public property that is channelled to the subsidiaries fully owned by the government as exempted from the obligation of zakat.
- 2- Nonetheless, public property that is channelled with business intention and aimed as investment in the concerned corporate company, which is not wholly owned by the government, is still subjected to the payment of zakat for such corporate company possesses its own legal entity. This fatwa, however, is in conflict with the Resolution issued Majma' al-Fiqh al-Islami that states:

" ويطرح نصيب الأسهم التي لا تجب فيها الزكاة, ومنها أسهم الخزانة العامة, وأسهم الوقف الخيري, وأسهم الجهات الخيرية, وكذلك أسهم غير المسلمين."

“Excluded from the portion of shares taken as a form of property upon which zakat is obligatory, are all the shares that are exempted from the payment of zakat, such as the shares owned by the Public Treasury, waqaf property, property belonging to charitable organizations as well as property owned by the non-Muslims.”

And also the AAOIFI’s accounting standard where it has also excluded the equity owned by governmental and endowment bodies<sup>93</sup>.

The question to be asked, thus, is this; on what ground is zakat exempted from being imposed on public property if the company established is fully owned by the government but rendered obligatory upon the same property which is combined with private property in a corporate company that is not owned by the government? Is it due to the existence of the characteristics of legal entity in an integrated company or institution but not the one which is fully owned by

<sup>93</sup> See the way zakat accounting is made at p. 291, Accounting , Auditing and Governance Standards For Islamic Financial Institutions, AAOIFI, 1431 H- 2010.

the government? Is it correct to claim as such? Does not a corporate company assume the status of legal entity upon its registration, regardless of whether it is owned by another entity, which in this case is the government? The next question is, if the integration of the public and private properties has caused the creation of a separate legal entity, then what is the position as regards to the merger of capitals belonging to Muslims and capitals owned by the non-Muslims in a particular institution?

According to the personal view of the writer, it cannot be denied that based on the arguments and evidence put forth by the opinion which says that zakat shall not be obligated upon the public ownership as well as the governmental ownership, which are established to gain profit, either it being a company fully owned by the government or an integrated company, is the stronger opinion between the two. In fact, this view is parallel to the Resolution of Majma' al-Fiqh al-Islami. Having said so, it is also the opinion of the author, that the argument forwarded by those whom propose that zakat shall be imposed on such kind of property without having regard to whether the investment is made via company that is fully owned by the government or through mutually owned or integrated company, is not void of rationale.<sup>94</sup> In fact, the latter approach has a wide range of maslahah or public benefits, especially in a country like Malaysia. Without arguing further into this matter, the author submits that although this kind of property, when viewed from the overall ruling (hukm kulliy), is not subjected to the payment of zakat, but if viewed from the maqasidic context, it is more proper to impose the obligation of zakat on the companies owned by government and on mutual investments made by the government in corporate companies. The author provides that such method is based on istihsan, within the category of "istihsan juz'i min hukm kulliy". It is also a humble opinion of the writer that the above proposition is a kind of maslahah or public interest that is the basis for obligating the payment of zakat over the abovementioned entities<sup>95</sup>. The same has been the reason for Sudan to impose the obligation of zakat on such entities.<sup>96</sup> Among the most notable maslahah that can be gained from imposing zakat on such

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<sup>94</sup> From Shariah perspective, it is called as 'wajih'.

<sup>95</sup> For further discussion on zakat implements on debt and mal mustafad, please refer to Hasan, Aznan, *Zakat 'arud al-tijarah wa al-Sina'ah wa Tatboqatiha alMu'asirah fi Malizia*, Risalah Master submitted to Faculty of Dar a-'Ulum, University of Cairo, 1998.

<sup>96</sup> Refer to the comments by Dr. Aisyah al-Ghabsyawi regarding to the context in Sudan in *Abhas wa 'Amal al-Nadwah al-Thalithat 'Ashara li Qadhaya al-Zakat al-Mu'asirah*, Khourtum, Sudan, 8-11 Safar 1425/ 29 Mac - 1April 2004, p. 333- 334

entities is that the benefit of the zakat payment will be enjoyed directly by the needy people under zakat beneficiaries. Anyway, the benefit of the public property is to be distributed to the public. By imposing zakat on these entities, the proceeds will still be used for the public. In fact, the distribution of the money under zakat might be better for the target group is really people who are in needs of help. By imposing zakat on these entities, we have in fact channeled the money to the public, maybe in a better manner than the distribution via other modes.

It should be emphasized again that for this opinion to be applied, these conditions need to be fulfilled:

- 1- It has been stipulated that the company will pay an amount of money as payment of zakat. All the shareholders are also aware that the company will pay the amount from all the shareholders; or
- 2- There is a law from the government that obligate the company to pay the amount from all shareholders. For instance, if the state decrees (in its law, like Islamic banking act etc), that as the company involves in a very specific business that relates directly to Islam, it is compulsory for the company to pay zakat.

In this case, the company will pay zakat on the whole shareholding. In term of name, I do not see any problem for the word zakat to be used and appeared on the financial report of the companies.

## 2) Ownership of waqf

There are some differences of opinion among the jurists in determining whether a waqf property falls under the category of public property that subsequently be exempted from the payment of zakat. Waqf property, in general, can be divided into three types which are; waqf ahli (zurri), waqf khairiy dan waqf mustaraq.<sup>97</sup> Generally speaking, majority of

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<sup>97</sup> Hasan, Aznan, *Revitalising Waqf Ahli in Modern Time: A prospect For Development*, Power Point Presentation, Singapore International Waqf Conference, 6-7 March 2007, The Fullerton Hotel, Singapore.

jurists maintain that zakat shall be imposed on waqf zurri for the benefit to be derived by the waqf are meant for individuals. This is the opinion of majority of jurists (including Syafi'I, Hanbali, Ibn Rushd al-Hafid<sup>98</sup> as well as Ibn Abbas, Abu Hurayrah, Ibn Umar, and Ibn Shihab al-Zuhri<sup>99</sup>), except that of the Hanafis who maintain that zakat is not to be imposed on all waqf, be it khairiyah or ahli<sup>100</sup>.

The majority of jurists argued that in the case of waqf ahli, the ownership is certain as the benefit is only to be derived by them. Therefore, we should consider as if they own the business. If the waqf is used for business, then zakat is imposed upon these shareholdings. Therefore, if a company is own, among others by waqf ahli (or alike like Foundation (Yayasan)<sup>101</sup>, hence zakat should be imposed on this ownership. The same ruling applies for ownership of Co-operative, Tabung Haji and Provident Fund Bodies such as Employees Provident Fund (Kumpulan Wang Simpanan Pekerja) on the amount that they use for investment (such as when they use the money to own, wholly or partly Islamic financial Institutions).

With regards to zakat on shareholding owned by waqf khairiyah, the ownership of waqf khairiyah is different from ownership of non-Muslims or ownership of the Government. In ownership of non Muslims, the shareholders are the owners of the shares. Therefore, if they agree to give the amount, they are agreeing to what is their right to do. As for the waqf institutions, the mutawallis, in actual fact are not the owner of the properties. They are just administrating the properties on behalf of others. So, they cannot deal with the properties in a way that it will reduce the amount of waqf, except by what has been specified in the waqf.

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<sup>98</sup> Ibn Rush, Bidayah al-Mujtahid, 1, 239

<sup>99</sup> Abu Ubaid, al-Amwal, p. 495-496.

<sup>100</sup> Ibn Qudamah, al-Mughni, vol. 5, p. 233, al-Nawawi, al-Majmu', vol. 5, p. 340, al-Kasani, Bada'i al-Sana'i, vol. 2, p. 88, Al-Mardawi, al-Insaf, vol 3, p. 14 ff, al-Buhuti, Kashshaf al-Qina', vol. 2, p. 196

<sup>101</sup> From legal perspective in Malaysia, individual waqf could be formed with a formation of society (society, board of trustees or cooperation). Refer Hasan, Aznan, *Revitalising Waqf Ahli in Modern Time: A prospect For Development*, Power Point Presentation. If these societies are formed and their requirements are similar to the individual waqf, hence it will be subjected to zakat had the requirements fulfilled.



Waqf khairy is also different from the ownership of the government. As has been discussed before, it is the responsibility of the government to allow the people to benefit from its properties and the beneficiaries of zakat are part of this people. Waqf khairy on the other hand, though meant for public, yet its benefits are specified to certain group of people. It is not the right of the mutawalli to give anything of the properties to anybody who is not the beneficiaries of the waqf.

The majority of jurists uphold that zakat is not to be imposed on waqf khairy except that of Malikis<sup>102</sup>. This is based on their opinion that waqf properties are not considered to exit the ownership of the waqif<sup>103</sup>.

Based on the arguments presented in this case, the writer still believes that waqf property shall not be subjected to zakat if it is waqf khayri. To impose the payment of such amount on the waqf like the ownership of the government is also not possible, for zakat beneficiaries may not be the waqf beneficiaries. The writer could not find any opinion that allow for the mutawalli to give away some of the benefit to other than the waqf beneficiaries. If only that we find this argument, then we can impose the payment on the waqf institutions the way we impose on the government ownership.

It may also be argued that based on the opinion of those who impose zakat on the government's properties if the properties were to be used for business, we should also impose zakat on waqf institutions if it involves in business by using the waqf's money, for the concept of nama' is also present here. If this opinion were to be applied, I believe the previous two conditions must present.

#### **FOURTH ISSUE: THE IMPOSITION OF ZAKAT ON CORPORATE COMPANIES BASED ON THEIR BUSINESS ACTIVITIES**

In the collection of zakat, only property which is deemed halal, from the Shariah's standpoint will be subjected to zakat. Non-halal property is not only prohibited from being taken as zakat

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<sup>102</sup> Ibn Rushd, *Bidayat al-Mujtahid*, vol. 2, p. 583

<sup>103</sup> For further elaboration of this issue, please refer to *al-Mudawwanahal-Kubra*, vol 1, p. 344

but the prescribed hukm (ruling) is also haram.<sup>104</sup> Such property, if taken, must be returned to the payer or initial owner in the case that the owner is determinable. If the owner is not known, the property must be channelled to charitable organizations in order to purify or avert oneself from the haram property (takhlis al-nafs min mal al-haram), and not to be given on the basis of zakat or charity.

It is an undisputed fact that under certain circumstances, the nature of 'haram' in a property is apparent. For example, the means gained from interest is clearly forbidden. The same goes to the profit of gambling. However, more often than not, the said characteristic or nature of "haram" is not evident, due to the ambiguity between halal and haram contained in most of today's professions. This is viewed from an individual perspective.

The above situation becomes more complicated when viewed from the perspective of a corporate company. What is the method to determine or ascertain that the corporate company is in line with the Shariah before authorizing the collection of zakat from them? Based on the author's limited knowledge, there exists no guideline in assessing whether a particular company that is listed adheres to the rulings of the Shariah or otherwise. There are various methodologies in this aspect.<sup>105</sup> Perhaps this variety of methodologies may be used as the basis in providing some guidelines for both individuals as well as the corporate entities as regards to matters related to the collection of zakat.

Generally speaking, if zakat is to be imposed at the company's level and on the whole shareholding, the calculation of zakat shall exclude percentage of income that comes from non Halal activities. In this regards, al-Qurahdaghi mentions:

"أما إذا كانت أنشطتها و مكوناتها حراما مثل البنوك الربوية، و شركات التأمين التجاري، و الشركات التي تتعامل في الخمر، و القمار، و نحوها من المحرمات فإن الزكاة تجب في الحلال منه، و لا تحب في الحرام، لأنه علي حازه أن يتخلص منه..."

<sup>104</sup> Refer to Fatwa Mukhtamar Zakat al-Awwal, Kuwait. See also Fatawa al-Nadwah al-Rabi'ah li Qadhaya al-Zakat al-Mu'asirah, Bahrain, 17 Syawal 1414 – 29 March 1994.

<sup>105</sup> Refer to: Hasan, Aznan: Islamic Capital Market and Stock Screening Process as implemented worldwide. Power Point Presentation

## **FIFTH ISSUE: CHALLENGES FACED IN THE IMPOSITION OF CORPORATE ZAKAT**

Among the challenges that are related to the compliance of corporate zakat is the obligation in the payment of corporate zakat. It is within the writer's observation that the obligation to pay zakat is more focused on individuals.<sup>106</sup> Such is obvious when the penalty provided by each State is looked at. Even so, the penalty imposed on an individual who fails, without any valid reason, or simply refuses to pay zakat is too low. In many situations, the said offence centres on the refusal to pay zakat on agricultural products.<sup>107</sup> Today, despite the increment in the amount of zakat and fitrah collected by every State, there are still many Muslims, either individuals or companies that do not meet the payment of zakat required of them. The reality is, even though adherence to the law plays an important role in ensuring that Muslims pay out zakat, looking at the deficiency in the execution and enforcement of the law that is taking place today, self-conscience has become a more effective tool than the legal abidance. Usually, the payment of zakat is entirely dependent on the faith of the payer, and not the legal enforcement. Therefore, greater effort must be taken to ensure that the enforcement of zakat is duly executed as well as reminding the Muslims of the obligation and the importance of zakat in today's world.

Having said so, the obligation of zakat imposed on corporate companies shall not be taken lightly. The question that is too intricate and complex to be unravelled in such a short writing

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<sup>106</sup> In order to get further details on the management of zakat and the rulings imposed on the liability of non-payment of zakat or giving zakat not through the appropriate channel. Refer Hasan, Aznan, Undang-undang Pentadbiran Zakat di Malaysia, Siri Perkembangan Undang-undang di Malaysia, Vol. 12: Pentadbiran Undang-undang Islam di Malaysia, Dewan Bahasa dan Pustaka.

<sup>107</sup> See some part of the charges and sentences of punishment in Mohd. Ali bin Haji Baharum, Bidang Kuasa Pungutan Zakat: Kajian Kepada Enakmen Negeri-negeri Di Malaysia Barat, in Ibidem (ed.), p. 38-41, Abdullah Alwi Hassan, The Administration of Islamic Law in Kelantan, p. 351-353. The examples set therein shows triable charge with regard to the refusal in giving particulars as to the proceeds of paddy planting or pertaining to the zakat fitrah.

is, how can this be done? How can corporate parties be obliged to pay zakat when the incentives for the payment of zakat between individuals and companies vary?<sup>108</sup>

One possible method that may be thought of is, by inserting the obligation of zakat in the Article of Association of the company, whose majority's ownership is vested in the Muslims, or by proposing the same to the company's General Meeting.<sup>109</sup> Through this, the investors as well as the interests' holders of the said company, are able to ensure that the company pays off its corporate zakat before the profit, in any kind or form, is given to the persons duly entitled. Also among other things to be considered is to give rebate on the payment of zakat b corporate the way it is done with regards to individual. As for the time being, the payment of zakat is considered as part of expenses that are tax deductible.

## CONCLUSION

The previous discussion attempted at exploring the concept of al-Shaksiyyah al-I'tibariyyah in Islamic law and how this will have its effect on the obligation to pay zakat. After long deliberation, I conclude this discussion in some bullet points.

- 1- Islamic law does recognise the concept of Shakhsiyyah I'tibariyyah
- 2- Nevertheless, in the obligation to pay zakat, the imposition of zakat is still largely vested with the obligation of the shareholders of the company. Yet, the company can still pay zakat at company's level provided that the company is authorised to do so (by way of its Articles of Association or decision made in the general assembly) or because the law dictates as such.

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<sup>108</sup> See Section 44 (11A), Income Tax Act 1967. See also comment on the amendment made to the section in the year 2005 in *2005 Budget Commentary and Tax Information*, published by Malaysian Institute of Taxation, Malaysian Institute of Accountants and The Malaysian Institute of Certified Public Accountants, 2004. p. 7

<sup>109</sup> This is among proposal suggested by the Accounting and Auditing Organisation for Islamic Financial Institution (AAOIFI) centralized in Bahrain and it is practiced by most of the Islamic banks including the ones in Malaysia.

- 3- This imposition to pay zakat at company's level shall include all shareholders, including ownership of non-Muslim, government-owned shares, shares owned by waqf ahli. With regards to waqf khairy, though the writer incline towards not including this type of ownership from the zakat, it should be noted that some jurists have suggested that the zakat be imposed on it as well. If this opinion were to be adopted, then all shareholdings shall be subjected to zakat, notwithstanding the owner of the shares. This is to be applied if the previous two conditions are fulfilled.
- 4- It should be noted that though the writer suggested that the portion of zakat to be paid by the governments, non- Muslims etc, are in actual fact, not zakat, there is no harm in calling this and itemising this in the financial report of the companies as payment of zakat. This is for the purpose of consistency etc.

Wallahu a'lam