REVISITING THE FIQH OF SHARES
Considerations in light of a new challenge

MT Karaan

Dār al-'Ulūm al-'Arabiyyah al-Islāmiyyah
Strand, Western Cape, South Africa

الحمد لله رب العالمين، وصلى الله وسلم على سيدنا محمد وآله وصحبه، وبعد:

1. INTRODUCTION

The meteoric rise of Islamic finance in the modern world is indicative of a number of factors. It represents on the one hand the aspirations of a community eager to assert for itself an independent presence in the economic and financial arena. It bespeaks also of the deep rooted desire of this community to live in accordance with the precepts of its faith. And it reflects this community's success in harnessing both wealth and talent towards the effective implementation of a financial system founded upon revealed truth. In addition, it confirms the competence of the Sharī'ah as a legal system to provide pathways for ethical economic endeavour.

No enterprise as radical and ambitious as this was ever going to be free from challenges. One of the greatest tests of its viability would be the outcome of its struggle for market share against its conventional counterpart. Capturing the hearts and minds of the public would prove to be another hurdle intrinsically linked to the first. Attitudes towards Islamic finance would be informed by a third major hurdle: the debate between Sharī'ah scholars on the exact dimensions of Sharī'ah compliance. Seen from the point of view of the Muslim community, the first challenge is external; the second is primarily internal; while the third is restricted to a very specific sector within the house of Islam. The challenge to which this paper responds falls in the third category.

The South African Islamic finance industry presently consists of five asset management companies, three banks, and two takāful companies. I think it may be safely assumed that the bulk of the funds controlled by this industry in South Africa falls within the asset management area. Asset management typically entails the channeling of investors' money into approved securities. The security of choice appears to be the corporate share, and it would be justifiable to assert that shares at present constitute the most important cornerstone of the South African Islamic finance industry. Since it is the Sharʻī status of shares that is disputed by the challenge which is the focus of this paper, the gravity of the issue becomes self evident.

2. Summary of the Challenge

This challenge arose in an exchange of communication between the Darul Iftaa in Camperdown (DIC) and Mufti Ashraf Quraishi of Springs. The record of this exchange was published and circulated by the DIC in a 113 page document bearing the title *The Debate on Shares*, together with three academic articles. The DIC's position is essentially premised upon legal considerations surrounding the juristic person. Drawing on an array of legal sources, the DIC advances an argument which may be summarized into the following four points:

- The companies in which investment takes places are independent juristic persons.
- Companies with juristic personality own themselves, and are not owned by their shareholders.
- Funds advanced by investors to such companies therefore constitute, not investments into the company, but loans to the company.
- As such, returns on such investments amount to ribā.

The acceptance of such a position holds significant implications for the Islamic finance industry, not only in South Africa, but worldwide. It amounts in effect to pulling the rug from beneath the feet of a large section of this industry and robbing it of sound foundation. Furthermore, the quest to proscribe this particular avenue—whose viability as an area of investment for the ethical investor has proven itself—provides no alternative. Thus, Islamic finance, whose arrival was heralded and lauded by even non-Muslims, is effectively nipped in the bud. It is a matter of bitter irony that the very same religio-legal system that gave birth to this industry has now come to be cast in the role of its executioner.

However, no effective response to a challenge of this nature can suffice with a mere tabulation of negative consequences. The arguments upon which the challenge rests require to

be subjected to incisive yet balanced scrutiny in order to ascertain whether they do in fact have the merit to overturn a positive position on shares that has consistently enjoyed the support of the majority of contemporary scholars. It is to this task that this paper sets itself.[1]

3. THE PROBLEM OF LEGAL DUALISM

Colonialism left its effect upon just about every aspect of the Muslim world. One of the most prominent areas thus affected was the law. When colonialism eventually withdrew it would leave in its wake two lingering effects to testify to its past presence. In Muslim countries the Sharī'ah had been effectively replaced by imported legal systems, whilst elsewhere there appeared the phenomenon of the Muslim minority. Muslims in both kinds of situations thus came to experience legal dualism, with the state enforcing one legal system, while their religious convictions demanded the application of the Sharī'ah. Terms such as *tanfīdh al-sharī'ah* (implementation of the Sharī'ah) and *taḥkīm shar' Allāh* (establishing the law of Allah) have been—and remain—the motto of virtually every Islamist movement of the post-colonial era.

Aside from the response of political activism, though, there loomed the question of how to deal jurisprudentially with legal dualism. Our present issue is simply another example of an area of conflict and tension between the Sharī'ah and secular law. In formulating a method of negotiating such areas of tension it needs to be recognized that there can be no simplistic and universalized format, simply because not all cases of tension are homogeneous.

3.1 Situations of conflict

The instances in which conflict arises between Sharī'ah and secular law are numerous. Although our immediate concern is not with creating a comprehensive topology of all situations of conflict, it would be informative nonetheless to look at a number of situations so as to gain greater clarity on what exactly is meant by conflict here. We will suffice for the present moment with a rudimentary topology consisting of six conflictual situations. These are:

- conflict between Shar'ī prohibition and secular obligation
- conflict between Shar'ī prohibition and secular permission

[1] It is regrettable that the DIC saw fit to impute disingenuous motives to prospective respondents. (*The Debate on Shares* p. 112) Such arbitrariness, we believe, contributes nothing at all to objective discussion, and can only bring about further constriction of already strained relations.

- conflict between Shar‘ī obligation and secular prohibition
- conflict between Shar‘ī obligation and secular permission
- conflict between Shar‘ī permission and secular obligation
- conflict between Shar‘ī permission and secular prohibition

(1) Conflict between between Shar‘ī prohibition and secular obligation

This is the most serious kind of conflict. It tends to obtain only in situations where a government has adopted measures of open hostility against Muslims. The enforcement of apostasy and the consumption of wine and pork that Andalusian Muslims were subjected to during the Reconquista, come to mind as examples.[2] For this type of conflict the tone is set by the 106th verse of Sūrah al-Naḥl in terms of which necessity renders the prohibited permissible.

(2) Conflict between between Shar‘ī prohibition and secular permission

This is perhaps the broadest category. Most of Islam's major prohibitions would probably fall into this category: usury, adultery and fornication, consumption of intoxicants, etc. A prominent recent example would be the approval by secular law of homosexual unions. Clearly, the permission granted by secular legislators has no effect upon the prohibition of the Sharī‘ah.

(3) Conflict between Shar‘ī obligation and secular prohibition

Two distinct scenarios are identifiable here. The first is where execution of the Shar‘ī obligation rests upon judicio-political authority, as in the enforcement of *ḥudūd*. The other requires no such authority. The case of ḥijāb in France, where Muslim schoolgirls were forced by the law to abandon what Sharī‘ah enforces, is a conspicuous example of the second type. In the first type non-execution of Shar‘ī obligation did not come about due to secular prohibition, but rather due to non-fulfilment of an important condition. In the second type the Shar‘ī obligation stands unaffected, in principle, by the secular prohibition, with only the direst of circumstances warranting compromise.

[2] See Lea, Henry Charles: *The Moriscos of Spain*, p. 105

(4) Conflict between between Shar'ī obligation and secular permission

This, in reality, is not a case of conflict, since the secular permission grants latitude for the performance of the Shar'ī obligation. The performance of ṣalāh and discharge of zakāh, for example, would fit in here.

(5) Conflict between Shar'ī permission and secular obligation

The area in which a Shar'ī position of basic permissibility becomes juxtaposed against secular obligation or prohibition, is the domain of what the fuqahā call *siyāsah shar'iyyah*, where governments for the sake of regulating civil life proceed to make certain injunctions. The authority of a government to make such regulatory injunctions within limits is a well recognized concept in Sharī'ah with Qur'ānic roots (4:59).

(6) Conflict between Shar'ī permission and secular prohibition

Governmental prohibition on activities such as hunting certain species, driving at certain speeds, entering certain areas, and trading in certain goods are all examples of *siyāsah shar'iyyah* prohibitions, and would as such fall under this rubric.

3.2 The present case

We come now to the case before us. What is immediately noticeable is that our present case does not appear to fit comfortably into any of the six categories of conflict outlined above. This is on account of two reasons: firstly, the above topology is not, and was not intended to be, exhaustive; and secondly, the fact that our present case displays a highly nuanced sophistication that naturally would not allow for inclusion into categories as broad as the above six.

These six categories were in any event outlined not for the sake of accommodating our present case into one of them, but rather to adumbrate a general appreciation of the interaction between Sharī'ah and secular law. What emerged from them is that secular law might have the effect of enforcement when it comes up against a basic Shar'ī position of permissibility, but when it clashes against Shar'ī obligation or prohibition, the latter will remain unaffected except in cases of the direst necessity.

The case before us is that of the corporate juristic person. The area of tension is the nature of the relationship between shareholders and the company. To those scholars who approve of trading in the shares of a publicly listed company, the corporate share is an unallocated part *(sahm mushā')* of the assets of that company. To them there is nothing to debar an investor from purchasing a share in a company, as long as the nature of business and manner in which it is conducted are acceptable. The investor by virtue of his investment becomes a shareholder who owns part of the company, and he is therefore entitled to his proportionate share of its profits.

The DIC, on the other hand, takes its cue from a certain standpoint in secular law, where a company is regarded as an entity so distinct and separate from its shareholders that the shareholders have no rights of ownership. They have a right to dividends, but they do not own the company. The company, according to this view, owns itself.

What we have here is thus a case of conflict in characterization, where application of the general principles of the Sharī'ah gives rise to one form of characterization, whereas secular law proceeds from a different view on the character of the issue. The central question is: Which of these two characterizations of the relationship between company and shareholder should inform the position that is ultimately set before the investor: the one that looks at the matter through the prism of secular law, or the one that applies the general rules of partnership in the Sharī'ah and ignores the secular position? This is the question we will attempt to answer in the following pages. The issues around which we will conduct our investigation are:

- juristic personality
- reality vs. legal fiction
- the evolutionary nature of secular law

4. JURISTIC PERSONALITY

This brings us to the nature of the corporate juristic person. Definitions tend to converge more or less upon the fact that it is a legal fiction, a construct of the law that confers upon an abstract entity certain characteristics of a human. With corporations, the rationale behind acceptance of this concept has generally been the benefit of limited liability which a corporate juristic person enjoys. Placing limitations upon corporate liability is supposed to have stimulated economic growth by encouraging entrepreneurial risk-taking.

4.1 Juristic personality in Sharī'ah

In adopting the position that the Sharī'ah does not recognize juristic personality, the DIC invokes the authority of Joseph Schacht, Nabil Saleh and Timur Kuran.

Schacht (1902-1969) was professor of Arabic and Islam at New York's Columbia University. He was considered the leading Western scholar on Islamic law, and the influence of his book *Origins of Muhammadan Jurisprudence* in shaping Western attitudes towards specifically fiqh and ḥadīth is probably unsurpassed.

Nabil Saleh is a Lebanese lawyer based in London. He is the author of various published articles and books on Islamic law and the laws of the Middle East.[3]

Timur Kuran is a Turkish-American academic who is Professor of Economics and Political Science at Duke University in Durham, North Carolina. He was previously Professor of Islamic Thought and Culture at the University of Southern California in Los Angeles. He has been described as a "secular Turk". In 2004 he published *Islam and Mammon: The Economic Predicaments of Islamism*, a critique of Islamic finance and economics which a sympathetic reviewer describes as a book that "touches upon the myriad ways in which Islam… is a recipe for poverty." The same reviewer states: "In case you need to know: the man is certainly not hesitant to criticize Islam, Muslims or the Koran and does so on numerous occasions. This is certainly not a book by someone trying to "sell you" Qur'anic economics."[4]

The concept of juristic personality, in the form and extent to which secular law recognizes and employs it currently, was unknown in both Islamic and Roman law. Being unprecedented, though, does not constitute sufficient reason to reject the concept altogether. Like all other phenomena, the phenomenon of juristic personality needs to be examined in light of the fundamentals of the Sharī'ah to ascertain whether it may be accommodated in Islam.

When this phenomenon made its appearance in the world of Islam, its status in Sharī'ah was examined by Muslim jurists. The writings of scholars such as Muṣṭafā al-Zarqā', 'Alī al-Khafīf and others have been published and are accessible. It might well be that the DIC does not concur with the views of these 'ulamā, but to completely eschew the research of Muslim

[3] *Arab Law Quarterly*, 1998, p. 252

[4] http://www.amazon.com/Islam-Mammon-Economic-Predicaments-Islamism/dp/0691115109

scholars of repute, and take recourse to the writings of an Orientalist whose hostility to Islam is no secret, and an avowed secularist for who even the Qur'ān is not above criticism, indicates either a lack of insight or a level of subjectivity that renders the means justified by a predetermined end.[5]

We have very little doubt that an absolute repudiation of the historicity of ḥadīth literature based on Schacht's theories on the provenance of hadīth would be vehemently dismissed by the DIC. Timur Kuran's perceptions on the viability of Qur'ānic principles of finance would for certain be dismissed with disdain by the DIC. Therefore, when it is to this kind of authority that the DIC turns to substantiate its view on juristic personality, we find ourselves unable to suppress the notion that we are faced here with a case of acute subjectivity.

4.2 Origins of juristic personality

The contemporary notion of a juristic personality for a commercial profit-orientated entity with limited liability is very much a product of the modern world. Its modern origins go back to the rise of the great European joint stock companies of the 17th century, to whom limited liability was granted specifically to encourage the taking of risks.

The Roman *commenda* contract is often held to be the forerunner of the modern corporation. Another opinion identifies as origin the Roman *societas*. However, Duff remarks that "it is unlikely that the Romans should have worked out a theory so elaborate, so sophisticated, so remote from ordinary ideas, and left us only a few ambiguous hints that they ever thought about the matter at all."[6] Van Zyl, writing on Roman law, states:

> In Roman law only the natural person was recognised as a *persona*. The present day juristic person (eg. the company) was excluded from this definition simply because the juristic person was not a human being.[7]

[5] One cannot help taking notice of the apparent lack of consistency between the rejection (on p. 53 of *The Debate on Shares*) of the expertise of Muslim scholars such as Shaykh 'Abd al-Sattār Abū Ghuddah, Shaykh Wahbah al-Zuḥaylī, and Shaykh Ṣiddīq al-Ḍarīr, who are described as "liberals" of "the clean shaven suite-and-tie type", and the submission here to the opinions of non-Muslim academics whose hostility to Islam is an open secret.

[6] Duff, PW, *Personality in Roman Private Law* (1971) p. 232, cited in Cilliers and Benade, *Company Law*, (1982) p. 8, note 2

[7] Van Zyl, *History and Principles of Roman Private Law*, (1993) p. 80

The question about the source upon which Western jurisprudence drew when it formulated the concept of juristic personality with limited liability is thus far unanswered. Recent research suggests a source of which Schacht, Kuran, Saleh—and consequently, the DIC—appear unaware or preferred to ignore. Abraham Udovitch, Professor of Near Eastern Studies at Princeton, has traced the origins of the Roman *commenda* to the Islamic *qirāḍ*, better known as *muḍārabah*. Murat Çizakça, Professor of Economic History at Istanbul's Bahçeşehir University, writes:

> In a pathfinding article A. Udovitch concluded that Islam, indeed, appears to have been the most likely source. Udovitch came to this conclusion after eliminating both the Talmudic *isqa* and the Byzantine *chreokoinonia* as possible origins on the grounds that these differed from the *commenda* in its most important characteristic, namely, the liability of the agent. Indeed, while *isqa* and *chreokoinonia* both assign some degree of liability to the agent in case of loss, the complete absence of such a liability in *commenda* is traceable only in the Islamic *muḍāraba* (Udovitch, 1962). The Udovitch article was shocking news for the established norms of European scholarship which traditionally trace the bulk of Western civilization to Greco-Roman antiquity. Consequently this thesis was scrutinized down to the smallest detail.[8]

Çizakça notes that even Udovitch's most ardent critic, the University of Sydney's John H. Pryor, could do no more than reemphasize the possible linkages with Roman, Byzantine and Jewish origins. Although he was ultimately forced to admit that "the *qirāḍ (muḍāraba)* was undoubtedly more similar to the *commenda* than were the *chreokoinonia* and the *isqa*," and that "similarities both in economic structure and juridical conception between the *qirāḍ (muḍāraba)* and *commenda* were far too striking," Pryor would persist with the notion that the *commenda* was a synthesis into which Roman, Byzantine, Jewish and Muslim contract forms had all contributed.[9]

The debate concerning the origins of the *commenda* contract, says Çizakça, is not yet over. However, he says,

> the weight of the available evidence is such that the time has come to reverse the burden of proof, that is, it should be up to those who argue that *commenda* originated from non-

[8] Çizakça, Murat, *A Comparative Evolution of Business Partnerships: The Islamic World and Europe, With Specific Reference to the Ottoman Archives*, p. 11

[9] ibid. p. 12, citing Pryor, John H, "The Origins of the *Commenda* Contract." *Speculum* 52 (1977)

> Islamic sources to furnish the proof. Until they are able to do so, this author [i.e. Çizakça], at least, feels safer with the argument that *commenda* originated in the world of Islam.[10]

5. REALITY VS LEGAL FICTION

The concept of juristic personality is a legal fiction. Legal fictions may be defined as "suppositions of fact taken to be true by courts of law, but which are not necessarily true."[11] Prior to the development of this doctrine, partners in a business venture were responsible for the debts of the business, in accordance with the natural laws of liability. The adoption of this legal fiction came to mean that shareholders could not be held liable for debts that exceeded the assets of the corporation—or the concomitant doctrine of limited liability. It may be said that the adoption of this legal fiction primarily entailed a separation between the person of the company on the one hand, and its shareholders on the other, in the matter of liability specifically.

The above position remained in vogue for several decades since *Salomon vs Salomon* in 1897. The legal fiction of juristic personality only touched upon liability; as for ownership, it appears to have remained largely unaffected. Grantham, in one of the articles circulated by the DIC in substantiation of its view, clearly underlines this fact where he writes:

> Indeed, the persisting notion that the company is both owned, and is owned by its shareholders, has been the underlying assumption of much of corporate law scholarship this century.[12]

The current trend, expressed amongst others by the three articles circulated by the DIC,[13] represents, in the opinion of this writer, a development of the legal fiction that takes it deeper into the realm of fiction and thus further away from reality. From a doctrine that originally impinged upon nothing but the extent of liability, it has now been extended to a justification for negating shareholder ownership. Motivation for this extension appears in Berle and Means' identification in 1932 of the separation between ownership and control. David R.

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[10] ibid. p. 12

[11] http://en.wikipedia.org/wiki/Legal_fiction

[12] Grantham, Ross: "The Doctrinal Basis of the Rights of Company Shareholders" p. 555, Cambridge Law Journal 57(3) November 1998

[13] Grantham R: "The Doctrinal Basis of the Rights of Company Shareholders", Ireland P: "Company Law and the Myth of Shareholder Ownership", and Ireland P, Grigg-Spall I, and Kelly D: "The Conceptual Foundations of Modern Company Law"

Francis, senior economics correspondent for the *Christian Science Monitor*, summarizes this development as follows:

> In 1932, in the classic book "The Modern Corporation and Private Property," Adolf Berle, who later became a New Deal brain-truster, and economist Gardiner Means, identified an immense gap between ownership and control. By 1928, stockholders numbered 18 million, up from 4.4 million in 1900. Though in theory stockholders owned a company, they were too numerous to exercise any control over management. Executives essentially ran companies as they saw fit. Stockholders couldn't provide the oversight of non-owner managers to see that they maximized profits and secured the prosperity of a company for their benefit. Managers, it was feared, would rather seek for themselves the perquisites of power - cushy jobs, great salaries, fancy offices, chauffeur-driven limousines. Shareholders had become simply investors - not real owners. That separation of ownership and control, Berle and Means wrote, "destroys the very foundation on which the economic order of the past three centuries has rested."[14]

What emerges from the above is that it was essentially the unprecedented numbers of shareholders that precipitated the move to divest them of ownership. With such large numbers it seems to have been reasoned that shareholders will no longer be able to fulfil the function of supervising directors. Control, it was realized, resides in one party—the directors—while ownership at the time was still vested in the shareholders. The solution to the problem was disarmingly simple: "Let us then say that shareholders are no longer owners." And by this unique manner of cutting the Gordian knot the fiction of legal personality was given a new dimension.

From a Shar'ī perspective there are two questions that need to be asked: To what extent are we bound to adapt and conform to theoretical developments of secular law? And, is the separation between ownership and control a factor powerful enough to enforce such adaptation and conformity here? For the moment we will deal with the second question. As for the first, we will come to it in the next section, *in shā Allāh*.

5.1 Separation between ownership and control in Sharī'ah

The first important consideration here is that the separation between ownership and control, far from being a factor that compels a rethinking of the relationship between the shareholder and the company, is actually a well-founded phenomenon in the Sharī'ah.

[14] Francis, David R., "The Boss' Cut of the Pie", in the *Christian Science Monitor*, April 4 1999

The *rabb al-māl*, after providing the capital, becomes restricted from dealing with the capital directly, and even from retaining a say in how the business is conducted. In fact, should he in any way try to impose such control over the *muḍārib*, the entire *mudārabah* contract is rendered invalid.[15] Despite this restriction, his ownership is never disputed. In fact, ownership of the capital, and to a certain degree, even of the profit, remains vested in him up to the moment of profit-sharing. That much is trite fiqh that enjoys the support, moreover, of the vast majority of the fuqahā.

If Berle and Means in 1932 were sufficiently alarmed by the separation between ownership and control to conclude that this separation "destroys the very foundation on which the economic order of the past three centuries has rested", and if it is this very separation that has contributed to the formulation of the doctrine of corporate separateness, then to what extent are we, whose fiqh has consistently enforced separation between ownership and control, bound to abide by this newly formulated stance?

We note with interest that the DIC concurs enthusiastically with Professor Ireland's characterization of shareholders as money capitalists, and of equating the shareholder with the usurious moneylender. If Ireland and others like him are motivated by the separation between ownership and control, then even the traditional *rabb al-māl* to them would deserve the same treatment, prevented as he is from control. It probably goes without saying the DIC would object most strenuously to the drawing of a comparison between the *rabb al-māl* and the *murābī*, or usurious moneylender. On other hand, if they are motivated in this characterization by the outcome of this separation—i.e. by the legal shift from ownership of assets to ownership of a "bundle of rights"—then we find ourselves intrigued by the question as to whether the DIC's willingness to adapt to the dynamic evolution of the law is restricted to this case alone, or whether it applies universally.

5.2 Manifestations of reality

Underlying the legal fiction of a corporate entity independent of its shareholders is an obscured reality: that of a group of investors who pooled their resources. Traditionally such

[15] For the Ḥanafī, Mālikī and Shāfi'ī positions, see al-Kāsānī, *Badā'i' al-Ṣanā'i'* vol. 5 p. 117, al-Qarāfī, *al-Dhakhīrah* vol. 6 p. 37, al-Nawawī, *Rawḍat al-Ṭālibīn* vol. 4 p. 199 respectively. In the preferred view of the Ḥanbalī madhhab the *rabb al-māl* is permitted to work with the *muḍārib*, and it is also permitted that the *ra's al-māl* remains in his possession. See Ibn Qudāmah, *al-Mughnī* vol. 5 p. 137. As for the *rabb al-māl* retaining a decisive say in the running of the business, we have not come across an explicit text in the Ḥanbalī madhhab on that point.

an association had always been regarded, in both secular and Islamic law, as inseparable from the partners. It would be the development of the doctrine of corporate separateness that would eventually drive a wedge, in secular law, between the shareholders and the company, and turn what was once an association into an institution. But even this legal abstraction would not succeed in severing all links between the company and its shareholders. At the most important junctures the veil of legal abstraction would be cast aside to reveal the underlying reality. In what follows we examine 7 aspects of a company in which fiction recedes and reality is manifested. These 7 are:

- inception
- appointment of directors
- directors' responsibility
- receipt of profits
- piercing the corporate veil
- deciding to terminate the company
- residual rights

(1) Inception

No company can create itself; it has to be created by human persons. The company as such owes its very existence to its human founders. That those founders thereafter become divested of the rights of ownership is only due to the imposition of a legal fiction.

(2) Appointment of directors

The founders' bond to the company is reemphasized in the appointment of directors. The authority to appoint directors is vested in the shareholders, and this authority is underscored at every meeting where directors are appointed or reappointed. Reducing the shareholder's status to that of a creditor leaves unanswered the question as to how the shareholders become invested with this authority.

(3) Director's responsibility

Directors, despite the power they wield, remain in principle answerable to the shareholders. If it is true that the huge scale of subscription in public companies has conspired with the malaise of shareholder apathy to grant directors unprecedented freedom from answerability to their shareholders, then it does not have to follow necessarily from there that shareholders should therefore be divested of their status as owners. And if such a move could be

contemplated and validly executed within the framework of a secular legal system, its imposition from a Shar'ī position remains patently questionable.

(4) Receipt of profits

Whether conceived of as the exclusive, or the primary objective of the company, the realization of profit in favour of its members remains its core objective. At the most basic level, companies are founded to realize profits for their shareholders, and such is the profundity of this simple truth that the legal fiction of corporate separateness, for all its sophistication, fails to obscure it from the sight of the objective onlooker.

Even if it is admitted that certain parties other that the shareholders also derive benefit from the company's existence—for example, creditors, directors, employees—this admission will have to be accompanied by two other admissions: Firstly, that such additional benefits tend to arise out contingent activities (eg. loans) and not the primary activity of the company; and secondly, the difference in nature between what accrues to the shareholders, and what accrues to employees. What accrues to the shareholders is profit, which is the *raison d'etre* of the company's activities, and which is variable. What accrues to employees, on the other hand, is salary which is remuneration for services rendered; which is a fixed deduction from gross profit; and which, in the event of insolvency, remains a liability against the company.

(5) Piercing the corporate veil

One of the most powerful indicators of the reality that underlies the legal fiction of corporate separateness is what is referred to as the "piercing of the corporate veil". In this procedure the court ignores the fiction of corporate separateness and places liability directly upon the shareholders. Such action of the court is usually motivated by, but by no means restricted to, instances of fraud or abuse of the corporate structure. Significant though the justificatory grounds for piercing might be,[16] it is not with them that our immediate concern lies. It lies rather with what is implicit in piercing, which is the recognition that, despite the fiercest arguments in support of the independence of the corporate entity, the company remains the property of its shareholders. If the fiction of separateness has managed to mask this truth at the superficial levels of the law, its manifestation at deeper levels could not be suppressed.

[16] For instance, the Cornell Law Review states that "95% of corporate veils are pierced when courts determine that shareholders have disregarded the legal separateness of the corporation (or LLC) and the corporation acts as nothing more than an alter-ego for the shareholders."

Of substantial significance is the fact that in the USA piercing of the corporate veil happens to be the most litigated issue in corporate law.[17] The significance thereof increases drastically when it is considered that the above only applies to cases that made it to court, since according to Graham A. Stanford, one of America's leading authorities on corporate piercing, most cases do not make it to court. He writes:

> The risk is much greater than most people realize. The majority of veil piercing activity never makes it to the courtroom. Rather, when business owners are threatened with litigation, and become aware of their vulnerability to veil piercing, they pay expensive settlements to avoid litigation (and keep the settlement terms private). Any lawsuit, partner of contract dispute, employee claim, personal injury/property damage occurrence, or IRS audit can trigger a veil piercing event. In addition, the IRS has become particularly aggressive in pursuing corporations used for estate planning and asset protection, seeking to "pierce the veil" in order to capture estate or gift tax revenues.[18]

On the whole one is seized with an irrepressible perception of the tremulous foundations of these dimensions of corporate law, due in full to the conjectural jurisprudence upon which it was formulated. The significance of the fact that both Paddy Ireland (upon whose research the DIC relied) and Stanford Graham seized upon the same word—a myth—to describe their impressions of shareholder ownership and corporate separateness respectively, should not be dismissed lightly.

(6) Deciding to terminate the company

Substantially compelling indication of the true nature of the shareholders' relationship to the company is found in the fact that the authority to terminate the existence of the company rests with the shareholders. Section 67(1) of the Close Corporations Act states:

> A corporation maybe wound up voluntarily if all its members so resolve at a meeting of members called for the purpose of considering the winding up of the corporation, and sign a written resolution that the corporation be wound up voluntarily by members or creditors, as the case may be.

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[17] Thompson, Robert B., *Piercing the Corporate Veil: an Empirical Study*, 76 Cornell Law Review 1036, 1991. Robert B. Thompson is Professor of Law at Vanderbilt University. The reference here is cited from Stanford A. Graham in his article *The Myth of Corporate Veil Protection: Are Your Assets at Risk?*

[18] Graham, Stanford A., *The Myth of Corporate Veil Protection: Are Your Assets at Risk?* at http://www.bulletproofveil.com/pdf/whitepaper.pdf

Reality may thus be said to surface at both ends of the company's existence. This form of termination is termed voluntary winding-up. As its name indicates, it is purely volitional and does not depend upon the company being unable to meet its liabilities. It may be done at any time the members wish. Clearly, such authority cannot arise out of being a mere creditor.

(7) Residual rights

The term "residual rights" is used to denote both the right to share in profits, and the right to share in the assets of the company upon winding-up. Having already discussed the first aspect of residual rights under (4) above, we now focus upon the second aspect.

It appears that there is very little disagreement, if any, about the fact that shareholders assume full and unfettered ownership of the company's surplus assets after it has been wound up. This much is even admitted by the fiercest defenders of corporate separateness. From our point of view, though, this represents not the exception to any rule, but rather a reversion from the unnatural state imposed by the legal fiction of separateness, to the normal order of things. In it we see the recession of fictional separateness and the manifestation of the reality of ownership.

6. THE EVOLUTIONARY NATURE OF SECULAR LAW

There is no gainsaying that secular law is evolutionary by nature. Examples of this abound, and our present case of shareholder ownership represents yet another example of legal evolution, from asset-owning shareholders to de facto creditors. Be that as it may, what concerns us at present is not how and why such changes occur in the law, but rather how they are to be appropriated in the formulation of a Shar‘ī position. To what extent is the faqīh bound to adhere to the stipulations of secular law in determining the position of the Sharī‘ah?

The word used here is "evolutionary". This word implies a certain evanescence, or a lack of permanence, where what is accepted today may be overturned tomorrow. There can therefore be no guarantee that the present legal position on shareholder rights will forever remain unchanged. It has already been mentioned that piercing the corporate veil is the most litigated aspect of corporate law in the United States. Does this represent a trend to which legislatures will eventually adapt themselves? That is a question which the future alone will answer. Of concern, however, is the question as to whether the formulation of Shar‘ī positions on such issues should be held in thrall to positive legal positions, and whether the dimensions of the

Sharī‘ah's position on an issue should of necessity be founded upon the evanescent slopes of secular law.

Earlier in this article an attempt was made to sketch a tentative topology of situations of conflict between Sharī‘ah and secular law. At this point it is felt that it would be useful to look at a number of parallel cases in order thereby to underline the untenability of the approach that insists upon subjecting the Sharī‘ah to the conventions of secular law.

(1) Statutory imposition of supplementary conditions in marriage

The codification of Muslim personal law that started in Muslim countries from about the middle of the previous century saw the imposition of unprecedented conditions in the contract of marriage. Aside from the requirements of registration, conditions such as the permission of the first wife in case of a second marriage, soon led to a phenomenon that has plagued the Arab world in recent years: the *zawāj ‘urfī*, or conventional marriage that fulfils the traditional fiqhī requirements of validity but falls short in one of the statutorily imposed conditions.

Aside from the question as to whether or not a government is entitled, in light of *siyāsah shar‘iyyah*, to impose such additional requirements, the weight of scholarly opinion lies squarely on the side of the validity of such marriages. The DIC's response to the MPL codification project a few years ago leads us to believe that the DIC does not approve of such impositions, and holds a marriage as valid despite non-fulfillment of conditions imposed by statute. But it may also be true that there has been a shift in the DIC's position vis-à-vis such conditions.

(2) Nominee contracts in apartheid South Africa

Under the provisions of apartheid, people of certain races were debarred by statute from purchasing and owning property in certain areas. It was not uncommon for persons thus debarred to resort to purchasing and holding such property through nominees. Full subordination of the Sharī‘ah to secular law would have demanded that property thus held be regarded as the possession of the nominee.

It is readily admitted that we do not have on record fatāwā that actually declare the opposite, but there does appear to be general concurrence—if such an argument may be advanced—upon disregarding the role of the nominee's for Shar‘ī purposes.

(3) FNB's Million-a-Month account

In December 2006 First National Bank's innovative Million-a-Month account was declared to contravene the Lotteries Act by the Pretoria High Court. A subsequent appeal was dismissed by the Appeal Court in April 2007. Implicit in both rulings is the characterization of this competition as an act of gambling.

Despite these rulings, the DIC has issued a fatwā on its website that states: "If one opened up a savings account in FNB due to need and necessity and he won a draw without him paying a fee to qualify for the draw, that will not be regarded as gambling."[19] While it is true that this fatwā was issued before both court rulings, it is also true that the fatwā remains on the website, and that no retraction has been published.[20] Howsoever that may be, the point that emerges is that in formulating its fatwā the DIC did not see the need to abide by—or even be informed by—statutory law as reflected in the judgements of both courts.

6. CONSEQUENCES

The position taken by the DIC represents the type of radical shift in paradigm that is generally accompanied by drastic consequences. It would be interesting, therefore, to examine some of its consequences.

It has been maintained[21] that acceptance of corporate separateness leads to an effective collapse of entire areas of Sharī'ah such as zakāh and inheritance. Underpinning this claim lies the reasoning that the obligation of zakāh is founded upon ownership, and succession to property presupposes possession in the first place. Acceptance of the company's exclusive ownership of its assets amounts to the denial of ownership by shareholders. Thus, if a person has vested his assets in a company, he is no longer the owner thereof, and if he is not the

[19] http://www.askimam.org/ fatwa no. 13335

[20] It is very obvious that the DIC approached this issue from the angle of gambling *only*. We have very little doubt that, had a more circumspect approach been employed, the DIC would concur with us in characterizing this coupling of a bank account to a competition as a *qarḍ jarra manfa'ah*, a loan that generates benefit, the benefit here being participation in the competition, and therefore, a chance at winning a million. Conventional banking accounts have long been characterized as loans, both in secular law and Sharī'ah, and it is for exactly this reason that returns on them were condemned as ribā.

[21] This was stated by our respected senior, Mufti Ebrahim Salejee, principal of Madrasah Taleemuddeen, Isipingo Beach, Durban, in a letter written by him to Mufti Ashraf on 24 May 2007.

owner, then zakāh does not become wājib upon him nor can those assets be transferred to his heirs upon his death.

Whilst the present writer was initially inclined to agree with this view, he speedily realized that acceptance of corporate separateness would certainly affect both zakāh and inheritance, but not to the extent suggested. This is because the acceptance of this doctrine does not mean that the shareholders own nothing at all, but only that they have given loans to the company which the company owes them. Thus zakāh will still become wājib upon loans thus receivable, and heirs would still be able to inherit. The difference would be that both zakāh and inheritance would be restricted to the original amounts invested in the company, since in accordance with this doctrine all returns would be classified as ribā.

It was also realized, however, that zakāh and inheritance are not the only consequences generated by the acceptance of corporate separateness. To the best of our knowledge the law, in stating that companies own themselves and are owned by no one, makes no distinction between different kinds of companies. Even a simple close corporation with a single member is a company, and as a company it possesses all the attributes conferred by law upon a company: its liability is limited, it owns itself, and it is owned by no one.[22] Profits received by an entrepreneur who conducts his business through a close corporation registered and capitalized by him are essentially no different in nature from dividends of a publicly listed company. Apparent differences in the manner and regularity of profit distribution, or in the extent to which there is separation between ownership and control, pertain to contingent and not essential aspects. At the most basic level, both the gains of a close corporation and the dividends of a publicly listed company are profits realized within a corporate structure for the benefit of beneficiaries who just a few decades ago, before the legal fiction of juristic personality was given the imaginary appendage of corporate separateness, would have been called the owners of the company.

The prevalence of the company in the modern business environment is such that one is almost tempted to speak of a "virtual omnipresence". What exactly would be the result of an

[22] *Beuthin's Basic Company Law* states: "Property which is owned by the company cannot be treated as if it were owned by the members or any one of them (*Dadoo Ltd.*, above) and so not even the sole beneficial shareholder who manages the company's business and can exercise complete control, may appropriate the company's assets for himself or confuse his own banking account with that of the company. For example, even a sole director who is beneficially entitled to all the shares, is not entitled to pay into his own private bank account cheques which are made payable to the company (*AL Underwood v Bank of Liverpool & Martius Ltd* (E 1924))." (p. 10)

uncritical adoption of the DIC's position on shares? We believe it would lead to the characterization of every cent earned by members and shareholders of corporate entities as ribā. We are as yet in no position to produce precise statistics on how widely and deeply this would affect specifically the Muslim business community, but for whatever it is worth, an amateur prognosis points towards a catastrophe of pandemic proportions.

In fiqh, when great hardship ensues from the adoption of a certain position, that should be taken as indication of one of two things: either the need to introduce relief, or to reconsider whether the adoption of this particular position was based on sound fiqh in the first place. Refusal to go either way ignores the needs of society, the flexibility inherent in our Sharī'ah, and the fundamental axiom that, barring the Anbiyā, anyone can err.

The DIC appears willing to extend its judgement of ribā to the gains of every sort of company with the exception of the non-dividend paying section 21 company.[23] It would be unfair, however, to infer from here that it has totally ignored the needs of society and the flexibility of the Sharī'ah, since they are prepared to make the necessary adjustments.[24] The DIC's approach may therefore be described as dispensational, in that it initially applies a general rule of prohibition followed by exemptions motivated by *ḍarūrah*, or necessity. In keeping with the rule of *ḍarūrah*, it is prepared to extend the exemption only as far as the need stretches, and remains firmly convinced that "no such need exists regarding the trading of shares on the stock-exchange," and that "[e]ven if all the Muslims of the world abandon trading in shares on the stock-market or in unit-trusts, no difficulty is created."

From our point of view it was not necessary in the first place to have adopted the dispensational route. In the document referred to in the previous paragraph, the alternative view that disregards corporate separateness is characterized by the DIC as the "denial of reality". This, we submit, is where we differ. Corporate separateness is not a reality. It is an imaginary appendage grafted not too long ago onto the illusory body of that other legal fiction, the juristic person.

In summary, we fail to find justification for the subordination of Sharī'ah to the sort of legal conjecture which the courts themselves are prepared to set aside when faced with reality. It is

[23] In an email by Mufti Ebrahim Desai, head of the DIC, to Mufti Yusuf Suliman, dated 23 August 2007.

[24] The email states: "To the extent that Muslims may experience difficulties, the rules of the Shariah would be adjusted to accommodate for only those difficulties which are unavoidable."

therefore suggested here that in formulating a Shar‘ī perspective to companies, there be adopted on a permanent basis what courts are prepared to do on an occasional basis (and apparently with rising frequency): pierce the corporate veil.

7. CONCLUSIONS

From all of the above we are led to draw the following conclusions:

- Companies created by the pooling of resources by owners of capital remain associations, as used to be the position in secular law, and do not become the kind of separate institutions contemplated by the law in the adoption of the doctrine of corporate separateness.

- Shareholders in such companies, be they founding members or investors at a later stage, are therefore owners, and not creditors.

- The only basis for divesting shareholders of ownership appears to be the extension of the legal fiction of juristic personality, whose acceptance *mutatis mutandis* in Sharī‘ah remains patently open to question.

- This particular extension of the legal fiction appears to be premised upon the separation between ownership and control—a factor well-entrenched in fiqh without ever having necessitated similar measures.

- Until such time as a clear line of differentiation is drawn, the acceptance of this legal construct here holds the analogous potential of enforcing the subordination of Sharī‘ah to secular law in other areas as well—with potentially disastrous results.

- Although the nature of a company is admittedly an issue of secular law, the matter of determining the extent to which the legal position will inform the Shar‘ī position remains firmly and unambiguously a matter of Sharī‘ah.

والله سبحانه وتعالى أعلم

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