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# ZAKAT ON LEGAL ENTITIES (SHAKHSIYYAH I'TIBARIYYAH): A SHARI'AH ANALYSIS<sup>1</sup>

*Aznan Hasan*

## **Abstract**

*The purpose of this study is to explore the issues related to zakat implementation on shakhsiyyah i'tibariyyah (legal entities) to establish whether they are subject to zakat and the methodology for zakat payment. The study examines the issues from the Shari'ah perspective and concludes on several issues based on ijtiḥad (independent reasoning) relying majorly on the sources of the Shari'ah, opinions of classical and contemporary scholars and the resolutions of the fiqh academies. Primarily, the Shari'ah recognises the concept of shakhsiyyah i'tibariyyah. Although the imposition of zakat is still largely vested on the shareholders of the company, the company may still pay zakat at the company's level provided that the company is authorised to do so (by way of its Articles of Association or decision made by the general assembly) or because the law dictates so. This shows that the imposition of zakat is still vested with the individuals, even though it can be paid at the company's level. It also proposes that, if the payment of zakat is to be made at the company's level, it also includes all shareholders including ownership of non-Muslims, government-owned shares and shares owned by waqf ahli. Nevertheless, the portion of payment to be paid by the governments, non-Muslims, etc, are in actual fact not zakat. However, for the purpose of consistency, there is no harm to name and itemising this payment in the financial report of the company as payment of zakat. The study also stresses on the need to facilitate for a proper methodology for zakat payment and to offer proper incentive for the payment of zakat in the manner that will be beneficial to companies which pay zakat, the enforcement agencies and the recipients.*

**Keywords:** Zakat, shakhsiyya i'tibariyya, legal entities

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## 1.0 Introduction

The concept of “individuality” in corporations is conferred through legal recognition by ascribing the status of ‘legal entity’ to it (also known as juristic person). In a general sense, the concept is relatively not new in the *Shari’ah* according to the majority of jurists. The concept has been in existence in some practices long time ago, which a typical example is in the practice of *waqf*. In *waqf*, once the *waqif* (*waqf* donor) gives away the asset, his ownership of the asset ceases. The asset is not transferred to other persons, instead the ownership is detained and impliedly owned by God and the *waqf* entity. A *waqf* manager will be appointed to manage the asset and the benefit of the *waqf* will be distributed to the named beneficiaries (as per the conditions stated by the *waqif*) or general benefit of mankind<sup>2</sup>. A *waqf* manager (*mutawalli*) will be appointed to perform necessary management for the benefit of the *waqf* property which include matters related to maintenance of the asset and others, as if the said *waqf* is having a legal entity. Any pecuniary responsibility will be made on the *waqf* asset, and not the *waqf* manager. The *waqf* property in this regard is given the attributes of a legal entity as contemporarily practiced in companies or institutions. Another example may be seen in the practice of *bayt al-mal* where elements of a legal entity exists. *Bayt al-mal* has rights and liabilities such as initiating right to sue or to be sued.

Although these entities were not established in the form of corporate entities as practiced in our modern days, some features and principles of legal entity are obvious in the two examples. There are indeed other examples in the *Shari’ah* such as in the concept of *fard al-kifayah*, the notion of *ummah* in the establishment of state, the practice of *al-‘aqilah* in the payment of *diyat*, institution of *masjid* and *al-qada’*, all are also cited as evidence that support the acceptance of the concept of *al-shaksiyyah al-i’tibariyyah* in the *Shari’ah*<sup>3</sup>.

<sup>2</sup> Ibn Qudamah, *Al-Mughni*, vol.6, 187; Al-Dasuqi, *al-Hashiyah*, vol.4, 85.

<sup>3</sup> Cf. Ahmad Muhammad Al-Khuli, *Nazariyyat al-Shaksiyyah al-I’tibariyyah*, Dar al-Salam, 1/e, (1423/2003), 69 ff.; Ali al-Khafif, *Al-Sharikat fi al-Fiqh al-Islami*, 22; Al-Khayyat, *Al-Sharikat fi al-Shari’ah al-Islamiyyah*, vol.1, 208-230; Al-Qurahdaghi, *Al-Shaksiyyah*

Nevertheless, even with the instances given, the modern jurists are not in consensus on the concept of legal entity. Even though some jurists reject the concept of legal entity, the majority of the contemporary jurists are of the view that the conferment of the attributes related to legal entity as separate from the entity of their owners is established in the *Shari'ah* and hence the concept of legal entity in modern application should not raise any *Shari'ah* issues<sup>4</sup>. However, the payment of *zakat* on legal entities remains a point of discussion. The main contention is on how the obligation to pay *zakat* would be determined and imposed on legal entities. The main objective of this study is to examine the issues related to *zakat* implementation on legal entities. After this introduction, the study examines a number of issues, particularly, the concept of *khultah* (combination of wealth), methodology of *zakat* payment, and kinds of ownership subjected to *zakat*.

## 2.0 Combination of Wealth (*Khultah*) in Legal Entities

Legal entities possess different attributes as compared to natural entities. In the case of a natural entity, the individual needs to be a Muslim and the wealth must be fully owned (*al-milkiyyah al-tamah*) by a known individual (*mu'ayyan*). These attributes may be difficult to be ascertained in legal entities, which makes the issue of *zakat* on them more complicated. The juristic adaptation to this would be to consider the wealth of legal entities as a combined wealth commonly known in *fiqh* as *khultah*. *Khultah* means admixture of things, whether the things can be distinguished after the mixture from one another or not<sup>5</sup>. *Allah* (s.w.t.) says in *Al-Qur'an*:

(.... وإن كثيرا من الخلطاء ليبغي بعضهم على بعض إلا الذين

آمنوا وعملوا الصالحات وقليل ما هم....)

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*al-I'tibariyyah wa Ahakmuha fi al-Dawlah al-Mu'asirah.*

<sup>4</sup> Ibid.

<sup>5</sup> Al-Raghib al-Asfahani, *Mufradat Alfaz al-Qur'an*, 4/e, (Damascus: Dar al-Qalam, 1430/2009), 293; Cf. Isra' Khidr Khalil Al-Nadi, *Al-Khultah 'ala al-Amwal wa Atharuha 'ala al-Ahkam*, MA Dissertation, Faculty of Shariah, al-Jamiah al-Islamiyyah fi Ghazzah, (1436/2015), 3-6.

“...truly many are the partners (in business) who wrong each other: Not so do those who believe and work deeds of righteousness, and how few are they?...”<sup>6</sup>

The meaning of *al-khulata*’ in this verse refers to partners who mix their assets in a way that their ownership is no longer distinguishable except by way of *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 shelter 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 feeds them together<sup>7</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 belongs to one person only. The meaning further denotes that the combination of the livestock is for the whole period of the *hawl* (completion period to pay *zakat*) and it attains the *nisab* (*zakat* payable amount)<sup>8</sup>. Almost the same meaning can be found in the explanation of al-Bahuti<sup>9</sup> and Ibn Muflih<sup>10</sup>. In a *hadith*, the Prophet (pbuh) says<sup>11</sup>:

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

“Separated assets should not be put together nor the combined assets should be separated to avoid *zakat*. Whatever belongs to two persons, must be settled in proportion to their ownership”.

<sup>6</sup> *Surah Saad*: 24

<sup>7</sup> Ibn Manzur, *Lisan al-‘Arab*, 1/e, (Dar al-Saadir, n. d.), vol.7, 291.

<sup>8</sup> Al-Shirazi, *Al-Muhazzab fi fiqh al-Shafi’i*, (Dar al-Kutub al-‘ilimiyah), vol.1, 265.

<sup>9</sup> Ibn Muflih, *Al-Furu’ al-Mawsu’ah al-Fiqhiyyah*, vol.2, 293.

<sup>10</sup> Al-Bahuti, *Kashshaf al-Qina’ ‘an matn al-‘Iqna’*, (‘Alam al-Kutub, 1403/1983), vol. 2, 192.

<sup>11</sup> Narrated by al-Bukhari, *Kitab al-Zakat*, *hadith* no.1382.

Based on this *hadith*, most jurists opine that *khultah* in livestock will affect *zakat* obligation on the persons who owned animals on *khultah* basis<sup>12</sup>. As such, if livestock are mixed, they shall not be separated with the aim of decreasing or increasing the *zakat* payable. Similarly, it is also impermissible to count them together if they are, in actual fact, separated. On the other hand, the Hanafis<sup>13</sup> and Ibn Hazm believe that *khultah* in animals has no effect on the individuality of *zakat*. Nevertheless, even by going for the opinion of the majority, certain conditions should be observed:

1. It is accepted by way of consensus that the obligation to pay *zakat* is only on Muslims. The jurists unanimously agree that *zakat* is not mandatory to non-Muslims, though they will be questioned about it in the Hereafter<sup>14</sup>. This is based on the *hadith* of Mu'az, when the Prophet sent him to Yemen<sup>15</sup>. As reported in an authentic *hadith*, when the Prophet (s.a.w.) 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>16</sup>. The rejection of *khultah* between Muslim and non-Muslim has

<sup>12</sup> Al-Hattab, *Mawahib al-Jalil fi Sharh Mukhtasar Khalil*, (Dar al-Fikr, 1414/1992), vol.2, 266; *Al-Majmu'*, vol.5, 388; Al-Sharbini, *Mughni al-Muhtaj*, vol.1, 376; Ibn Qudamah, *al-Mughni*, vol.2, 248; Al-Bahuti, *Kashshaf al-Qina'*, vol.2, 196; Ibn Hazm, *al-Muhalla bi al-Athar*, (Dar al-Kutub al'Ilmiyyah, n. d.), vol.6, 52.

<sup>13</sup> Al-Sarakhsi, *Al-Mabsut*, vol.2, 153; Ibn 'Abidin, *Al-Hashiyah*, vol.2, 304, Al-Samarqandi, *Tuhfat al-Fuqahak*, (Dar al-Kutub al-'Ilmiyyah, 1405/1984), vol.1, 292.

<sup>14</sup> Al-Qardhawi, *Fiqh al-Zakat*, vol.1, 95; Ibn al-Humam, *Fath al-Qadir*, vol.2, 153; Ibn 'Abidin, *al-Hashiyah*, vol.2, 259; Al-Hattab, *Mawahib al-Jalil*, vol.2, 366; Al-Sharbini, *Mughni al-Muhtaj*, vol.2, 121; Ibn Qudamah, *Al-Mughni*, vol.4, 69

<sup>15</sup> Narrated by Ibn 'Abbas.

<sup>16</sup> The *hadith* is narrated by Al-Bukhari and Muslim.

been considered by many jurists<sup>17</sup> as a consensus among the jurists. Nevertheless, there is an opinion from Ibn al-Majishun<sup>18</sup> of the Maliki School of law that<sup>19</sup> even if the *khultah* happens between a Muslim and non-Muslim, the *khultah* will still have its effect. However, it should be clear that non-Muslims shall not pay *zakat*.

2. The jurists differ on the calculation of *nisab*. The Shafi'is, Hanbalis, 'Ata, al-Awza'i and al-Laith ibn Sa'ad uphold that in case of *khultah*, *zakat* is calculated as one *nisab*<sup>20</sup>. On the other hand, the Malikis maintain that each partner in *khultah* shall estimate his *nisab* separately<sup>21</sup>. While the majority relies on the *hadith* that relates to *khultah*, the Malikis rely on the *hadith* that mentions the need for the *zakatable* assets 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, the opinion of the majority is more accurate based on the principle of *takhsis al-'amm* (specifying the general).
3. Jurists also differ on the nature of *khultah*, is it *khultah al-'ayn* (animals that are in the mixing situation) or *khultah al-milk* (mixing based on ownership). If the *khultah* is considered here

<sup>17</sup> Al-Nawawi, *Al-Majmu' Sharh al-Muhazzab*, (Dar al-Kutub), vol.5, 391.

<sup>18</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. He died around year 214H.

<sup>19</sup> Al-'Abdari Al-Muwaq, *Al-Taj wa Iklil li Mukhtasar Khalil*, 1/e, (Dar al-Kutub al-'Ilmiyyah, 1416/1994), vol.2, 266. His writing on that: "وكفل حر (مولم) بن عوف: الدؤل لطي طعب بد أو ذمي خافدا لابن مالما بنحو"

<sup>20</sup> Al-Shafi'i, *Al-'Umm*, vol.2, 14; Al-Sharbini, *Mughni al-Muhtaj*, vol.1, 377; Ibn Qudamah, *Al-Mughni*, vol.2, 249; Al-Bahuti, *Kashshaf al-Qina'*, vol.2, 198.

<sup>21</sup> Ibn Rushd, *Bidayat al-Mujtahid*, vol.1, 264; Al-Hattab, *Mawahib al-Jalil*, vol.2, 267.

as *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 to include other assets to the *khultah* that is not in the *khultah*. He has to pay *zakat* on that animals separately. On the other hand, if the *zakat* is payable on the basis *khultah al-milk*, he will include other assets he possesses to the assets that are in the *khultah* for the purpose of calculating *zakat*. According to the majority of jurists from Maliki<sup>22</sup>, Shafi'i<sup>23</sup>, and Hanbali<sup>24</sup> Schools of law, the *khultah* is based on *khultah al-milk*. On the other hand, some Malikis<sup>25</sup> and another opinion narrated from Imam Shafi'i<sup>26</sup> uphold that the *khultah* is *khultah al-'ayn*. Therefore, he is not allowed to include other assets which are not subject to *khultah* to the *khultah* for the payment of *zakat*. Whilst these opinions are largely based on *ijtihad*, the second opinion is stronger for several reasons. The most relevant reason is that the *hadith* on *khultah* mentions specifically the assets that are under *khultah*. Therefore, its application should only be limited to the assets which are strictly in the *khultah*. In addition, the *Shari'ah* recognizes the concept of *khultah* to appreciate the concurrence of the parties to have *khultah*. If we allow the inclusion of other properties, the sanctity of the arrangement will be defeated, as if the arrangement they entered has not been honoured.<sup>27</sup>

4. The condition that the *zakat* must be in the possession of the payer for one year (*hawl*) is also applicable in the case of *khultah*. Nevertheless, the jurists differ on the requirement of *hawl*: is the *hawl* for each partner, or is it the *hawl* for the *khultah* itself? Some jurists uphold that the requirement of *hawl* in *khultah* dictates that the mixing shall happen throughout the period of *hawl* and any interval will nullify the situation of *khultah*. This is the opinion of the Shafi'i School

<sup>22</sup> Al-Qarafi, *Al-Zakhirah*, 1/e, (Dar al-Garhb al-Islami, 1994), vol.3, 133.

<sup>23</sup> Al-Nawawi, *Al-Majmu' sharh al-muhazzab*, vol. 5, p. 444

<sup>24</sup> Al-Bahuti, *Sharh al-Muntaha al-Iradat*, 1/e, ('Alam al-Kutub, 1993), vol.1, 385.

<sup>25</sup> Al-Qarafi, *al-Zakhirah*, vol.3, 132.

<sup>26</sup> Al-Nawawi, *Al-Majmu' sharh al-muhazzab*, vol.5, 401.

<sup>27</sup> إعمال الكلام أولي من إعمال



of law and an opinion of the Hanbalis<sup>28</sup>. On the other hand, the Malikis<sup>29</sup> uphold that the condition of *khultah* is not a requirement for the whole *hawl*. In fact, it is enough that *al-khultah* happens in a period of *hawl* with a condition that the *khultah* does not happen very close to the period of *hawl* like a month or so. What is important is that when the time to pay *zakat* comes and the *zakat* collector finds that the *khultah* has happened between them, then he will just take the *zakat* based on that situation. The *hadith* on *khultah* is also silent on that. A lot of arguments and counter arguments have been forwarded on this matter. The opinion of the Malikis seems more acceptable to the author because the text of the *hadith* on *khultah* seems to render to that understanding. As such, the calculation of *hawl* will start with the time that the livestock reaches its *nisab* for *zakat*.

The jurists also differ as to whether the concept of *khultah* applies to assets other than livestock. The Shafi'is 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 (*al-Qawlal-Jadid*) of Al-Shafi'i<sup>30</sup> and this is the opinion that is acceptable in the School<sup>31</sup>. It is also an opinion narrated from Imam Ahmad<sup>32</sup>. On the other hand, other jurists from Maliki and Hanbali School of law uphold that the concept of *khultah* is only applicable to animals<sup>33</sup>. They cite another *hadith* which

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<sup>28</sup> Al-Nawawi, *Al-Majmu' sharh al-muhazzab*, vol.5, 404; Al-Sharbini, *Mughni al-Muhtaj*, vol.1, 376; Ibn Qudamah, *Al-Mughni*, vol.2, 249; Al-Bahuti, *Kashshaf al-Qina'*, vol.2, 196.

<sup>29</sup> Al-Qarafi, *Al-Zakhirah*, vol.3, 131.

<sup>30</sup> Al-Shafi'i, *Al-Umm*, vol.2, 14.

<sup>31</sup> Al-Nawawi, *Al-Majmu' sharh al-muhazzab*, vol.5, 408; Al-Sharbini, *Mughni al-Muhtaj*, vol.1, 377.

<sup>32</sup> Ibn Qudamah, *Al-Mughni*, vol.2, 254. In actual fact, the opinion of the Hanbali on this matter is varied. Cf. *al-Mughni*, vol. 2, 254 ff. and Ibn Muflih, *al-Furu'*, vol.2, 304.

<sup>33</sup> Al-Hattab, *Mawahib al-Jalil*, vol.2, 267; Al-Qarafi, *Al-Zakhirah*, vol.3, 79.

they believe is in support of the previous *hadith*. The *hadith* reads<sup>34</sup>:

الخليطان ما اجتمع علي الحوض و الفحل و الرعي

“The two mixing (*al-khalitaan*) can only happen when it involves using together the same pond, the same male and the pasture”.

It is safe to say that the first opinion is stronger for two reasons. First, the *hadith* on *khultah* was general without specifying a certain type of property. Second, the *hadith* that the second opinion relies on their specificity (*takhsis*) on this generality (*umum*) is weak (*da'if*). Perhaps due to that, most contemporary scholars accept the opinion that *khultah* can happen in other types of properties.

### 3.0 Methodology for Zakat Payment in Corporations

There are three different opinions of contemporary jurists on the methodology of *zakat* payment on legal entities. Some scholars like al-Buti<sup>35</sup> restrict the obligation of *zakat* on individuals only. Hence, companies are not required to pay *zakat* on behalf of the shareholders. This view in fact, does not accept the concept of *shakhsiiyyah i'tibariyyah* in the obligation to pay *zakat*. Each owner shall give out *zakat* when he has fulfilled his own *nisab* and *hawl* individually. The second opinion is that the company takes the nature of *shakhsiiyyah i'tibariyyah* and therefore, required to give out *zakat* as required from an individual or natural person. In this regard, the personality and individuality of the shareholders who owns the company will not be considered. This opinion is largely attributed to Dr. Shawki Ismail Shahatah<sup>36</sup>. The third opinion as concluded at the First *Zakat* Conference<sup>37</sup> is that even though the company will take

<sup>34</sup> The *hadith* is narrated by al-Bayhaqi and al-Daruqutni.

<sup>35</sup> Said Ramadhan Al-Buti, *Al-Shakhsiiyyah al-I'tibariyyah, Ahalliyatuhawa Hukm Ta'aluq al-Zakat Biha*, 2 ff.

<sup>36</sup> Shawki Ismail Shahatah, *Muhasabat Zakat al-Mal, 'Iman wa Amalan*, 1/e, (1970), 92.

<sup>37</sup> First *Zakat* Conference, Kuwait, (29 Rejab - 1 Sha'ban, 1404 / 30 April -

the nature of *shaksiyyah i'tibariyyah* in its personality, the obligation to pay *zakat* on the company will only be imposed upon the presence of any 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.

In addition, the Conference had also suggested that when the company does not pay the *zakat*, it is suggested that the company calculates 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 from each share. This opinion is similar to the resolutions of *Majma' al-Fiqh al-Islami*,<sup>38</sup> *Bayt al-zakat* of Kuwait<sup>39</sup>, The Accounting, Auditing and Governance Standards for Islamic Financial Institutions issued by Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) and the Sudanese Law on *Zakat*<sup>40</sup>:

The resolutions of *Majma' al-Fiqh al-Islami* adds that in obtaining the exact value of *zakat* payable, 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 non-Muslims must be excluded. However, despite considering the company as legal entity<sup>41</sup>, this does not wholly dilute the individuality of

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1 May, 1984).

<sup>38</sup> Fourth Conference, Resolution no 3, 4/08/88, Jeddah, (18-23 *Jamadil Akhir*, 1408 / 6-11 February, 1988)

<sup>39</sup> Cf. *Ahkam wa Fatawa al-Zakat wa al-Sadaqat wa al-Nuzur wa al-Kafarat*, (1425 H / 2004), 53; cf. also *Ahkam wa Fatawa al-Zakat wa al-Sadaqat wa al-Nuzur wa al-Kafarat*, (1428 H / 2007), 56.

<sup>40</sup> Article 4 of Sudanese Law on *Zakat*, (1990).

<sup>41</sup> *ثانيًا: إخراج إدارتها شركة زكاة* أسهمكم لي خرج على شخصي زكاة أموال. Second: The management of the company pays *zakat* of the shares in the very same

shareholders in the company. Hence, the company pays *zakat* on behalf of the shareholders. This is clearly stated in the Resolution<sup>42</sup>:

"....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 mentions 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 الخزنة 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* must be paid, 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."

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

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manner as a natural person pays *zakat* on his wealth.

<sup>42</sup> Fourth Conference, Resolution no.3, 4/08/88, Jeddah, (18-23 *Jamadil Akhir*, 1408 / 6-11 February, 1988).

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>43</sup>:

هذا ولا زكاة في الأسهم التي 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 above resolutions are also the opinions of the majority of contemporary scholars, such as Shaikh al-Darir, Wabbah al-Zuhayli, al-Buti, etc. although their arguments vary. As correctly suggested by al-Qurahdagi<sup>44</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*. However, the shareholders have the right to delegate the obligation to pay *zakat* to the company, provided that this delegation to pay *zakat* is obtained 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”.

To conclude this discussion, though the payment of *zakat* is an individual obligation of the shareholders, in certain circumstances (as discussed above), this obligation can be delegated to the company. Hence the company can pay *zakat* on behalf of its shareholders. When the company pays *zakat* in this situation, it will exclude individuals (be it personal or institution) that have no obligation to pay *zakat*, like non-Muslim, institution of *zakat* or *wakaf khairy*.

<sup>43</sup> Cf. *Ahkam wa Fatawa al-Zakat wa al-Sadaqat wa al-Nuzur wa al-Kafarat*, (1425/2004), 53; cf. also *Ahkam wa Fatawa al-Zakat wa al-Sadaqat wa al-Nuzur wa al-Kafarat*, (1428-2007), 56.

<sup>44</sup> Al-Qurahdagi, *Al-Shakhsyiyah al-I'tibariyyah wa Ahkamuha fi al-Dawlah al-Mu'asirah*, accessed on July 15, 2018, <http://www.qaradaghi.com/chapterDetails.aspx?ID=492>,

#### 4.0 Zakat on Non-Muslims' Wealth in *Khultah*

It is difficult to find any supportive evidence that suggests a company to pay *zakat* (as an individual) without considering the shareholders who own the company. If analogy is to be made to the concept of *khultah*, the issue of considering non-Muslims will be more obvious. Hence, the amount of *zakat* to be paid must exclude the portion owned by non-Muslim. A question that may be asked, when the company pays *zakat*, is it allowed for the company to pay *zakat* without excluding the portion of non-Muslim, especially when the company involves in business that directly related to Islamic businesses, like Islamic banking and *takaful*?

As discussed before, according to majority scholars, the *khultah* of non-Muslim is not calculated at all. Yet, in other texts, the calculation of *khultah* will also consider the ownership of non-Muslim, i.e. without considering the religion of the partners as a condition<sup>45</sup>. If this opinion is to be followed, the payment of *zakat* from non-Muslim shareholders can be accepted especially when the business that the company involves in is very much related to Islamic business, like Islamic banking, finance and *takaful*. In this situation, there must be a clear stipulation that the company will pay an amount of money as payment of *zakat* and the non-Muslim investors should be consented that the company will pay the amount for all the shareholders. If they are agreeable to that condition, the amount will be paid from the shareholdings as well. Alternatively, there is a law from the state that obliges the company to pay the amount of *zakat* from all shareholders. For instance, if the state decrees 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 Muslims) or its equivalent amount (for non-Muslims).

Though there is no specific evidence to support this opinion, the practice of 'Umar can be used as a rules of thumb (*isti'nasan*) to this. Abu 'Ubayd<sup>46</sup> reports that when Umar intended to take *jizyah* from the Christians of Bani Taghlib, al-Nu'man bin Zar'ah (or Zar'ah

<sup>45</sup> Al-Mardawi, *Al-Insaf*, 2/e, (Dar al-Ihya' al-turath al-'arabi, , n. d.), vol.3, 58.

<sup>46</sup> Abu 'Ubayd, *Kitab al-Amwal*, 1/e, (Beirut: Dar al-Kutub al-'Ilmiyyah, 1986), 33.

bin al-Nu'man) said to Umar: "Oh Amirul Mu'minin, Bani Taghlib are Arab. They are dismayed at the word *jizyah*. They have no money. They are people of 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*. Al-Zayla'i said that this payment of *sadaqah* is not *jizyah*<sup>47</sup>. Al-Kasani further explained that what was taken from Bani Taghlib takes the same ruling as *zakat*. The only difference is that the amount is higher<sup>48</sup>. Whilst the portion of the Muslim the payment is considered *zakat*, the portion of non-Muslim, though does not take the rules of *zakat*, in terms of reward, but as said by al-Kasani<sup>49</sup>, can still take the rules of *zakat* in terms of distribution, etc.

Before ending this discussion, a question that may pose itself here is: what is the suitable name to be given to this payment? In the opinion of the author, for the purpose of consistency in the financial reporting and to give the corporate the effect of a legal entity, there would not be a problem to name the whole amount as *zakat* and be channelled to *zakat* recipients<sup>50</sup>. Again, the analogy can be made to the story of Bani Taghlib based on a narration by al-Bayhaqi that when 'Umar refused to accept *zakat* from them considering it is an obligation upon Muslims only, they told him: "Impose whatever you want, but under that name(*zakat*), not under the name of *jizyah*. Umar then agreed, and they settled on doubling the amount due on them"<sup>51</sup>. In other narrations, Umar said: "Name it whatever you like"<sup>52</sup>. When

<sup>47</sup> Al-Zayla'i, *Al-Bahr al-Ra'iq*, 2/e, (Dar al-Kitab al-Islami, n. d.), vol.2, 250.

<sup>48</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* (cf. Abu Ubayd, *Kitab al-Amwal*, 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>49</sup> Al-Kasani, *Bada'i al-Sana'i*, vol.2, 38.

<sup>50</sup> The amount can also be used for other purposes like CSR etc.

<sup>51</sup> Al-Bayhaqi, *Al-Sunan al-Sughra*, (Karachi: Jami'h al-Dirasat al-Islamiyyah, 1989), vol.3, 142.

<sup>52</sup> Cf. *Al-Amwal* and its footnote, 538. Ibn Hazm upholds that the *hadith* is weak (*Al-Muhalla*, vol.6, 111). Shaikh Ahmad Shakir refutes this

arguing on the additional amount imposed upon Bani Taghlib, Al-Shirazi 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>53</sup>. Al-Nawawi also concurred to this opinion<sup>54</sup>. The jurists hence agree to call it *sadaqah* (*zakat*) and not *jizyah*. Some jurists have gone further stating that the amount taken from them was under the name of *zakat* as opined by a number of jurists such as Al-Samarqandi<sup>55</sup>, Ibn Qudamah<sup>56</sup>, Ibn Rushd<sup>57</sup>, Ibn 'Abd al-Barr<sup>58</sup> and Ubayd<sup>59</sup>. Although some jurists limit the application of the case of Bani Taghlib<sup>60</sup>, there is no harm 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. This is also the conclusion of some contemporary jurists such as Yusuf al-Qardhawi<sup>61</sup>, al-Qurrahdaighi<sup>62</sup>,

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condemnation and says: "This *athar* is narrated from various chains of narration and we feel comfortable that the *hadith* has an authentic narration". Cf. Al-Qardhawi, *Fiqh al-Zakat*, vol.1, 100.

<sup>53</sup> Al-Shirazi, *Al-Muhazzab fi fiqh al-Shafi'i*, vol.2, 251.

<sup>54</sup> Cf. Al-Nawawi, *Al-Majmu' sharh al-muhazzab*, vol.19, 392 ff.

<sup>55</sup> Al-Samarqandi, *Tuhfat al-Fuqaha'*, vol.1, 316.

<sup>56</sup> Ibn Qudamah, *Al-Mughni*, vol.10, 581.

<sup>57</sup> Ibn Rushd, *Bidayat al-Mujtahid*, vol.1, 245

<sup>58</sup> Ibn 'Abd al-Barr, *al-Istizkar*, vol.1, 1610. Cf. also Wahbah Al-Zuhayli, *Al-Fiqh al-Islami Wa Adilatuhu*, vol.3, 161.

<sup>59</sup> Abu Ubayd, *Kitab al-Amwal*, 540.

<sup>60</sup> For example, Ibn Rushd maintains that this ruling should be confined to *bani Taghlib* only. According to him, to impose such payment in that manner (additional amount) to a non-Muslim is against the practice of *Shari'ah*. Cf. 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>61</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 *Shari'ah* 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



Dr Hannan ‘Abd al-Rahman Abu Mukh. Dr Hannan ‘Abd al-Rahman Abu Mukh says<sup>63</sup>:

"على 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 على هذا الشرط فلا حرج أن تؤخذ من المساهمين غير المسلمين ولا حرج أن تصرف في مصارف الزكاة، وإن لم تسم الزكاة بالنسبة لهم شرعا".

“For the company which wants to pay *zakat* at the company level, it should stipulate in its Article of Association that it shall pay *zakat* from the ownership of all shareholders. If the stipulation has been made and the non-Muslim shareholders agree to this stipulation, there is nothing wrong to pay *zakat* from the shareholding of non-Muslims and there is nothing wrong with it being paid to the beneficiaries of *zakat*, even if it is not named *zakat* on their portion”.

## 5.0 Zakat on Incomplete Owned Wealth by Corporations

Generally, ownership in Islam is divided into two. The first is private ownership (*al-milkiyyah al-khassah*), which is further divided into complete ownership (*al-milkiyyah al-tammah*) and incomplete ownership (*al-milkiyyah al-naqisah*). The second is public ownership (*al-milkiyyah al-'amah*). Public ownership refers to an ownership

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non-Muslim shareholders, by whatsoever name. To ensure consistency in the financial report and the give the effect of *shaksiyyah 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>62</sup> Al-Qurahdaghi, *al-Syaksiyyah al-I'tibariyyah wa Ahkamuha fi al-Dawlah al-Islamiyyah*.

<sup>63</sup> Hannan ‘Abd al-Rahman Abu Mukh, *Zakat al-Sharikat fi al-Fiqh al-Islami*, 1/e, (Dar al-Ma'mun, Amman, 2007), 137.

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 of such properties. This is in accordance to the interpretation made by Imam al-Sharqawi on public property as the *mubham* property<sup>64</sup>. For example, *Qanun Muamalat Maliyyah Imarati* defines public property as<sup>65</sup>:

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

“All things owned by the government or other legal entities and 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-Nuhathat*<sup>66</sup>:

“No *zakat* is obligated upon *mal fay'* (the booty surrendered by the enemy without actual fighting), the same goes to *khums ghanimah* (property 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 *waqf* properties because they do not fall under the ownership of any particular individual”.

<sup>64</sup> ما كان كالكه بهما cf. Al-Sharqawi, *Hashiyah al-Sharqawi 'Ala al-Tahrir*, 2/e, (n. d.), vol.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>65</sup> *Qanun a-Muamalat al-Maliyah al-Imarati*, article 25.

<sup>66</sup> Rahaybani, *Matalib Uli al-Nuha*, (Al-Maktab al-Islami, 1994), vol.2, 16 ff.

It is clear from the above text that the primary reason why *zakat* is not obligatory over the abovementioned properties is the lack of ‘perfect ownership to a specific individual’ (*al-milk al-tam li al-mu'ayyan*) which is the main condition required for properties subjected to *zakat*. Though the term public ownership is known, it should be noted 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 whether there are circumstances in which, though the properties are somehow belongs to the public, *zakat* should still be paid from those properties. Among the modern properties that have been disputed to either belonging to public property or otherwise include:

#### **a. Government Property and Public Treasury**

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 Al-Zuhayli: “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”<sup>67</sup>. It will be correct to say that if the properties of the government are not used in business to gain profit, the properties should not be subjected to *zakat*.

#### **b. Fully or Partially-Owned Government Companies**

In this issue there is a clash of two essential requirements of *zakat*. On one hand, *zakat* shall not be imposed on government-owned companies because they are not

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<sup>67</sup> Wahbah Al-Zuhayli, *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), 350.

privately-owned companies which lack the requirement of a perfect ownership. On the other hand, 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 *Shari'ah* with regard to the imposition of *zakat* obligation unto this type of corporate companies? Should these companies be considered purely government-owned companies, thus are exempted from *zakat*, or should these companies be regarded as normal business entities that are subjected to the payment of *zakat*? The latter approach will broaden the funds of *zakat* for the sake of *zakat* beneficiaries. or is there a need for new *ijtihad* on such companies?

There are two views related to this issue. The first view states that as long as the government-owned companies are formed for making profit for the benefit of the government either directly or indirectly, *zakat* should not be imposed on such companies. If the government co-owns a corporation with a private entity, the part owned by the government should be excluded from the whole amount that is subjected to *zakat*. The fact that the companies are profit-based, does not change their status as ownership of the government. This is because profits are generated from the government's own property, hence, exempting them from the imposition of *zakat* is based on the legal maxim that<sup>68</sup>:

التابع تابع

“An affiliate takes its ruling as an affiliate”

And also:

التابع لا يفرد بالحكم

“An affiliate shall not be singled out with a ruling”

This is the opinion accepted by Abu Hanifah, Abu Yusuf, Malikiyyah, Syafi'iyah, and Hanbaliyyah in general. This is also the opinion of contemporary jurists with regards to

<sup>68</sup> Al-Zarakhsi, *Al-Manthur fi al-Qawa'id*, Wizarat al-Awqaf al-Kuwaytiyyah, (1405/1985), vol.1, 234.

government-owned companies such as Prof Wahbah al-Zuhaili<sup>69</sup>, Dr. Muhammad Nu'aym Yasin<sup>70</sup>, Dr. Rafiq al-Misri<sup>71</sup>, Dr 'Abd al-Hamid al-Ba'li<sup>72</sup>, Dr. Hasan al-Bily<sup>73</sup>, Dr. Muhammad Sir al-Khatm<sup>74</sup> and Dr. Muhammad bin 'Aqil<sup>75</sup>. Similarly, Article 37 of Qanun *Zakat* in 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, those properties will be subjected to *zakat*.

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>76</sup>. This opinion is also shared by Dr. Muhammad Nu'aym Yasin<sup>77</sup>, Dr. Rafiq al-Misri<sup>78</sup>, Dr 'Abd al-Hamid al-Ba'li<sup>79</sup>, Dr. Hasan

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<sup>69</sup> Wahbah Al-Zuhayli, "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), 234-236; Cf. also, Muhammad 'Uthman Shubayr, "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), 273.

<sup>70</sup> Cf. Wahbah Al-Zuhayli 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), 420-421

<sup>71</sup> *Ibid.*, 422-424

<sup>72</sup> Cf. 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 March - 1 April, 2004), 310.

<sup>73</sup> *Ibid.*, 317-318

<sup>74</sup> *Ibid.*, 320-321

<sup>75</sup> *Ibid.*, 322-323

<sup>76</sup> Al-Sarakhsi, *al-Mabsud*, 3, 52

<sup>77</sup> Cf. Wahbah Al-Zuhayli 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), 420-421.

<sup>78</sup> *Ibid.*, 422-424

<sup>79</sup> Cf. Wahbah Al-Zuhayli commentary in *Abhas wa 'Amal al-Nadwah al-Thalithat 'Ashara li Qadhaya al-Zakat al-Mu'asirah*, Khourtum, Sudan,

al-Bily<sup>80</sup>, Dr. Muhammad Sir al-Khatm<sup>81</sup> and Dr. Muhammad bin 'Aqil<sup>82</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 amount or value that will be channelled to needy people whilst the public properties, in the general sense, are used for the benefit of the public as a whole<sup>83</sup>. Further, when the government set up companies and receive the title of 'legal entity', the companies become ordinary companies altogether. Their positions, are as such akin to those of private 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>84</sup> It seems that the notion of *al-Shaksiyyah al-I'tibariyyah* has been used as one of the arguments.

The 13<sup>th</sup> *Nadwah Zakat Mu'asirah* has arrived at two important issues on this matter<sup>85</sup>. Firstly, public properties channelled to subsidiaries fully-owned by the government are exempted from the obligation of *zakat*. Secondly, public properties channelled with the intention of business and aimed at investment in the concerned corporate company, which is not wholly-owned by the government, is still subject to the payment of *zakat* since 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: "The shares that are exempted from the payment of *zakat* should be excluded such as

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(8-11 *Safar*, 1425 / 29 March - 1 April, 2004), 310.

<sup>80</sup> *Ibid.*, 317-318

<sup>81</sup> *Ibid.*, 320-321

<sup>82</sup> *Ibid.*, 322-323

<sup>83</sup> Al-Kasani, *Bada'i al-Sana'i*, 2, 68.

<sup>84</sup> Commentary of Dr. Hasan al-Bily, 317-318.

<sup>85</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), 414.

the shares owned by the public treasury, *waqf* property, property belonging to charitable organizations as well as property owned by non-Muslims". Similarly, the AAOIFI's accounting standard also excludes the equity owned by governmental and endowment bodies<sup>86</sup>.

It cannot be denied that arguments and evidence put forward by those who opine that *zakat* shall not be made obligatory upon the public ownership as well as the governmental ownership, even if the entities are established to gain profit, either a company fully owned by the government or an integrated company, is the stronger opinion. In fact, this view is parallel to the Resolution of *Majma' al-Fiqh al-Islami*. Having said so, we cannot deny that the argument forwarded by those who propose that *zakat* to be imposed on such entities, irrespective whether the investment is made via company that is fully owned by the government or through mutually owned or integrated company, is not void.<sup>87</sup> In fact, the latter approach has a wide range of *maslahah* (public benefits), especially in a country like Malaysia. It is submitted that although this kind of property, when viewed from the overall ruling (*hukm kulli*), is not subjected to the payment of *zakat*, but if viewed from the *maqasid* context, it is more proper to impose the obligation of *zakat* on the companies owned fully or partially by government, if the intention is for business purposes. The author provides that such method is based on *istihsan*, within the category of "*istihsan juz'i min hukm kulliy* (departing from general ruling for certain specific benefit)". 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>88</sup>. The same has been the reason for Sudan to impose the obligation of *zakat*

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<sup>86</sup> For *zakat* accounting cf. Accounting, Auditing and Governance Standards For Islamic Financial Institutions, (AAOIFI), (Manama, Bahrain: AAOIFI, 1431/2010), 291.

<sup>87</sup> From the *Shari'ah* perspective, it is referred to as '*wajih*'.

<sup>88</sup> For further discussion on *zakat* implements on debt and *mal mustafad*, cf. A. Hasan, *Zakat 'arud al-tijarah wa al-Sina'ah wa Tatboqatiha al-Mu'asirah fi Malizia*, Masters *Risalah* submitted to Faculty of Dar a-'Ulum, University of Cairo, (1998).

on such entities.<sup>89</sup> Among the most notable *maslahah* that can be gained from imposing *zakat* on such entities is that the benefit of the *zakat* payment will be enjoyed directly by the needy 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 when the target group are people who are in need of help. By imposing *zakat* on these entities, we have in fact channelled 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 applicable, these conditions need to be fulfilled:

1. The company will pay an amount of money as payment of *zakat*. All the shareholders should be aware that the company will pay the amount for all shareholders; or
2. There is a law from the government that obliges the company to pay the amount from all shareholders. For instance, if the state decrees (in its law, like Islamic Banking Act) that as the company involves in a very specific business that relates directly to Islam, it is compulsory for the company to pay *zakat*.

When this happens, the company will pay *zakat* on the whole shareholding. In terms of name, there seem to be no problem to use the term *zakat* and disclose it on the financial reports of the companies.

### c. Ownership of Waqf Properties

There are differences of opinion among the jurists in determining whether a *waqf* property falls under the category of public property that is subsequently exempted from the payment of *zakat*. *Waqf* property, in general, can be divided into three types which are; *waqf ahli* or *zhurri*(family *waqf*), *waqf khairiy*

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<sup>89</sup> Cf. 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 March-1 April, 2004), 333-334.



(philanthropy *waqf*) and *waqf mushtaraq* (a combination of both).<sup>90</sup> The majority of jurists maintain that *zakat* shall be imposed on *waqfah* since the benefit to be derived by the *waqf* are meant for individual beneficiaries. This is the opinion of majority of jurists (including Syafi'i, Hanbali, Ibn Rushd al-Hafid<sup>91</sup> as well as Ibn Abbas, Abu Hurayrah, Ibn Umar, and Ibn Shihab al-Zuhri<sup>92</sup>) except the Hanafis who maintain that *zakat* is not to be imposed on all *waqf*, be it *khairy* or *ahli*<sup>93</sup>.

In addition, the majority of jurists argue that the ownership in *waqf ahli* is certain as the benefit is only to be enjoyed by certain individuals. Therefore, they will be considered as if they own the business. If the *waqf* is utilised for business, then *zakat* is imposed upon these shareholdings. As such, if a company based on *waqf ahli* (or similar institutions in the form of a foundation)<sup>94</sup>, then *zakat* should be imposed on this ownership. The same ruling applies for ownership of co-operatives, 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 khairy*, the ownership of *waqf khairy* is different from ownership of non-Muslims or ownership of the Government. In ownership of

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<sup>90</sup> A. Hasan, *Revitalising Waqf Ahli in Modern Times: A prospect for Development*, presentation at the *Singapore International Waqf Conference*, The Fullerton Hotel, Singapore. (6-7 March, 2007).

<sup>91</sup> Ibn Rush, *Bidayah al-Mujtahid*, 1, 239

<sup>92</sup> Abu Ubaid, *Kitab al-Amwal*, 495-496.

<sup>93</sup> Ibn Qudamah, *al-Mughni*, vol. 5, 233, al-Nawawi, *Al-Majmu' sharh al-muhazzab*, vol.5, 340; Al-Kasani, *Bada'i al-Sana'i*, vol.2, 88; Al-Mardawi, *Al-Insaf*, vol 3, 14 ff.; Al-Buhuti, *Kashshaf al-Qina'*, vol.2, 196.

<sup>94</sup> From the legal perspective in Malaysia, individual *waqf* could be formed with a formation of a society (society, board of trustees, or cooperative), cf. A. Hasan, *Revitalising Waqf Ahli in Modern Times: A prospect for Development*, op. cit. 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.

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 so. As for the *waqf* institutions, the *mutawallis*, in actual fact are not the owners of the properties. They are just managing the properties on behalf of others. 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* deed. As in the case of ownership of the government properties, it is the responsibility of the government to allow people to benefit from the properties and the beneficiaries of *zakat* are part of these people. Although *Waqf khairy* is also meant for the public, yet its benefits are specified to a certain group of people. It is not the right of the *mutawalli* to give away any of the properties to anybody who is not a beneficiary of the *waqf*. Due to this reason, majority of jurists uphold that *zakat* is not to be imposed on *waqf khairy* except that of Maliki<sup>95</sup>. This is based on their opinion that *waqf* properties are not considered to exit the ownership of the *waqif*<sup>96</sup>.

Based on the arguments presented in this case, the writer believes that *waqf* property shall not be subjected to *zakat* if it is *waqf khairy*. The arguments for non-payment of *zakat* as held by the majority of Jurists is stronger. Besides that, the writer also could not find any opinion that allows the *mutawalli* to give away any part of the wealth to a group other than the *waqf* beneficiaries.

## 6.0 Imposing Zakat Based on the Business Activities of the Companies.

In the collection of *zakat*, only property which is deemed halal, from the *Shari'ah*'s standpoint will be subjected to *zakat*. Not only that the non-halal business shall not be subjected to *zakat*, to involve in the business itself is not allowed, from *Shari'ah* point of view<sup>97</sup>. Any

<sup>95</sup> Ibn Rushd, *Bidayat al-Mujtahid*, vol.2, 583.

<sup>96</sup> For further elaboration of this issue, cf. Al-Dardir, *Al-Mudawwanahal-Kubra*, vol.1, 344.

<sup>97</sup> Cf. *Fatwa Mukhtamar Zakat al-Awwal*, Kuwait; cf. also *Fatawa al-Nadwah al-Rabi'ah li Qadhaya al-Zakat al-Mu'asirah*, Bahrain, (17

income or wealth from non-*halal* business should be returned back to the payer or initial owner in the case that the owner is determinable. If the owner is not known, the wealth 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 the gained wealth 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 clearly evident, due to the ambiguity between halal and haram contained in many of today’s business activities. This situation becomes more complicated when it is 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 *Shari’ah* before authorizing the collection of *zakat* from the company? There seems to be many screening guidelines in assessing whether a company adheres to the rulings of the *Shari’ah* or not<sup>98</sup>. Perhaps a variety of methodologies may be used as the basis in providing some guidelines for both individuals and the corporate entities on matters related to the collection of *zakat*. In a nutshell, if *zakat* is to be imposed at the company’s level and on the whole shareholding, the calculation of *zakat* should exclude the percentage of income that comes from non-Halal activities. This is the opinion of Al-Qurahdagi<sup>99</sup>.

## 7.0 Challenges in the Imposition of *Zakat* on Corporates

The primary challenge in relation to compliance to corporate *zakat* is the differences in the obligation of the *zakat* on corporates. The obligation to pay *zakat* is more focused on individuals only<sup>100</sup>. This is

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Syawal, 1414 / 29 March, 1994).

<sup>98</sup> Cf. A. Hasan, *Islamic Capital Market and Stock Screening Process as implemented worldwide*, presentation.

<sup>99</sup> Al-Qurahdagi, <http://www.qaradaghi.com/chapterDetails.aspx?ID=252>, accessed on July 15, 2018.

<sup>100</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

obvious when the penalty provided by each State is considered. Even the penalty imposed on individuals who fail to pay *zakat* without any valid reason, or simply refuses to pay *zakat* is too low. In many instances, the said offence centres on the refusal to pay *zakat* on agricultural products<sup>101</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* due on them. The reality is that even though adherence to the law plays an important role in ensuring that Muslims pay *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 adherence to the law. Usually, the payment of *zakat* is entirely dependent on the faith of the payer, and not on legal enforcement. Therefore, greater efforts must be taken to ensure that the enforcement of *zakat* is duly executed as well as reminding the Muslims on the obligation and the importance of *zakat* in today's world. In fact, the obligation of *zakat* imposed on corporate companies should not be taken lightly. There are further issues that will need further studies, such as whether *zakat* can be enforced on corporations in a situation where the incentives for the payment of *zakat* between individuals and companies vary<sup>102</sup>.

It is recommended that the obligation of *zakat* payment should be included in the Articles of Association of the company, in case the

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the appropriate channel, cf. A. Hasan, "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>101</sup> Cf. 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.), 38-41; Abdullah Alwi Hassan, *The Administration of Islamic Law in Kelantan*, 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 *zakat fitrah*.

<sup>102</sup> Cf. section 44 (11A), Income Tax Act 1967. Cf. also comment on the amendment made to the section *Budget Commentary and Tax Information 2005*, published by Malaysian Institute of Taxation, Malaysian Institute of Accountants and The Malaysian Institute of Certified Public Accountants, (2005), 7.

major ownership goes to Muslims or by proposing the same to the company's General Meeting<sup>103</sup>. Through this, investors and the shareholders could ensure that the company pays its corporate *zakat* before the profits are distributed. Also, it is also proposed that a rebate be given on the payment of *zakat* by corporates in a similar way given to individuals in Malaysia.

## 8.0 Conclusion

This study examined the *Shari'ah* rulings on *zakat* payment on *shaksiyyah i'tibariyyah* and reached several conclusions. Primarily, Islamic law recognises the concept of *shaksiyyah i'tibariyyah* in the establishment of modern corporation. However, in the obligation to pay *zakat*, the imposition of *zakat* is still largely vested on the shareholders of the company on individual basis. Yet, the company can still pay *zakat* at the company's level provided that the company is authorised to do so (by way of its Articles of Association or decision made by the general assembly) or because the law dictates so. Also, the imposition to pay *zakat* at company's level shall include all shareholders, ownership of non-Muslims, government-owned shares and shares owned by *waqf ahli*. With regards to *waqf khairy*, though the writer inclines towards not including this type of ownership from the *zakat*, it should be noted that some jurists have suggested that *zakat* may be imposed on it as well.

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<sup>103</sup> This is among proposals suggested by the Accounting and Auditing Organisation for Islamic Financial Institution (AAOIFI) in Bahrain and practiced by most of the Islamic banks including those in Malaysia.

# AL-SHAJARA

## Special Issue

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