Challenges from Sasol's Inzalo Share Initiative

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Sasol's recent share offering has challenged our assumptions on more than one level. In what follows an attempt is made not to simply formulate an opinion on the permissibility of the shares on offer in the Inzalo initiative, but to place this issue within a wider framework where ways are explored in which this one issue becomes a means to generate a keener sense of responsibility on the part of both laymen and 'ulamā. It would be appropriate, however, to begin with a brief description of the offering.

The offering

Two classes of shares are offered in the Inzalo invitation. The first is the Sasol Inzalo Ordinary Share, commonly referred to as the "funded invitation", and the second is the Sasol BEE Ordinary Share, referred to as the "cash invitation".

The funded invitation

The funded invitation is a multi-layered structure. It is offered not by Sasol directly, but by a company, Sasol Inzalo, founded specifically for the purposes of this invitation. Subscribers pay what appears to be one-twentieth of the reduced share price (R18,30) to Sasol Inzalo. Being less in this way, proceeds from the subscription cannot be used to purchase shares in Sasol directly. Instead the proceeds will be used to form a company, "FundCo" that will in turn subscribe for preferred shares in Sasol. But the subscription funding will still not be sufficient to purchase a full amount of shares. The deficiency will be made up through financing raised from financing institutions. For the next 10 years the following restrictions will apply:

- No trading of the shares will be permitted for 3 years.
- For the next 7 years limited trading is permitted, only to BEE persons/groups, and on a market specifically to be established by Sasol for this purpose.
- After 10 years the preferred shares will become ordinary shares listed on the JSE.
- Finance raised from financial institutions (which equates to about $^{19}/_{20}$ of the share price) will first have to be repaid though, even through the sale of some of the shares.

The cash invitation

The cash invitation offers common shares at a reduced but full price (R366), but with the following restrictive features:

- For 2 years no trading of the shares will be permitted
- For the next 8 years limited trading is permitted, only to BEE persons/groups, and on a market specifically to be established by Sasol for this purpose
- Thereafter the share will be listed on the JSE and restrictions will be removed

A challenge to the public

This offering challenges our assumptions at two levels. At one level the challenge is to the ordinary man in the street: Would he ascertain the permissibility and validity of the share offering in Sharī'ah before applying for the shares on offer? Or would he ignore whatever the Sharī‘ah might have to say and rush heedlessly into applying? Or would he be as recklessly bold as those who have justified their purchase of both classes of shares on offer, on the basis of amateur conjecture?

It is symptomatic of our society—regrettably—that large sections of it persist with the notion that our Deen addresses matters of beliefs and ritual and ignores commercial pursuits. Almost equally lamentable is the conjecturing whereby others attempt to justify their actions. At this level the challenge to the ordinary person is, firstly, to realize that his Deen does in fact address matters of commerce; and secondly, to willingly align his own actions with the position of the Sharī‘ah.

A challenge to the ‘ulamā

The other level at which our assumptions are challenged is that of the ‘ulamā. It pertains, first of all, to the willingness to grapple with the issue. Avoiding it will only give credence to the perception that our Deen is one of dogma and ritual. But the need to deal with the issue neither justifies nor excuses an approach that is conceived in haste and considered at a level no deeper than the surface.

We stand heir to a tradition of jurisprudence that is both rich in content and deep in foundation. The robustness of that tradition is such that for many—if not most—of our problems we find ready solutions in it. But when situations arise for which we have no direct solutions, the robustness of our fiqh yields to its inner resilience. In such cases it should be realized that the search for a direct solution in our existing fiqh legacy is futile, and that answers should be sought in more profound ways.

Taking cognizance of the case

The first step is to recognize the case for what it is: What is being offered is two classes of shares. Shares, however, are nothing but slices of ownership in a corporation or company and through it one becomes part owner of the company.**[1]** Would it make proper sense to approach the purchase of a share in the same way as one would approach the sale of a car or a house? This is the first juncture at which opinions begin to diverge.

Characterization as *bay‘* (sale)

Some have equated the purchase of a share with the purchase of any other normal commodity, and therefore proceeded to apply the general rules of *bay‘* (sale) to it. The nature of restrictions imposed upon shareholders (of absolutely no trade during an initial period, and limited trading for the remainder of a 10 year period) led to the conclusion that the deal is unlawful since the restrictions amount to *shurūţ tukhālifu muqtadэā l-‘aqd* (conditions that contradict the consequential implications of the contract).

From our point of view it would not be proper to locate this issue under the rubric of generic *bay‘*. What is purchased is not a commodity that is analogous in every respect to the normal tangible article. Through the purchase of a sale one effectively becomes owner of a slice of a company, and a company is in essence a group of people that have pooled their resources towards the joint pursuit of commercial purposes. A more plausible context to locate the issue in appears to be the one that addresses the phenomenon of the pooling of resources towards economic pursuit, which is the chapter on *shirkah*, or partnerships.

Characterization as *shirkah* (partnership)

For all the propriety of the relocation from *bay‘* to *shirkah*, there is another matter that remains of concern: To what extent would it be valid and proper to apply the rules of *shirkah* directly to the modern company? Implicit in this question lies the realization that the modern company is not completely analogous to the form of partnership contemplated by our classical fuqahā. It remains open to question, therefore, whether the laws of *shirkah* as developed by them would apply to the corporation as we know it to the minutest detail.

The question as to how the Sharī'ah would treat modern companies is thus not one for which direct answers will be found in our fiqh literature. Its treatment, both in terms of general principles and ramificatory details, has to be approached with greater subtlety and circumspection. To this end it is intended here to delineate a rudimentary framework within which the "transplantation" of detail from existing areas of fiqh (such as *shirkah*) to the modern company may occur in a methodical manner circumscribed by valid justification, instead of a thoughtless and haphazard transfer.

Shirkah and the modern company

The appearance of the modern company in the Muslim world was almost unobtrusive. With the exception of two cases—that of Shaykh Muhəammad Taqiyy al-Dīn al-Nabhānī,**[2]** and that of Shaykh'Alī al-Khafīf**[3]**—scholarly attention appears to have been directed more at some of the secondary by-products of companies—such as shares and bonds—than at the concept of a company itself.**[4]** It was inevitable that such an approach would come to be interpreted as acquiescence to the acceptability of the corporate structure.

A detailed discussion around the Shar'ī status of the company falls outside the purview of the present paper. It will be assumed for immediate purposes that the company is a valid form of business organization. What then needs to be done is analyze the company and determine the extent to which there is similarity or dissimilarity between it and the traditional *shirkah* partnership. The type of company to be dealt with will be the public company since this is the type of company that the entity in question—Sasol—happens to be.

Similarities

Both the traditional *shirkah* and the modern company are business organizations in which a number of persons pool resources towards the pursuit of commerce with the aim of realizing profit. Profits, when made, are distributed in proportion to each partner/shareholder's contribution to capital, and losses are borne in the same manner. The common factors may thus be tabulated as:

- a multiplicity of persons
- pooling of funds
- commercial activity
- profit as objective
- proportionate distribution of profit/loss

Dissimilarities

Differences between the *shirkah* and the company exist in the areas of (1) shareholders, (2) mode of contract, (3) juristic personality, (4) management, (5) tradeability of shares, and (6) potential for perpetuity.

- *Shareholders:* In a *shirkah* there tends to be a personal relationship between partners with each partner knowing the other and having concluded the partnership agreement with the other. Naturally, the numbers of partners tended to be low. One of the most striking characteristics of a public company is the large number of shareholders. With such large numbers there could hardly be expectations of personal acquaintance between *all* shareholders. Secondly, partners in a *shirkah* tend to contribute physical labour, while shareholders are rarely ever active participants in the company's activities.

- *Mode of contract:* Where personal contact between a limited number of partners is possible, the mode of contract may be expected to conform closely to the traditional model of *ījāb* and *qabūl*. The mass subscription that is characteristic of public companies tends not to allow for a mode of contract along identical lines.
- *Juristic personality:* The company is deemed by law to possess juristic personality, whereas fiqh recognizes no such concept for the *shirkah*.
- *Management:* Shareholders in a company rarely ever participate in management of the company; it is appointed managers that run the company. In a *shirkah* partners personally manage the partnership, more often than not.
- *Tradeable shares:* The shares held in a company may be sold to an outside party without affecting the existence of the company. A shareholder who sells all his shares effectively withdraws from the company and his place is taken by a new shareholder. Withdrawal from the company thus does not entail termination of the company, whereas withdrawal from the traditional *shirkah* terminates the*shirkah* if not enough partners are left to form one.
- *Perpetuity:* The tradeability of shares gives rise to the potential for perpetuity in the company, and on account of it a company may well outlive all its shareholders. The *shirkah*, by virtue of the fact that it is a personal agreement between natural persons, terminates upon death or withdrawal.

With the above in place (and it is admittedly a very crude delineation that does little justice to the crisp precision that characterizes the language of the fuqahā) it now starts becoming possible to separate the areas in which a transfer of rules from *shirkah* to the modern company would be feasible, from those where it would not be. As a rule it might be stated that **to the extent that the company bears an equivalent or *a fortiori* resemblance to the *shirkah*, rules may be transferred. Conversely, when the *shirkah* rule arises from an area of dissimilarity, the transfer would be inadmissible.** For such instances, rules would either have to be formulated according to general principles, or transferred from areas in fiqh other than*shirkah*.

Restrictions

The approach adopted thus far has taken us from the juncture where we opted for locating this issue under*shirkah* instead of *bay'*, to where we now have to decide to what extent may the rules of *shirkah* be applied to the modern company. Of immediate and acute concern are the two restrictive conditions imposed upon the shares in question:

(1) the condition that there be no trading of the share whatsoever for 3 years in the case of the funded share, and 2 years for the cash share

(2) the condition that for the remainder of the 10 year period, the share be sold only to BEE groups/persons

For purposes of easy reference we will refer to the first as the *absolute restriction*, and to the second as the*partial restriction*.

One of the areas in which *shirkah* is fundamentally different from *bay'* is that there is considerably more latitude in the imposition of restrictions. At the foundation of *shirkah* lie mutual and bidirectional relationships of *tawkīl*-cum-*tawakkul* in terms of which each partner acts as an authorized agent of the other. Each party to the *shirkah* is therefore deemed to possess authority to restrict the other in ways such as the following:

- One partner may restrict the other partner from selling in certain markets
- One partner may restrict the other partner to trade in specific goods
- One partner may restrict the other partner from selling on credit
- One partner may restrict the other partner from trading at certain times

However, before transferring the rule of restrictions from *shirkah* to the company it needs to be ascertained whether the specific area in *shirkah* from which this authority arises is adequately represented in the company as well. Within *shirkah* this authority originates from the *wakālah* relationship that exists between the *shurakā*: each partner acts as *wakīl* to the other, and since a *muwakkīl* is entitled to place restrictions upon his *wakīl*, a *sharīk* is similarly entitled to curb his fellow *sharīk*.**[5]**

Could the same be said for a company where the shareholders barely know one another? Or do the structure of the company and the nature of its management preclude the application of the *wakālah* based rule from *shirkah*? The restrictions under discussion here originate with the directors of the company; should restrictions made by directors be afforded the same authority as those made directly by partners?**[6]**

If it is considered that directors derive their very appointment from shareholders, their appointment appears very much to be that of a *wakīl bi l-ujrah*. The similarity is underscored by the fact that their appointment comes under review at shareholder meetings—reminiscent in this instance of *tawqīt al-wakālah*. Inasmuch as the *wakīl* executes the will of his *muwakkil* his acts may be deemed the acts of the *muwakkil*. Since the*muwakkil* is a shareholder, the authority with which the restriction is made appears to have a valid provenance.

It would be fairly easy to conceive of the above set of relationships when faced with a company of just a handful of shareholders. Would the same hold true for a public company with multitudes of shareholders? This is another area in which the public company differs from the traditional *shirkah*.**[7]** The sheer numbers of shareholders that a public company may potentially have necessitate the adoption of a mechanism through which to exercise the will of the shareholders, and to make choices where differences in will prevail. This mechanism came to be the majority rule. The voting procedures through which directors are appointed, and the manner in which differences between directors themselves are settled, all attest to the crucial importance of the majority rule in the company.

Before going on to the actual restrictions themselves, one issue remains: Does the *tawkīl* have to be specific and recurrent for every act the *wakīl* proposes to do? Or would it be acceptable to have a plenipotentiary *wakīl* to whom free rein is given to act within broadly defined limits, or even unstated and automatically delineated parameters? In terms of the H anafī madhhab an unrestricted commercial *tawkīl*leaves the *wakīl* almost absolutely unfettered,**[8]** while the other three madhāhib impose certain automatic restrictions in terms of currency, price, selling on credit, and the *wakīl*'s selling to himself or his close family.**[9]**

We now come to the actual restrictions.

The absolute restriction

In this restriction the shareholder is prevented from selling his shares for a defined period, 2 years in the cash invitation and 3 years in the funded invitation. Would the imposition of such a restriction render the entire contract invalid?

From the perspective of the Mālikī madhhab it appears that it would not. Unlike the other three madhāhib, the Mālikī madhhab regards the contract of *shirkah* as mutually binding *(lāzim*) and not simply optional*(jā'iz)* from which any party can withdraw at will.**[10]** A condition thus imposed would therefore be, from a Mālikī standpoint, a *shart yuwāfiqu muqtadā l-'aqd* (condition that harmonizes with the consequential implications of the contract.

To the H anbalī fuqahā, who hold that the contract of *shirkah* is non-binding, a condition of this nature goes against the nature of the contract and is as such, invalid. As for whether its imposition affects the validity of the contract itself, the carried view of the Hanbalī maddhab clearly states that it does not. Any condition thus imposed will be considered null and void and the validity of the contract will be left unaffected.**[11]**

Within the H anafī madhhab the imposition of a condition which does not arise as a consequential implication of the contract *(muqtadā l-'aqd)*, nor is it conducive *(mulā'im)* to the contract, nor is it founded on the basis of *'urf* or *ta'āmul*, but holds no particular benefit for any of the parties, would be expected to render the entire contract invalid, as is recorded from Imām Abū Yūsuf in *al-Imlā'*. However, in terms of what Imām Hasan ibn Ziyād narrates from Imām Abū H anīfah, as recorded in *al-Mujarrad*, the contract remains valid.**[12]** At the crux of the motivation for this view—said by al-Kāsānī to be the more authentic view of the madhhab—lies the fact that an imposition of this sort does not grant advantage to any party over the other. Where an imposed condition brings about such advantage, they become akin to *ribā* in that it amounts to benefit stipulated by contract.

The majority of the Shāfi'ī fuqahā, according to Imām al-Haramayn, hold the view in a parallel—if not more compelling—case**[13]** that while the condition imposed is certainly invalid, the contract itself remains valid.**[14]** Imām al-Nawawī points out, however, that this "validity" pertains to the effectiveness of operations conducted in such a contract.**[15]** For all practical purposes, the partners remain entitled to profits.**[16]**

The partial restriction

In the partial restriction the shareholder is prevented from selling his shares to buyers other than BEE groups or persons. At face value this appears to be the sort of restriction imposed by one *sharīk*—via his*wakīl* in this case—over the other. As far as we are able to tell, restrictions of this nature would be acceptable and binding in all four madhāhib.**[17]**

The cash invitation

The cash invitation offers ordinary shares for a reduced price, with two restrictions imposed. Given that

(a) the company is a valid form of business organization

(b) through the purchase of a share one effectively becomes owner of a part of the company thus invested in

(c) the restriction of absolutely no trade for the first 2 years is valid in the Mālikī madhhab, inconsequential as far as the validity of the contract is concerned in the Hanbalī and Hanafī madhhabs, and does not affect entitlement to profit in the Shāfi'ī madhhab

— investment in this share is permissible.

The funded invitation

The essential difference between the funded invitation and the cash invitation lies in the fact that the funded invitation entails a funding component. The gist of this component is that 95% of the share price will be obtained through loans from financial institutions. When restrictions are lifted and the shares eventually become listed after 10 years, this loan, which will in all probability be a *ribā*-based loan, will first be settled, either from the accrued profit or through the sale of some of the shares themselves. FundCo, the company that will raise the finance with the financial institutions, will be 100% owned by subscribers in the funded invitation. The shares are furthermore held in the name of the person who subscribes for them for the entire duration. This means that the finance is raised in the name of the subscribers and on their behalf. The shares held in this manner will in addition be preferred shares, and preferred shares are generally deemed to be different from ordinary shares in (1) order of settlement, and (2) the fixed return that it gives, which is akin to *ribā*.

Thus, given that the funded share

(a) entails involvement in a *ribā* based loan

(b) remains a preferred share with a fixed rate of return

— investment in this share is not permissible.

والله سبحانه وتعالى أعلم

[1] Do note that a difference of opinion exists on whether a shareholder actually owns a share in the company, or whether what he pays for his shares amounts only to a loan which he extends to the company. The latter characterization as loan leads to the identification of dividends on shares as *ribā* and therefore unlawful. For this point of view, see Darul Iftaa Camperdown's article, *Shar'i Stand on Shares & Stocks* by Mawlānā Yusuf ibn Yaqub at http://www.al-inaam.com/fataawa/shares_stocks/shares_stocks.htm. My own article, *Revisiting the Fiqh of Shares: Considerations in light of a new challenge*, espouses the first view.

[2] In 1953 al-Nabhānī (better known as the founder of Hizb al-Tahrir, died 1977) published his *al-Nizəām al-Iqtis,ādī fi l-Islām* (The Economic System in Islām) in which he dealt, among others, with the company. His contention that the company is an invalid form of business organization rests upon a number of substantive reasons:

- The modern company does not fit the fiqhī definition of the *shirkah* in (1) the requirement of *ījāb* and*qabūl*, between parties; (2) the requirement of an agreement upon some sort of economic labour; and (3) the indispensability of the physical person in *shirkah*.
- In *shirkah* the partners agree to operate their pooled resources, whereas the company has a fictitious personality that is the operator, leading to a situation where it is the money that operates, and not the human shareholder.
- The potential for perpetuity of a company contradicts the Sharī'ah.
- Denial of juristic personality.

These reasons were subjected to detailed objective criticism by Shaykh 'Abd al-'Azīz al-Khayyāt, in his book *al-Sharikāt fi l-Sharī'ah al-Islāmiyyah wa l-Qānūn al-Wadə'ī* vol. 2 pp. 178-185

[3] Shaykh 'Alī al-Khafīf's book *al-Sharikāt fi l-Fiqh al-Islāmī*, was published in 1962. His approval in it of the modern company appears to rest upon the similarity between *mudəārabah* and the company with specific reference to the inactivity of the *rabb al-māl*. (*al-Sharikāt fi l-Fiqh al-Islāmī* p. 96) Al-Khayyāt, (vol. 2 p. 167) correctly points out the incompleteness of the analogy in that it fails to take into consideration the fact that managers earn a fee and do notshare in profits in the manner a *mudəārib* would.

[4] For example, the controversial fatwā on post office savings with a fixed return by Shaykh Muhəammad 'Abduh in 1906, and the equally controversial view of Shaykh 'Abd al-Wahhāb Khallāf on the same issue a few decades later in 1951. A considerable number of refutations of these views have been published. Prominent amongst these were the refutations by Shaykh Muhəammad Abu Zahrah (*Fatāwā al-Shaykh Muhəammad Abū Zahrah* p.), Shaykh 'Abd al-Rahəman Tāj, the Shaykh al-Azhar (*Majjalat Liwā' al-Islām*vol. 5 1952), Shaykh 'Abd al-Majīd

Salīm, the Muftī of Egypt (*Majallat al-Azhar* vol. 18, year 1366/1946), Shaykh H anasayn Muhɘammad Makhlūf, also Muftī of Egypt (*Fatāwā al-Shaykh H anasayn Muhɘammad Makhlūf* vol. 2 p. 142).

[5] See Ibn H ajar, *Tuhfat al-Muhɘtāj*, vol. 5 p. 289; Ibn ʻĀbidīn, *Radd al-Muhɘtār* vol. 3 p. 341

[6] It is for the sake of drawing attention to specific issues pertaining to companies, such as this issue, that the writing of a straightforward opinion was eschewed in favour of a tentative research article that seeks to build a coherent framework of approach and enquiry into the phenomenon of the company. Aside from the issue under discussion, there are several other aspects to the company that require to be researched and then worked into a comprehensive set of rules that could eventually be fleshed out into an addendum to the existing chapter on *shirkah* in our fiqh legacy. The recent article in Arabic by MS Omar on the relationship between the holding company and subsidiary company is a positive step in this direction. It happens too often, alas, that opinions are marshaled in a helter-skelter fashion without due regard to the overarching framework into which they ought to fit. If the company is going to be accepted as a valid form of business organization, it deserves the same kind of attention that historically turned atomistic *fatāwā* into systematic*furūʻ*, and that made corporate law the almost independent area of specialization in secular law that it has today become.

[7] Only in terms of what actually happened, but not necessarily in terms of what may potentially happen. I have not come across anything in our fiqh that prohibits the appointment of *wukalā* by *shurakā*; that limits the number of *shurakā*; or that precludes a *sharīk* from using his authority to restrict his fellow *shurakā* via his *wakīl*. Colleagues and others who read this article may even recollect having seen instances of such situations in our fiqh literature.

[8] *al-Mawsūʻah al-Fiqhiyyah* vol. 45 pp. 37-38, citing *Badāʼiʻ al-Sanāʼiʻ* vol. 6 p. 27, *al-Bahr al-Rāʼiq* vol. 7 pp. 166-167, Ibn Ābidīn vol. 4 p. 40, and *al-Fatāwā al-Hindiyyah* vol. 3 p. 588

[9] *al-Mawsūʻah al-Fiqhiyyah* vol. 45 pp. 38-41

[10] Al-Qarāfī, *al-Dhakhīrah* vol. 8 p. 51; al-Kharshī, *Sharhɘ Mukhtașar Khalīl* vol. 6 p. 39

[11] Ibn Qudāmah, *al-Mughnī* vol. 5 pp. 186-188

[12] al-Kāsānī, *Badāʼiʻ al-Sanāʼiʻ* vol. 4 p. 378-379

[13] That of stipulating a percentage for profit sharing different to the percentage contributed to capital.

[14] Imām al-H aramayn, *Nihāyat al-Mațlab* vol. 7 p. 25

[15] al-Nawawī, *Rawdɘat al-T ālibīn* vol. 3 p. 516

[16] Shaykh al-Islām Zakariyyā al-Ansɘārī draws a distinction between the case where a person knew of the invalidity of the contract and where he did not know of it. He restricts entitlement to profit to the second situation. Al-Shawbarī points out, however, that in the *muʻtamad* view of the madhhab there is no such differentiation. See *H āshiyat al-Jamal ʻalā l-Manhaj* vol. 3 p. 398

[17] In a very recent development the Darul Iftaa Camperdown issued an addendum to its previous fatwā on the Sasol shares. This addendum states: "Under the assumption that dealing in shares are correct, the Ahkam of Shirkah will generally apply. However, the aspect of shares is not a clear-cut Shirkah. It has some other elements as well. Under the assumption of a pure Shirkah, the Shurūt Fasidah are supposed to be considered Bātil and fall off according to the Sharīʻah. However, in the case of the Inzalo shares, the Shurūt are implemented by secular courts and cannot merely fall off. It will be impermissible to enter into such an agreement knowing that the Shurūt Faasidah will be implemented and not fall off."

With the fullest respect to our noble brother Mawlānā Yusuf ibn Ya'qub (author of the fatwā and its addenda) we wish to point out the questionability of invalidating a contract purely on account of the potential of a secular court enforcing a condition considered non-enforcible by the Sharī'ah. This will not be the only case in which Sharī'ah-based positions would clash with secular legal positions. Should the same approach be adopted in all similar cases, it might well lead to a completely untenable situation. Greater regard should perhaps be given to the doctrine of legal dualism which we introduced in our paper *Revisiting the Fiqh of Shares*, and which Mawlāna Yusuf dismissed as irrelevant in his response *Redressing the Concept of Shares*.