



***The Concept of  
Limited Liability—  
Untenable in  
The Shariah***

Rasulullah (sallallahu alayhi wasallam) said: " The truthful and honest trader will be (on the Day of Qiyaamah) with the Ambiya, the Sid-diqeen and the Shuhada (Martyrs)."

**By:  
Mujlisul Ulama of South Africa,  
P.O. Box 3393,  
Port Elizabeth, 6056  
Rep. of South Africa**

## **NO ABSOLUTION**

“ Verily, Maut (Death) does not absolve the debtor from debt. It is for this reason that the debt will be demanded from him in the Aakhirah. There is consensus (Ijma’) on this.”

*(Musallamuth Thuboot)*

## **THE WORST SIN**

“ The greatest (worst) of sins after the major sins prohibited by Allah, with which a servant (of Allah) will meet Allah is that a man dies saddled with debt for which he has not left assets to pay it.”

*(Al-Jaamius Sagheer)*

### **THE CONCEPTS OF 'JURIDICAL PERSON' AND LIMITED LIABILITY**

The concept of juridical person and the idea of limited liability are cornerstones of the western capitalist economic system. Simply and truly a 'juridical person' is a non-existing or imaginary person created by western law. This imaginary or fictitious person is regarded as a legal entity supposedly having transacting and contractual ability and powers in the same or in almost the same way as a real, living human being. It is a 'person' existing on paper and in relation to the word 'person' it is pure fiction.

Although the 'juridical person' is acknowledged and understood to be a figment of the imagination of men, it is nevertheless accorded some consequences in the capitalist system of economics. The two main consequences of the fictitious man created by western economists are:

- (1) The acquisition of capital from investors
- (2) Insulating the partners of the business enterprise against the debt they owe their creditors. This safeguard which the 'juridical person' provides is termed the 'principle of limited liability'.

In terms of this principle if the business suffers a loss or becomes insolvent the partners or shareholders are absolved of their debts. The rights of creditors extend to only the amount which the shareholders have invested and whatever assets are registered in the company's name. Beyond the assets of the fictitious person, the creditors have no claim whatsoever. They have to suffer and write off the debts even if the partners and the actual contractors/transactors who happen to be shareholders enjoy the bounty of enormous wealth in their personal names.

### **ABSOLUTION FROM DEBT**

The theory of absolution from debt, that is, to be absolved of debt without payment or a wholehearted waiver by the creditors, is a kuffaar concept alien and unacceptable to Islam. Not only fictitious entities, the so-called juridical persons, but even living persons are absolved of their debts by virtue of the insolvency law of the western

kuffaar. Thus, when a man is declared insolvent and all his assets have been possessed and disposed of to pay his creditors, he is totally set free from all remaining debts. Thereafter when he again acquires wealth, even millions, his creditors have no right in terms of western kuffaar law to pursue him for demanding what he owes them.

This same theory of arbitrary and legal absolution of debt, which denies the rights of the creditors, is extended to the fiction called 'juridical person'. When a company (the fictitious entity) is declared insolvent, the claim of the creditors is limited to the assets registered in the name of the fictitious person or the 'juridical person' in the terminology of the capitalists. The debts are simply written off and cannot be claimed from anyone. Those who had incurred the debt are let off the hook to go free to earn and become rich while those who have *huqooq* (rights), namely, the creditors, have to simply relinquish their rights and claims under duress of kuffaar economic laws.

In his book, *An Introduction To Islamic Finance*, Hadhrat Mufti Taqi Uthmaani of Pakistan, presents argument in favour of the absolution of debt, juridical person and limited liability concepts of the western capitalists.

### THE JURIDICAL PERSON

In his argument, he firstly presents the concept of juridical person. Henceforth we shall refer to the juridical person as the fictitious person, for it is nothing other than a figment of the imagination of the kuffaar. According to the venerable Mufti Saheb, the concept of 'limited liability' which gives rise to arbitrary absolution from debt, is the logical consequence of the concept of the fictitious person. Therefore, if sanction for the fiction can be acquired from the Shariah, then the concept of limited liability with its absolution from debt will be a logical necessity.

Outlining his postulate, Mufti Taqi Saheb states:

*“The basic question, it is believed, is whether the concept of a juridical person is acceptable in the Shariah or not. Once the*

*concept of 'juridical person' is accepted and it is admitted that, despite its fictive nature, a juridical person can be treated as a natural person in respect of the legal consequences of the transactions made in its name, we will have to accept the concept of 'limited liability' which will follow as a logical result of the former concept."*

The 'logical result' postulated by Mufti Taqi Saheb will be correct if the Shariah is made subservient to the laws of the kuffaar economists who fabricate theories and laws according to their thinking. Assuming that the concept of a fictitious person does exist in Islamic Law independently from kuffaar economic law, then too there is no logical necessity to latch onto this concept the idea of limited liability and arbitrary absolution from debt. Limited liability and automatic absolution from debt as logical consequences of the fictitious person theory will have to be proven on the basis of Shar'i evidence. It is a mere arbitrary conclusion to assert that if the concept of a 'juridical person' is accepted, then liability and arbitrary absolution from debt are logical consequences. There is no basis and no proof for this other than to tender the assertion that according to western economic law limited liability is inseparable from the concept of a 'juridical person'. But this hypothesis is baseless in the Shariah and repugnant to Islamic intelligence.

Hadhrat Mufti Taqi Saheb, as substantiation for his claim of 'logical result', argues that:

*"The reason is obvious. If a real person, i.e. a human being dies insolvent, his creditors have no claim except to the extent of the assets he has left behind. If his liabilities exceed his assets, the creditors will certainly suffer, no remedy being left for them after the death of the indebted person."*

The presentation of this analogy in support of the contention that limited liability is a logical consequence of the concept of the fictitious person indeed staggers the mind.

There is absolutely no scope for the general idea of limited liability and absolution of debt in the effect and consequence of the insolvent estate of the deceased.

In respect of the insolvent estate of a deceased, the question of ‘limited liability’ simply does not feature. The creditors cannot claim from persons other than the deceased because others are not the debtors. The rights of the creditors are restricted to the assets of the person who is the true debtor, namely, the deceased. The creditors cannot claim from the heirs for the simple and obvious reason that they are not the debtors and they inherit no part of the insolvent deceased’s assets which will be entirely possessed by the creditors.

Furthermore, the unfulfilled amount of the debt is not waived nor arbitrarily cancelled by the Shariah. It does not follow from the insolvent estate of the deceased that he is automatically absolved from his debt. The claim and rights of the creditors remain valid and will extend right into the Akhirah where they will be entitled to lodge their claims and demand payment or fulfillment of their rights in the Divine Court which is NOT a fictitious institution like the kuffaar concept of a ‘juridical person’. The Divine Court has greater reality than this material world in which we live. Hadhrat Mufti Saheb is fully aware of the consequences of unpaid debt, especially if the non-payment is willful. The rights and demands of creditors — even non-Muslim creditors — will be satisfied and fulfilled in full measure in the Divine Court on the Day of Qiyaamah.

The Divine Court, the Akhirah and Allah Ta’ala are inseparable from the Muslim way of life and thinking. These fundamental Entities are REAL and a Muslim is not allowed to formulate laws, theories, etc. in isolation from these REAL Entities.

### **ARE THESE ‘JURIDICAL PERSONS’ IN THE SHARIAH?**

Hadhrat Mufti Taqi Saheb presents the following Shar’i masaa-il in substantiation of the western concept of the fiction called ‘juridical person’ which is a legal entity supposedly possessing all contractual powers and abilities which a real human being is capable of in Islam:

- (1) Waqf
- (2) Baitul Maal

- (3) Joint Stock
- (4) Inheritance under debt
- (5) Al-Abd-ul Ma'zoon

Insha'Allah we shall proceed to discuss each one of these examples which the venerable Mufti Saheb presents as his basis for the validity and Shar'i acceptability of the capitalist system of 'juridical person' with its consequence of limited liability and arbitrary absolution of debt.

### (1) WAQF

Presenting his *daleel* (evidence/proof/basis), Hadhrat Mufti Sahib states:

*“The first precedent is that of a Waqf. The Waqf is a legal and religious institution wherein a person dedicates some of his properties for a religious or a charitable purpose. The properties after being declared as Waqf, no longer remain in the ownership of the donor. The beneficiaries of a Waqf can benefit from the corpus or the proceeds of the dedicated property, but they are not its owners. Its ownership vests in Allah Almighty alone.”*

After presenting the definition of a Waqf in terms of the Shariah, Hadhrat Mufti Taqi Saheb lapses into the following incongruous averment:

*“It seems that the Muslim jurists have treated the Waqf as a separate legal entity and have ascribed to it some characteristics similar to those of a natural person.”*

In substantiation of this incongruity, the Mufti Saheb presents the following argument:

*“This will be clear from two rulings given by the fuqaha (Muslim jurists) in respect of Waqf. Firstly, if a property is purchased with the income of a Waqf, the purchased property cannot become a part of the Waqf automatically. Rather, the ju-*

*rists say, the property so purchased shall be treated as a property owned by the Waqf. It clearly means that a Waqf, like a natural person, can own a property.”*

*Secondly, the jurists have dearly mentioned that the money given to a mosque as a donation does not form part of the Waqf, but it becomes in the ownership of the mosque.”*

## SUBHAANALLAAH!

Assets purchased with the income of a Waqf do not become part of the original Waqf property for the simple reason that for anything to become Waqf there has to be a *Waaqif* (a human being who dedicates the asset in the Path of Allah as Waqf). In this case, the purchased asset has no *Waaqif*. The *Waaqif* of the Waqf property specifically and expressly made the property Waqf so that it could be employed to generate income for distribution to whatever charitable cause he (the *Waaqif*) had designated. If the income of the Waqf too has to become Waqf automatically, the very aim and purpose of the Waqf will be defeated and it will be devoid of utility.

For his claim that the property purchased with the income of the Waqf will be a property owned by the Waqf, Mufti Taqi Saheb cites ‘*Al-Fatawa al-Hindiyyah, ch.5, v.2, p.417*’. For better understanding of this issue, we cite the relevant text to which Mufti Taqi Saheb has referred:

*“When the mutawalli (trustee) of a Masjid purchases a shop or a house with the money of the Masjid, then sells it, it (the sale) is permissible if he has the authority of purchasing. This mas’alah is actually based on another ma’alah, namely, Does the house or shop purchased by the mutawalli with the income of the Masjid become consolidated with the property which were made Waqf for (the expenditure) of the Masjid? In other words, does it become Waqf? The Mashaaiikh (Fuqaha) - Rahmatullah alayhim—differ in this regard. Sadrus Shaheed said that the preferred view is that it will not be consolidated (with the original Waqf property), but will become income for the Masjid. So is it*



*expressed in Al-Mudhmaraat.”*

In this reference there is no mention made of the purchased property being owned by the Waqf. The Shar’i law simply states that the property bought with the income of the Waqf does not become Waqf. It forms part of the income which has to be expended in accordance with the directive of the *Waaqif*. The issue of ownership does not arise at all.

The statement of the Fuqaha , namely, ‘*At-tamleek lil Musjid*’ which appears in I’laaus Sunan and other Kitaabs does not have the meaning of a ‘juridical person’ or a fictitious person as the capitalist concept propounds. Ownership of the Musjid in this context means *ownership of the Owner of the Musjid*. He Who is the true owner of the Musjid becomes likewise the owner of all assets made Waqf for the expenditure of the Musjid, and of all income generated by these Waqf assets.

Who is the owner of the Musjid? Hadhrat Mufti Taqi Saheb himself makes explicit reference to the owner of the Musjid, in fact to the owner of all Waqf property of any kind whatsoever. Thus, Mufti Saheb states in his book:

*“ITS OWNERSHIP VESTS IN ALLAH ALONE.”*

This is not a fictitious being. Allah Ta’ala is the only Being Whose existence is REAL. His Reality is true Reality, greater than all other realities created by Him. Let us see what the *Fuqaha* (Jurists of Islam) say about the ownership of a Musjid and of Waqf property.

(1) “Abu Yusuf and Muhammad said that Waqf in the Shariah is the retention of an object (or property) in the legal category of it being in the ownership of Allah Ta’ala in such a way that the benefit (of the Waqf asset) reaches the servants (of Allah). Thus the ownership of the *Waaqif* terminates and passes to Allah Ta’ala. It is therefore absolute. It cannot be sold, nor pawned, nor inherited.”

(Al-Jauharatun Nayyirah, page 21, Part 2)

(2) The same definition as above. However, in the consequence of

the Waqf its is said: “It cannot be sold nor gifted away nor inherited.”

- (3) According to one opinion of Imaam Muhammad and Imaam Abu Hanifah, the issue of ownership is described as follows  
“Verily, the demand (effect) of Waqf is the elimination of ownership (of the owner) without *tamleek*.”  
(Hidaayah, Volume 1)

In other words, when the *Waaqif*'s ownership is terminated by virtue of Waqf, there is no logical necessity for the Waqf asset to enter into the ownership of another human being as some Fuqaha aver. The ownership of Allah Ta'ala is Real, legal and adequate. It is not a stratagem of fiction as the western concept of 'juridical person' which has no reality whatsoever.

- (4) Verily, there is the need for the Waqf of the *Waaqif* to become absolute so that its thawaab accrues to him perpetually. And, this need can be fulfilled (by the *Waaqif*) terminating his ownership and making over ownership to Allah Ta'ala. For this there is a precedent in the Shariah, namely, the Musjid. Hence, it (the Waqf) shall simply be effected in this way.” (i.e. There being no need for any human being to assume ownership).

(Hidaayah, Vol.1, page 617)

- (5) “The (Waqf) property is the haqq of Allah Ta'ala.”  
(Hidaayah, Vol.1, page 622)

Our Fuqaha unanimously proclaim that when the Waqf is validated, ownership passes to the Original and True Owner, namely, Allah Ta'ala. Validation of the Waqf takes place in different ways according to the different Fuqaha. There is no need to elaborate this point here because it is beyond the scope of our discussion.

It will suffice to say that our Fuqaha do not assert that the Waqf has no owner. They are explicit in stating that Allah Ta'ala is the owner. The meaning of the averment of some Fuqaha that the Waqf property after leaving the ownership of the *Waaqif* does not enter into the ownership of anyone, is that it does not become the property of any human being. The Waqf asset will be used according to the directive of the *Waaqif*

for the beneficiaries of the Waqf. However, it does not follow from the termination of the *Waaqif's* ownership that the Waqf asset has absolutely no owner. Neither is this a Shar'i conclusion nor a logical consequence of Waqf. On the contrary the Shariah is explicit in its ruling that Allah Ta'ala is the Owner of the Waqf.

This Shar'i ruling effectively negates the idea of the Waqf being a fictitious entity/person like the western kuffaar concept of 'juridical person'. By what stretch of Shar'i reasoning can it be claimed that Waqf is similar or almost identical to the western concept of a fictitious person when the Shariah emphasises the real ownership of the Waqf? Is it Islamic to negate Allah's Ownership for relegating Waqf to the limbo of fiction merely for substantiating the kuffaar concept of 'juridical person'?

The Fuqaha are the Jurists of Islam and their preserve is Fiqh or Islamic Jurisprudence. They did not deal in allegory. They do not present metaphorical and figurative interpretations and arguments. Their arguments are cold, logical and rational facts based on the Qur'aan and Sunnah. So when they aver that ownership of a property reverts to Allah Ta'ala, their averment is in the literal and legal sense. It is therefore baseless to conclude from the termination of the *Waaqif's* ownership that some fictitious person assumes ownership like the fiction fabricated by the kuffaar economists.

There is not an iota of Shar'i evidence to substantiate the assertion that "it seems that the Muslim jurists have treated the Waqf as a separate legal entity and have ascribed to it some characteristics similar to those of a natural person".

What exactly are these characteristics which the Fuqaha have ascribed to a Waqf to justify dubbing it a 'juridical or legal entity'? We have already shown that a Waqf is not a separate legal entity in the way the capitalist system regards its fictitious 'juridical man'. Allah Ta'ala is the Owner. This indisputable Shar'i fact and reality utterly negate the claim of a Waqf being a fictitious person having rights and powers similar to a natural person.

### OWNING PROPERTY

How can one Waqf asset or property own another property when Allah Ta'ala

is the owner of the Waqf asset? In fact, this conclusion militates against even the concept of juridical person because according to this fiction of the capitalists, the ‘juridical person’ or the separate legal entity is not the tangible asset or the property or the capital invested. All these items are the assets of the juridical person. Who is this phantom described as the ‘juridical person’? It is the legal document which has been registered with the authorities of the land. This piece of paper which has been legally transformed into a ‘juridical person’ owns the assets of the company. The assets are not the juridical company.

But in the Islamic concept of Waqf, there is no such document which the Shariah elevates to the pedestal of an *Aaqil* (*sane human being*) and *Baaligh* (*an adult natural human being —Insaan*). A Waqf document in the first place is not a requisite for the validity of Waqf. Even if a document (Waqf Naamah) is drawn up, it (the document) is never regarded in Islam as an entity with contractual powers, rights, obligations and abilities. Even a natural human being lacking in the two imperative conditions of *aql* (*sanity*) and *bulugh* (*adulthood*) is estopped by the Shariah from contracting and transacting. Thus a minor and an insane person are not permitted to transact, contract and deal in commerce and trade.

If it is argued that since a lawful guardian or an appointed curator can act, transact and contract on behalf of a minor and an insane person, we can apply the same rule to a juridical person who can be represented by the directors of the company, we shall refute this argument. In the former instance, the guardian/curator represents a real and a natural human being while in the latter case the directors represent a fiction—an imaginary chap—a phantom, a piece of paper. In terms of the Shariah such fictitious representation is baseless. Islam does not condone falsehood, especially falsehood and fiction conjured for usurping the *huqooq* (rights) of the creditors.

Representation, that is, to be an agent of another, for its validity requires two fundamental conditions.

- (1) That the *Muakkil* (the principal) and the *Wakeel* (the agent) should be sane and adult human beings.
- (2) That the *Wakeel* assumes agency in a matter which the *Muakkil* himself is capable of executing.

Both these conditions are lacking in the representation of the juridical person who is supposedly the *Muakkil* by the directors who are the agents of the fictitious *Muakkil*.

There is no similarity of characteristics between the fictitious ‘juridical’ creation of the capitalist economic system and a Shar’i Waqf. While the fictitious legal ‘person’ is a document, Waqf is a tangible asset. Without the asset, there is no Waqf. But without assets, this figment of man’s imagination has been given legal sanction and elevated to the pedestal of a natural man in several aspects. The existence of Waqf hinges on a tangible asset while the ‘juridical person’ can exist without assets.

The ‘juridical’ paper-man can dispose of all its assets, but not so with Waqf. The Mutawallis (trustees) of the Waqf asset, i.e. the original asset which constitutes the Waqf, cannot dispose of it in any way whatsoever. The Shariah declares: “The Waqf asset cannot be sold nor given away, nor pawned, nor inherited.” The ‘juridical person’ can be annihilated, not so the Waqf property. The Waqf remains until the Day of Qiyaamah.

Like an animal cannot own money, so too can a stone not own money. Only *Insaan* (the human being) can own money. The conditions for ownership according to the Shariah do not exist in animals and stones and all lifeless objects. Thus, the Musjid property does not have the capacity of ownership in the meaning of ownership as related to *insaan* (man). That ownership of a Musjid is vested in Allah Ta’ala Alone, is irrefutable. Hence when it is said that the carpets belong to the Musjid, the money belongs to the Musjid, etc., it is meant thereby that all such assets are in the ownership of the Owner of the Musjid and have to be utilized exclusively for that particular Musjid. This obvious and logical conclusion is corroborated by the explicit declaration of the Fuqaha that Allah Ta’ala Alone is the Owner of the Musjid. Even Mufti Taqi Saheb concedes this fact. It is therefore a self contradiction to claim that ownership of the Waqf vests with Allah Ta’ala, and the income generated by the Musjid’s Waqf properties belong to the Musjid. The absurdity of this claim is self-evident.

The very same jurists who say that a Musjid can own assets, affirm that ownership of the Musjid is vested in Allah Ta’ala. From this averment it should be clear that their statement is not in negation of Allah’s Ownership. Most certainly, they do not propound the theory of partnership between Allah Ta’ala and the Musjid property. They do not ascribe the Shariah’s concept of ownership as related to *insaan* (man), to inanimate structures.

### BEQUESTS FOR MUSJIDS

Mufti Taqi Saheb says:

*“Another Maliki jurist, namely, Ahmed Dardir, validates a bequest*

*made in favour of a mosque, and gives the reason that a mosque can own properties.”*

We fail to understand why Hadhrat Mufti Taqi Saheb who is a Hanafi had to cite “another Maaliki jurist” when even the Ahnaaf validate bequests for a Musjid. A *wasiyyat* made for a Musjid is simply a directive by the *moosi* (the one who makes the bequest) to spend a certain sum of his money for the upkeep of the Musjid. There is no need to fabricate concepts of fiction for the execution of this simple directive. A mutawalli simply keeps in trust the bequeathed amount and utilizes it for the maintenance of the Musjid. What this has to do with the fiction of a juridical man defies imagination. Support for the creation of a phantom cannot be eked from the validity of a bequest for a Musjid. Monetary contributions bequeathed for a Musjid are like the contributions made by a living person. All such contributions are for the upkeep of the Musjid. The issue of ownership plays no role in obtainal of the discharge of the bequest.

Mufti Saheb makes the following conclusion:

*“It is clear from these examples that the Muslim jurists have accepted that a Waqf can own properties. Obviously, a Waqf is not a human being, yet they have treated it as a human being in the matter of ownership.”*

What Mufti Taqi Saheb claims is not at all clear from the examples he has tendered. From the examples he has cited there does not emerge the consequence that the Musjid building becomes an owner of wealth in the same way as a human being. The wealth and assets of the Waqf are held in trust by Mutawallis on behalf of the True Owner, Allah Ta’ala.

It is also the contention of the venerable Mufti Saheb that the principle of limited liability is a logical consequence of the juridical person concept. If juridical person is accepted, then limited liability has to be necessarily and logically accepted. Now in Mufti Taqi’s view, the Musjid or any other Waqf property is a ‘juridical’ person. Thus should follow the limited liability effect. How will limited liability apply to the Waqf property? The Waqf property (which is a tangible asset, not a piece of paper), does not have shareholders from whom it has borrowed money which constitutes its capital nor does it have creditors who could be thwarted by some limited liability principle.

If the Mutawalli was constrained to incur debt for the upkeep of the property, the creditor is not encumbered by any limited liability device in favour of the Waqf asset nor by the arbitrary absolution of debt rule. The Owner of the

Musjid/Waqf permits the creditor to receive full payment from the income generated by the Waqf. The debt cannot be arbitrarily written off by declaring the Waqf asset insolvent.

Arguing in favour of the western concept of the fictitious person, Mufti Taqi Saheb states:

*“Once its ownership is established, it will logically follow that it can sell and purchase, may become a debtor and a creditor and can sue and be sued, and thus all the characteristics of a ‘juridical person’ can be attributed to it.”*

Undoubtedly, ownership of the Waqf is established. It is established by the Shariah as we have explained in the foregoing pages, that Allah Ta’ala is The Owner — the Real Owner of the Musjid or of the Waqf property. Therefore, the conclusion that the Waqf property itself can transact and contract is absurd. The inanimate stone building cannot act, contract and transact. The Mutawalli buys and sells for the upkeep of the Waqf property. He does not buy and sell on behalf of the inanimate stone structure. He is not the *wakeel* (agent) of the property. He simply uses the income of the Waqf for the welfare and upkeep of the building and its administration. These acts and transactions by the Mutawalli have no relationship with any ‘juridical person’ who is devoid of reality. The Owner of the Waqf Property has empowered the Mutawalli through the medium of His Shariah to act in the best interests of the Waqf property.

If the owner instructs a painter to paint his property, there is no need for the superfluity of saying that the stone building is a ‘juridical person’ who has instructed the painter via the agency of the owner to paint the house. This is precisely what Hadhrat Mufti Taqi Saheb avers in spite of his awareness that Allah Ta’ala is the Real owner of the Musjid property and that it is not the Musjid property (the stone structure) which acts and transacts, but it is the Mutawalli (Trustee) who deals with the affairs of the Waqf properties in accordance with the Commands of Allah Ta’ala. A real, natural human being (the mutawalli) acts on behalf of The Real Being, Allah Ta’ala Who is the Owner of the Waqf property. Thus, there is no resemblance between a Waqf and the fiction of ‘juridical person’.

Mufti Taqi Saheb further claims:

*“The liquidation of a company corresponds to the death of a person,*

*because a company after its liquidation, cannot exist any more. If the creditors of a real person can suffer, when he dies insolvent, the creditors of a juridical person may suffer too, when its legal life comes to an end by its liquidation.”*

In this analogy, the venerable Mufti Saheb seeks to gain a Shar’i ruling on non-existing basis postulated as a Shar’i Mas’ala, hence Hadhrat Mufti Taqi Saheb says :

*“If the creditors of a real person can suffer, when he dies insolvent, the creditors of a juridical person may suffer too, when its legal life comes to an end by its liquidation.”*

What is the basis for the claim that if the creditors of a real person can suffer then likewise the creditors of a juridical person should suffer. There is absolutely no link between the two. By the terms “*can suffer*” the inference is automatic absolution of debt. But there is no such a Mas’ala in the Shariah hence it cannot be cited as a primary premiss (*Asl or Maqees alayh*) for the extension of a *Shar’i Hukm* to a new contingency which in this case is the absolution of debt in relation to the fictitious person.

There is absolutely no evidence in the Shariah for justifying the argument that the legal liquidation of a company in terms of kuffaar law is akin to natural death of a natural human being. If a Musjid is demolished, it cannot by any stretch of Shar’i argument be compared to the death of a human being. To a far greater degree will the laws applicable to the death of a human being not apply to the demolition of a Waqf property or the dissolution of a Shar’i partnership (*Shirkat*) enterprise.

*Shirkat* and *Mudhaarabah* (Partnership enterprises) are valid Shar’i forms and systems of trade. By some crooked type of reasoning and reckless interpretation, it may be argued that a Western company resembles *Shirkat*. Many Ulama too are confused on this issue and accept that a company owned by the fictitious juridical fellow is a valid Shar’i *Shirkat* enterprise. Hence they apply all laws of *Shirkat* to the juridical phantom except debt. As far as debt is concerned they introduce the kuffaar principle of limited liability which is not an effect of Shar’i *Shirkat*. Therefore, if Hadhrat Mufti Saheb had rather claimed that the liquidation of a company corresponds to the liquidation of the *Shirkat* enterprise, then there would have been some superrficial façade of a seemingly ‘valid’ argument. But the averment that “*the liquidation of a company corresponds to the death of a person*”, is absurd. It is utterly devoid of substance.



There is also no grounds in the Shariah for the claim:

*“If the creditors of a real person can suffer when he dies insolvent, the creditors of the juridical person may suffer too when its legal life comes to an end by its liquidation.”*

On what Shar’i grounds is this hypothesis based? When there is no such concept as a ‘juridical person’ in Islam, it is ludicrous to extend the consequences of the death of a real person to a fictitious person. On the otherhand, if the Shariah validates the concept of a fictitious person having contractual and other powers of a human being, such a concept would have been known to the Fuqaha from the very initial stage of Islam. But there is not the slightest and flimsiest shred of evidence to back up the concept of the ‘juridical person’.

This concept is particularly vulgar and fraudulent in view of the fact that the effect of absolution of debt attributed to it is designed to circumvent and deny payment of debt. This is a vile denial having grave and painful consequences in the Aakhirah. The attitude of Islam towards payment of debt and denial of the rights of others is too well known to require elucidation.

If creditors are constrained to suffer on account of the death of a person, what logical and Shar’i need is there for them to suffer when all the contractors, partners and shareholders of the liquidated company are living and enjoying their wealth and properties?

It is important to understand that the ‘suffering’ caused to creditors when the estate of the deceased is insolvent is temporary. Insolvency in Islam does not give rise to absolution of debt. The debtor remains liable his entire life. He has to work and pay. If he fails to settle his debts, the claim of the creditors is not arbitrarily waived. Their claims will extend into Qiyaamah where they will have the right and the ability to apprehend the debtor and haul him into the Divine Court where he will have to pay with the currency of the Aakhirah.

While the Belief or Concept of Aakhirah may seem remote to those anchored in materialism and the pleasures of this world, it is not a fiction like the phantom they dub ‘juridical person’ manufactured to rob the creditors. If the fiction of the ‘juridical person’ is rational, intelligent, beneficial and acceptable to the minds of the liberalists, then the concept of the extension of creditors’ claims into the Aakhirah should pose no difficulty for their comprehension. This is so because after all, inspite of being liberal, they do have *yaqeen* in the

Aakhirah and in all the pronouncements of Rasulullah (sallallahu alayhi wasallam). Among the teachings of the Rasool is the tenet that there is no automatic or arbitrary absolution from debt and that the creditors will enjoy the right of demanding their *huqooq* in the Court of Allah Ta'ala.

It is therefore erroneous for Mufti Taqi Saheb to say that if the creditors of a person can suffer then the creditors of the fictitious person can also suffer. Firstly, the 'suffering' of the creditors is temporary and depending on the degree of their Sabr, it is wonderfully rewarded. Secondly, the creditors are encouraged by the moral code of Islam to wholeheartedly waive the debt. If they choose this option, the 'suffering' is completely eliminated and substituted with the pleasure of the awareness of enormous *thawaab* in the Aakhirah and *barkat* in this world.

The creditors therefore will not suffer any loss irrespective of the deceased's estate being insolvent. What happens when a person is declared insolvent, whether he remains alive or has died, is that payment of debt is deferred to a later time. It is not waived. But in terms of the kuffaar concept of juridical person, the debts are written off and creditors are deprived of their rights. Islam regards this set up with repugnance. The Qur'aan and Ahaadith bear ample testimony to the evil of usurping the *huqooq* of others, and to the dire consequences which ensue in the wake of such usurpation.

## (2) BAITUL MAAL

Hadhrat Mufti Saheb's second example for justifying and providing Shar'i validity for the juridical person and limited liability ideas is the Baitul Maal or the state treasury or the vaults and safes and boxes in which the government stores the funds which have to be utilized for state expenditure. In the endeavour to justify the 'juridical person', Mufti Saheb avers:

*“Another example of juridical person found in our classic literature of Fiqh is that of the Baitul-mal (the exchequer of an Islamic state). Being public property, all the citizens of an Islamic state have some beneficial right in the Baitul-mal, yet, nobody can claim to be its owner.”*

The Baitul Maal simply consists of the state vaults in which the revenue collected by the state is stored. The funds kept in the boxes have to be distributed and spent in accordance of the Shariah by the Islamic Ruler who is the guardian of the funds. In his capacity as the representative of Allah Ta'ala he spends the money according to the instructions of Allah's Shariah. The ques-

tion of 'juridical person' for achieving fulfilment of the Shariah's instructions pertaining to these funds does not arise. In fact it is absurd.

The funds in the Baitul Maal are of a variety of categories. Some funds according to the Shariah have to be distributed in some specific avenues and may not be utilized for a different expenditure. To achieve this, a 'juridical person;' is not needed. The Khalifah who is the Guardian of the funds has the duty and obligation to ensure correct Shar'i disbursement of the money, etc. The Shariah empowers the Khalifah to take funds of a particular designation to spend it in another avenue if the need arises. This is the right conferred to the Khalifah, not to the inanimate money kept in the vaults.

Mufti Saheb cites the following statement:

*“If the head of an Islamic state needs money to give salaries to his army, but he finds no money in the Kharaj department of the Baitul-mal (wherefrom the salaries are generally given) he can give salaries from the sadqah department, but the amount so taken from the sadqah department shall be deemed to be a debt on the Kharaj department.”*

The Shariah has ordained different classes of wealth such as Zakaat, Kharaaj, Sadqah Naafilah, Khums, etc., etc. These funds have to be expended in different avenues or for different purposes. If, for example, Zakaat money is used to construct a Musjid, the obligation of Zakaat will not be discharged. If Zakaat money is thus spent in a category of expenditure which does not result in the discharge of the Zakaat obligation, it (Zakaat) will have to be made good by person who had used the funds for another purpose. This is not exclusive with the Baitul Maal. This law applies to everyone.

The Khalifah is empowered by the Shariah to take money from one category of funds and utilize it for a different purpose other than for what the money has to be used for according to the Shariah. But in relation to the Khalifah such use is not misappropriation because the Shariah permits this. However, when later funds of the particular kind are received, the Khalifah has to replace it to ensure that correct distribution is achieved. It is simply an issue of replacing the funds which the Khalifah had borrowed by virtue of the right the Shariah has given him. The inanimate vaults in which are kept the funds do not lend. It cannot lend. It is not an *aaqil*, *baaligh insaan* who has the capacity and ability to transact and contract.

The statement that the amount which the Khalifah took from the Zakaat vault, for example, is a '*dain*' (debt) on the Kharaaj vault does not mean 'debt' in the legal and technical sense of the Shariah. For the validity of such debt the essential conditions are *aql* (sanity) and *bulugh* (adulthood). Furthermore, the substratum of these two essential conditions is *insaan* (the human being). An animal cannot transact, contract, lend, borrow, etc., notwithstanding the existence of these two conditions in it. To a greater degree will this ruling apply to an inanimate object such as money or the vaults in which the money is stored.

For the execution of his obligations and acting according in accordance of his rights, the Khalifah of the Islamic state is not in need of any 'juridical' or fictitious person. The Shariah does not need to present such a phantom for the simple reason that the Khalifah is empowered to utilize the state funds according to his discretion within the bounds prescribed by the Shariah. By Baitul Maal is meant the material building where the funds are stored. It does not mean anything else. It is therefore ludicrous to force the Baitul Maal into the meaning of the western idea of 'juridical person'.

The inanimate vaults and boxes and the building in which these items are housed have no contractual power and ability. These inanimate objects cannot trade, sue and get sued. If the Khalifah does not replace the funds from the vault from where he acquired it or he is unable to replace the borrowed money, the Baitul Maal cannot sue him. If the ruler misappropriated someone's wealth and unlawfully deposits it into the safe-boxes stored in the building, there is no 'juridical person' to be sued. The *mazloom* (oppressed one) can petition the Islamic court to compel the ruler to return his property. The action will be against the ruler, not against the building where the ruler happens to have stored the misappropriated wealth.

It is an irrefutable Shar'i fact that Islam does not accept the arbitrary or automatic absolution of debt idea as conceived by the insolvency law of the kuffaar. Islam clearly states that the debtor remains liable for his debt for all time. If he is unable to pay his debtors here on earth, he will have to satisfy them with the currency of the Akhirah in Qiyaamah where he will stand trial in the Divine Court. A necessary attribute of debt is its perpetuity until the debtor is absolved either by payment or voluntary absolution by the creditor. But this rule of debt does not apply to the Khalifah who 'borrowed' from one vault to use in another avenue of expenditure. If funds to make good the amount taken are not available, the Khalifah will not be held liable in the Divine Court nor can he be held liable on earth. In spite of the 'debt' he is not

liable because he is no the debtor. The ‘debt’ thus taken is not a true debt in the sense defined by the Shariah.

How will one department of the Baitul Maal sue another one of its own departments (boxes/vaults)? Who will do the suing? If the Khalifah cannot find funds to replenish the money he had appropriated and the so-called department in the Baitul Maal is bankrupt, will the specific department or the entire Baitul Maal be declared legally insolvent and legally dead, thus compelling the Khalifah to close shop and put the Baitul Maal into extinction? The incongruity of the endeavour to create a hybrid system (an admixture of the kuffaar system with the Islamic system) is a miserable absurdity.

The Baitul Maal in terms of the explanation proffered by Hadhrrat Mufti Taqi Saheb is supposed to be a separate legal entity or a juridical person like a company. But can a company sue its own assets or any of its own departments? The claim that one department of the Baitul Maal (the supposed juridical person) is indebted to the other department in the way in which debtors are indebted to a company, leads to the absurd conclusion that some assets of a company can sue other assets of itself. In other words the juridical person is indebted to itself and can sue itself. In short it can commit suicide.

The Khalifah does not represent the Baitul Maal. He does not contract on behalf of the Baitul Maal which has no such capacity. He represents Allah Ta’ala and acts in terms of the mandate assigned to him by Allah Ta’ala. The Khalifah is not in need of a concept such as ‘juridical person’ to carry out his mandate. The juridical person is a creation of the west, and it has specific aims as its object. In the mind of the western man some legality has to be accorded to denial of execution of the liability of debts in order to attract capital. For achieving this aim, the fictitious person was brought into being. When this juridical phantom is legally killed, the rights of the creditors are extinguished.

Muslims who are conscious of the need to submit to the Shariah are not in need of any fictitious person to enable them to trade and attend to all affairs related to trade and commerce. The Shariah has made ample provision for this, and there is no need to introduce a concept/system of the kuffaar. Above all, there is no basis in the Shariah for granting it Shar’i acceptance.

### **(3) JOINT STOCK**

Hadhrrat Mufti Taqi Saheb states:

*“Another example very much close to the*

*concept of juridical person in a joint stock company is found in the Fiqh of Imam Shafi'i. According to a settled principle of Shafi'i School, if more than one person run their business in partnership, where their assets are mixed with each other, the Zakah will be levied on each of them individually but it will be payable on their joint-stock as a whole, so much so that even if one of them does not own the amount of the nisab, but the combined value of the total assets exceeds the prescribed limit of the nisab, Zakah will be payable on the whole joint-stock including the share of the former, and thus the person whose share is less than the nisab shall also contribute to the levy in proportion to his ownership in the total assets, whereas he was not subject to the levy of Zakah had it been levied on each person in his individual capacity.*

*The same principle which is called khultah-al-shuyu' is more forcefully applied to the levy of Zakah on livestock. Consequently, a person sometimes has to pay more Zakah than he was liable to in his individual capacity, and sometimes he has to pay less than that. "This principle of Khultah-al-Shuyu' has a basic concept of a juridical person underlying it. It is not the individual, according to this principle, who is liable to Zakah. It is the joint-stock which has been made subject to the levy. It means that the joint-stock has been treated a separate entity, and the obligation of Zakah has been diverted towards this entity which is very close to the concept of a juridical person, though it is not exactly the same."*

According to the reasoning presented in the foregoing explanation, "*the obligation of Zakah has been diverted towards this entity*", i.e. to the joint stock which has been termed the juridical person. Prior to the admixture of the stocks, the obligation of Zakaat was the responsibility of the individual, i.e. the person who is the owner of the assets. After the stock of two persons has been mixed, the obligation of Zakaat according to Hadhrat Mufti Taqi's reasoning is diverted from *insaan* (the human being) to the inanimate stock, be it

wheat, rice, sugar, money, etc., etc. When the incidence of mixture of two assets takes place, the human beings who are the actual and true owners of the stock are no longer responsible for the Zakaat obligation since a diversion of obligation has been effected. After the admixture, the Zakaat obligation is transferred to the joint inanimate stock. Truly, this reasoning is weird to say the least. SUBHAANALLAH!

### WHAT IS ZAKAAT?

Everyone knows that Zakaat is one of the *Arkaan* (Fundamentals) of Islam. The obligation of this Fardh injunction devolves on Muslims —Muslim human beings, not on kuffaar, least of all on inanimate objects such as wheat and rice. Mufti Taqi Saheb has cited the *mas'alah* of *khultah* (the admixture of two assets) which is a ruling of the Shaafi Math-hab as well as of some Jurists of the Maaliki and Hambali Math-habs. However, Mufti Saheb has omitted to mention that regardless of the incidence of admixture of rice and barley or the money of two human beings, Zakaat on the combined stock will be obligatory only if the human beings are free Muslims.

In view of the imperative condition of being a Muslim for the obligation of Zakaat, Zakaat will not be Waajib according to the Shaafi Math-hab on the joint stock owned by a Muslim and a kaafir. If the stock of a kaafir and the stock of a Muslim are combined, *khultah* has taken place. No one can deny this. Now if the obligation of Zakaat devolves on the joint inanimate rice and barley which were mixed or on any other combined stock, it would logically follow that Zakaat will have to be paid regardless of one partner being a Muslim and one a kaafir. Only the Muslim will pay Zakaat on his share of the mixture. The kaafir will not pay Zakaat on his share of the admixture regardless of the incidence of *khultah*.

If the joint stock was truly a separate entity or a juridical person in the western conception of the term, then Zakaat should have been obligatory on the stock by virtue of the principle of *khultah* regardless of the faiths of the owners of the joint stock. Faith does not apply to the inanimate 'juridical person'. It is therefore meaningless to portray the joint stock as a juridical person and divert the obligation of Zakaat from the joint stock to only the Muslim.

This should make it abundantly clear that it is not the inanimate joint stock which is liable for Zakaat payment and obligation. The obligation is squarely the responsibility of the Muslim human being, not of the inanimate joint stock. Hence, Zakaat is not payable on such 'joint-stock' if both partners are kaafirs or if one partner is a Muslim and the other a kaafir. In this case, the

'*khultah*' has absolutely no effect. Only the Muslim will pay Zakaat on his share of the stock, and that too, if it amounts to *nisaab* or more. The crucial determinant for the obligation of Zakaat is the *nisaab* value owned by Muslim human beings. This is the unanimous verdict of all the Fuqahaa of Islaam. The difference is only in the manner in which the *nisaab* is attained. While the Shaafi Fuqahaa accept the validity of a *nisaab* achieved by admixture of assets (*khultah*), the Hanafi Fuqahaa reject this principle.

### WHAT IS KHULTAH?

To gain a better understanding, it is necessary to explain what exactly is the meaning of *Khulta tush Shuyoo*'. *Khultah* simply means an admixture of different substances or things. An admixture of heterogeneous things produces a homologueous whole, for example, different metals mixed after melting produce one whole alloy.

*Shuyoo*' means permeation or spreading throughout in every particle of the whole combination of things. In the context of Zakaat, *Khulta tush Shuyoo*' means the amalgamation of assets belonging to more than one person, whether two or a hundred, etc. For the obligation of Zakaat, a minimum amount termed the *Nisaab* is necessary. If a person is the owner of the *nisaab* value, he has to pay Zakaat. If a man owns several Zakaat-taxable assets, each being less than *nisaab*, the variety of assets will be figuritively amalgamated to see if they collectively amount to *nisaab*. Thus, a man's little cash, little stock-in-trade and a little silver he owns will all be added up and Zakaat will be paid on the combined value of his stock if it amounts to *nisaab* or more.

When the little assets of a variety of kinds, each less than the *nisaab*, belonging to a single person have a combined value of *Nisaab*, then Zakaat becomes Waajib on him. Since the owner of the variety of little assets of different kinds' is one person, the *khultah* (amalgamation) of values suffices for the production of the *nisaab*. On the other hand, according to the Shaafi Mathhab, if a physical *khultah* (amalgamation) of assets belonged to several **Muslim** persons has transpired, then this physical whole will be treated as a homologueous whole of one person only for the purpose of assessing Zakaat, not for any other purpose whatsoever. Confirming this, Imaam Nawawi (rahmatullah alayh) says in Raudhatut Taalibeen, Volume 2, page 170:

“Thus, the *maal* (stock/assets) of two or more persons will be regarded as the *maal* of one person. Then Zakaat will become obligatory.”

For the purpose of levying Zakaat only, and for no other purpose whatsoever,



the Shaafi Math-hab rules that the amalgamated stock be treated as a homologueous whole for the production of *nisaab*. There is nothing more to this amalgamation. For the obligation of Zakaat in this case, a juridical man is not necessary nor does amalgamation of assets give rise to a juridical person. Only the *nisaab value is required. And, this requirement is acquired by treating the combined assets as a whole*. If the amount of the amalgamated stock is less than *nisaab*, the *khultah* has no effect whatsoever even in the extremely limited scope the Shaafi Math-hab allows it to operate, namely, only for assessing Zakaat.

The following example in Raudhatut Taalibeen also confirms that the obligation of Zakaat is the liability and responsibility of the two human Muslim partners of the amalgamated stock. It is NOT the obligation of the inanimate 'joint stock' as has been averred by Hadhrat Mufti Saheb.

*“...like two men who amalgamate forty (goats) with forty (goats). One goat is Waajib on both of them.”*  
(Volume 2, page 170)

The ruling is clear — Zakaat is Waajib on both **human beings** whose stock has been amalgamated. Zakaat is not Waajib on the inanimate amalgamated stock. It is simple to understand that just as Zakaat is Waajib on one owner when his Zakaat-stock is equal to *nisaab* or more, so too in exactly the same way is Zakaat compulsory on two owners according to the Shaafi Math-hab when their combined stock equals *nisaab* or more. There is no intermediary of a 'juridical person' here, nor is there a need for such a fictitious person. The Western kuffaar had a specific need for inventing the paper man they term 'juridical person'. We have no need for such a fiction. Islam has ample systems, devices and apparatus for all exigencies and times.

While the condition for the obligation of Zakaat is related to wealth, the obligation of discharge or payment of Zakaat is the liability of the **Muslim human being, not of the inanimate stock**. *Khultatush Shuyu'* or amalgamation produced by permeation or diffusion of the stocks of more than one person results in a homologueous whole akin to the homologueous whole of one owner. This factor has been taken by the Shawaafe fuqaha to hold the two or more owners of the amalgamated stock responsible for Zakaat payment. There is nothing further to read in this principle. It presents no substantiation for the western concept of juridical person.

*Khultah* itself cannot assume any liability. The liability of Zakaat remains the responsibility of the Muslim owners. Imaam Nawawi states in his Raudhatut

Taalibeen, page 171, Vol.2:

*“(Among the conditions) is that both the (human) amalgamators should be of those on whom Zakaat is Waajib. Therefore, if one of the two (owners of the amalgamated stock) is a zimmi (non-Muslim citizen of a Muslim state) or a Mukaatab (a category of slaves), then khultah will have no consequence. If the share (of the amalgamated stock) of the free Muslim is nisaab, he (the Muslim) will pay Zakaat on it, the Zakaat of one person (the Muslim owner). If not (i.e. if his share is less than nisaab), there is nothing (of Zakaat) on him.”*

This ruling clearly negates the suggestion that the amalgamated stock has become a juridical person who has liability and who has become liable for Zakaat. Zakaat remains the obligation of only the Muslim person. It is never diverted from the Muslim owner to anyone or anything else.

There are also other examples in the Shaafi books of Fiqh to negate the claim that amalgamated stock called ‘joint stock’ is a juridical person having rights and obligations like *insaana* (a human being).

#### **(4) INHERITANCE UNDER DEBT**

Regarding the insolvent estate of a deceased, Hadhrat Mufti Taqi Saheb says:

*“According to the jurists, this property is neither owned by the deceased, because he is no more alive, nor is it owned by his heirs, for the debts on the deceased have a preferential right over the property as compared to the rights of the heirs. It is not even owned by the creditors, because the settlement has not yet taken place. Being property of nobody, it has its own existence and it can be termed a legal entity.”*

The aforementioned averments are not entirely correct. The following claims are incorrect:

- ? The property of the deceased is the 'property of nobody'.
- ? The property of the deceased, according to the Jurists, is neither owned by the deceased nor the heirs.

Hadhrat Mufti Taqi Saheb arbitrarily without Fiqhi or Shar'i basis makes the following erroneous conclusion:

*“Being property of nobody, it has its own existence and it can be termed a legal entity. The heirs of the deceased or his nominated executor will look after the property as managers, but they are not the owners.”*

The only statement which is correct here is that *“his nominated executor will look after the property as manager.”* The heirs of the deceased while they too can look after the affairs of the estate, are not in the same capacity as the executor.

Regarding the ownership of the deceased's estate, there are two views propounded by the Fuqaha. None of these corroborate the claim that *'nobody is the owner of the deceased's insolvent estate'*.

The one view is that the estate of a person after his death and prior to division legally remains the property of the deceased.

This view is stated as follows in *Al-Mabsoot of Sarakhsi, page 111, Vol.28:*

*“The estate after death, prior to division, remains in the 'hukm' of the property of the murith (the deceased from whom the heirs inherit).”*

Recording the same view, Hidaayah states in Vol.2, page 638:

*“The ownership (of the deceased) remains after death in view of the need.....”*

The other view is that the ownership of the heirs is established and confirmed simultaneously with the death of the *murith*. Hidaayah states:

*“The right of the heirs is confirmed in the assets of the murith from the inception of the (deceased's) illness (maradhul maut), hence he (the deceased) is estopped from acting in two thirds (of his estate).”*

*(Vol.2 page 639)*

On page 639, Vol.2 of Hidaayah also states:

*“The reality of ownership of the heir is confirmed at the time of death while before death only the right (of the heir) is confirmed.”*

According to the Fuqaha these are then the two views, namely, (1) The ownership of the deceased remains after his death and continues until division has taken place. (2) Ownership is confirmed at the time of death.

The Fuqaha do not propound the view that nobody is the owner of the deceased's estate. Regardless of the liabilities exceeding the assets, ownership passes to the heirs since their right of ownership is established during the *maradhul maut* (the last sickness) of the *murith*. Thus, at the time of his death it is not a question of their right or claim being established and confirmed. This right came into existence during the last illness of the deceased. On his death, they automatically become the owners of the estate.

This is not the same for the creditors. Their claim over the assets of the deceased existed from the very time he had incurred the debt. Their claim and right remain even after his death because Islam does not recognize the concepts of *limited liability* and *automatic absolution of debt*.

On the death of the *murith*, the heirs become the owners automatically. Hence, if the heirs distributed the assets without paying the creditors of the deceased, the distribution will be valid, not **baatil**. The creditors will nevertheless have the right of pursuing them to demand their rights which the heirs had usurped. Assuming that after the distribution of the assets to the heirs, the creditors waive their claim, the distribution remains valid because they had distributed what was in their ownership.

The heirs need not procrastinate the division of the estate. It is quite possible that considerable time will lapse before the rights of the various creditors are proven. It is also possible that some creditors may be absent. It is also possible that at the time of the death of the *murith* the financial state of the estate is not known. The debts may surface later. Some creditors may not even be aware of the death of their debtor. In view of these possibilities, the heirs will proceed with the division of the estate and take possession of their respective shares of the assets. Later when the rights and claims of the creditors are proven, the heirs will have to pay, not because the assets were in the ownership of the creditors, but on account of their rightful claims.

If it should be assumed that indeed nobody is the owner of the insolvent estate of the deceased, then too there is no compelling reason to create a 'juridical phantom' to assume 'ownership'. The division and the fulfillment of rights can proceed without ownership having passed to anyone. In this case it will be said that ownership passes to the heirs and creditors after division, and for the presentation of a rationale, it will be said that the need occasions the view of ownership remaining with the deceased until division takes place. This is in fact the view stated in Al-Mabsoot.

If anyone is surprised at the claim of a dead person being an owner, then we must say that the surprise should be greater for the silly concept of a piece of paper or an abstract idea being an owner such as the fictitious creature of the western kuffaar, namely, the 'juridical person'. At least the deceased at one stage in the very recent past was a true owner. He was an honourable *insaan* who is *Ashraful Makhlooqaat* (Allah's noblest creation). Thus, the surprise will be totally misdirected and baseless.

There is therefore, absolutely no basis for presenting the insolvent estate of the deceased as grounds for claiming validity for the concept of juridical person with its un-Islamic consequence of absolution of debt or denial of the rights of the creditors.

### **ABSOLUTION OF DEBT**

With regard to the insolvent estate of the deceased, Hadhrat Mufti Saheb states:

*“.....the liability of this juridical person (the estate of the deceased) is certainly limited to its existing assets. If the assets do not suffice to settle all the debts, there is no remedy left with its creditors to sue anybody, including the heirs of the deceased, for the rest of their claims.”*

The ability of the creditors to claim is restricted to the material assets of the deceased. It is palpably erroneous to claim that there is no remedy left for the creditors. Yes, in terms of kuffaar laws, there is no remedy. But according to the Shariah, the claims of the creditors are not eliminated on account of the insolvency of the estate. The claims re-

main here and will remain in Qiyaamah.

The heirs cannot be pursued because they are not indebted to the creditors of the deceased. It is not that they are absolved of the debt in terms of some limited liability concept of the Shariah. In relation to the creditors of the deceased, the heirs are outsiders just as non-heirs are. The introduction of the limited liability claim here is thus superfluous and baseless.

Perhaps Hadhrat Mufti Saheb had not reflected deeply regarding the consequences of absolution of debt and limited liability stemming from the western juridical person concept. If this concept is accepted, the implication is that the creditors will have no claim over their debtors in Qiyaamah. This is truly a dangerous theory because the *Nusoos* are categoric and emphatic in declaring that the creditors will be able to claim their *huqooq* in Qiyaamah and receive payment there. In fact, even the *Shaheed* (Martyr) will be held liable for debt notwithstanding the obtainal of forgiveness for all his sins. We are certain that Hadhrat Mufti Saheb will at this juncture appreciate the danger of the concept of limited liability.

To cancel clear and categoric Nusoos simply to find validity and acceptability for the western juridical person and its effect of limited liability is indeed fraught with grave perils among which is the rejection or abrogation of clear and Saheeh Ahaadith on the basis of extremely flimsy *ta'weel* (interpretation).

Hadhrat Mufti Taqi Saheb avers:

*“If a juridical person can be treated a natural person in its rights and obligations, then every person is liable only to the limit of the assets he owns.....”*

There is a contradiction here. If every person is liable to the limit of the assets he owns, then it conflicts with the limited liability concept Mufti Saheb propounds because in terms of this principle every person (shareholder) is absolved of the debt incurred in the name of the juridi-

cal person. Only the assets of the company can be claimed by the creditors, not the assets the shareholders own in their own names.

Perhaps Mufti Saheb has phrased it wrongly. In view of the principle of limited liability he advocates, he refers to the assets or amount of capital which the shareholder has invested in the company. While he will lose these assets, his other assets unrelated to the company will remain unaffected and he will be absolved of the debt.

How will Mufti Taqi Saheb reconcile this automatic absolution of debt acquired from kuffaar law with the many Ahadith which clearly negate absolution and on the contrary confirm the claim and right of the creditor to continue into the Aakhirah?

Hadhrat Mufti Taqi Saheb further propounding the limited liability principle states:

*“...and in case he dies insolvent, no other person can bear the burden of his remaining liabilities, however closely related to him he may be. On this analogy the limited liability of a joint stock company may be justified.”*

This analogy is fallacious. The venerable Mufti Saheb has simply stated what is so obvious. Relationship and family ties do not produce liability. The one who has liabilities is responsible for discharge of his obligations. As mentioned earlier, the heirs are not liable for the debts of the deceased for the simple reason that the debts are not their liability. The question of limited liability and absolution of debt is thus not directed to them. There is therefore no analogy whatsoever on which to base the limited liability principle of the kuffaar.

##### **(5) ABD-e-MA'THOON**

Hadhrat Mufti Taqi Saheb presenting another example to substantiate limited liability, states:

*“Here I would like to cite another example with advan-*

*tage, which is the closest example to the limited liability of a joint stock company. ....The slaves of those days were of two kinds.....There was another kind of slaves who were allowed by their masters to trade. A slave of this kind was called abd-e-ma'thoon. The initial capital for the purpose of trade was given to such a slave by his master, but he was free to enter into all commercial transactions. The capital invested by him totally belongs to his master. The income would also vest in him, and whatever the slave earned would go to the master as his exclusive property. If in the course of trade, the slave incurred debts, the same would be set off by the cash and stock present in the hands of the slave. But if the amount of such cash and stock would not be sufficient to set off all the debts, the creditor had a right to sell the slave and settle their claims out of his price. However, if their claims would not be satisfied even after selling the slave, and the slave would die in that state of indebtedness, the creditors could not approach his master for the rest of their claims. Here the master was actually the owner of the whole business, the slave being merely an intermediary tool to carry out the business transactions. The slave owned nothing from the business. Still, the liability of the master was limited to the capital he had invested including the value of the slave."*

In this example, there is no substantiation for either the juridical person or for the principle of limited liability in the meaning of the concept of the capitalist economists. Sight should not be lost from the fact that Hadhrat Mufti Taqi Saheb has presented the principle of limited liability with its consequence of automatic absolution of debt as the logical effect of the acceptance of the juridical person. Without the existence of a 'juridical person' there is no basis for the principle of 'limited liability'. In fact, the creature known as 'juridical person' was spawned specifically for the principle of limited liability.

But, in the example of *Al-Abd-ul Ma'thoon* (the slave who is permitted by his master to trade), the question of juridical person does not feature. The slave is not a juridical person. His master is not a juridical



person. In this example are only real human beings.

With regard to limited liability, it does not apply at all to the actual trader, namely, *the Abd-e-Ma'thoon*. The actual trader, dealer, transactor and contractor is the Abd-e-Ma'thoon, not the master. Hence, *Abd-e-Ma'thoon* is not absolved automatically of the debts he has incurred. He has to pay the debt he has incurred even if it takes him a lifetime. If at the end of his lifetime, the debt is not paid, the right of the creditors will extend into Qiyaamah where they will have the right to pursue him and demand payment.

If the *Abd-e-Ma'thoon* is unable to pay his debts, whatever wealth and stock he has in his possession will be possessed by the creditors. After this, if the debts are not fully discharged, the creditors have two options:

- (1) To compel him to work and pay his debts.
- (2) To sell him and take the proceeds of the sale as payment on his debt account.

If after selling him, the debts are not fully paid, the creditors can still pursue him after he has been emancipated. The better option, ofcourse, is to induce him to work and pay. He is not absolved of the debt. Limited liability does not apply to the slave, the slave, who is the actual trader and transactor.

The master is responsible for only the amount which he had initially invested and the price of the slave. But this is not due to any limited liability principle as advocated by Western theory. This ruling of the Shariah is based on another principle, namely, the principle of *Taukeel* (the Shariah's system of Agency) is the principle which governs the relationship, rights and obligations of the parties to a transaction. The liability and obligation of payment devolve on the actual transactor/contractor who had incurred the debt. In relation to the creditor/seller, the obligation of payment is not the responsibility of the *Muakkil* (the Principal) who had appointed the *Wakeel* (Agent). The Shariah states this principle as follows:

*“He (the Wakeel) is the transactor (or contractor), hence, the huqooq (the obligations) relate to him.”*

*(Hidaayah, page 505, Vol.2)*

*“Verily, the huqooq (rights and obligations) of a transaction relate to the Aaqid (the transactor).”*

*(Hidaayah, page 163, Vol.2)*

*“The huqooq (rights and obligations) of every transaction the Wakeel relates to himself, e.g. selling, leasing, relate to the Wakeel not with the Muakkil (Principal).....The Wakeel is the actual transactor (Aaqid) in reality.....Since he is the actual transactor the huqooq of the transaction apply to him.”*

*(Hidaayah, page 163, Vol.2)*

*“If the Muakkil (Principal) demands payment from the buyer (to whom the Agent sold the item), he (the buyer) has the right to deny payment because in regard to the transaction (aqd) and the rights of the aqd, he (the Muakkil) is a stranger in view of the fact that the huqooq relate to the aaqid (the transactor)*

*(Hidaayah, Vol.2)*

This makes it abundantly clear that in terms of the Shariah, the creditors can demand payment from only the *Aaqid* (the one who incurred the debt). In this case it is the *Abd-e-Ma'thoon* (the slave whom the master permitted to trade). Furthermore, while the creditors cannot demand payment of the debts from the owner of the *Abd-e-Ma'thoon*, the latter is not protected by any limited liability principle which absolves him from the debts. He has to pay with whatever stock and cash he has on hand. Then he has to work and pay the balance of the debts. In fact, if the creditors decide, they can sell him and divert the proceeds to-

wards payment of his debt. Should the master emancipate the slave, he (the slave) will be pursued by the creditors for any outstanding debt and he will be compelled to pay. And, if he dies insolvent, the claims of the creditors will apprehend him in the Divine Court in Qiyaamah.

This should be sufficient to convince any impartial student of the Deen that the principle of limited liability does not pertain at all to the *Abd-e-Ma'thoon*. In so far as the master is concerned, limited liability applies in its literal meaning, not in the technical meaning of the kuffaar concept which gives rise to absolution of debt and to the fictitious person.

The master's liability is limited to the initial stock and the price of the *Abd-e-Ma'thoon* because he (the master) undertook liability to this extent. In other words, the master was the *Kafeel* (guarantor) of this amount. Thus, on the basis of the Shar'i principle of *Wikaalat*, the creditors have the right to demand full payment (not limited payment) from the *Abd-e-Ma'thoon*, and not from the master who happens to be the *Muakkil*. And, in terms of the principle of *Kafaalah* (Suretyship), the creditors can demand from the master the amount which he had undertaken to pay.

This then is the explanation for the limited liability of the master. The limited liability in this case is not the product of the concept of a juridical person, for there is no such fictitious person involved in the contract between the *Abd-e-Ma'thoon* and the creditors nor in relation to the master who is the *Muakkil*.

The principle of *Taukeel* (Agency) is not confined to the specific example of the *Abd-e-Ma'thoon*. The same principle governs a *Shirkat* (Partnership) enterprise as well. In partnership businesses such as *Shirkat-e-Anaan* and *Shirkat-e-Wujooh*, the creditors can demand payment and pursue only the actual partner who had transacted and had incurred the debt. In these types of *Shirkat* ventures, each partner is the *Wakeel* of the other partner, not the *Kafeel*. Hence the huqooq of the *aqd* apply to only the transacting partner. Yes, the *Wakeel* can demand payment from his partner and pursue him until the end of his life and if necessary, into Qiyaamah.

According to Imaam Shaafi (rahmatullah alayh) the problem is more difficult for Hadhrat Mufti Taqi Saheb because the Shaafi Math-hab teaches that the *huqooq* relate to the *Muakkil*.

Explaining the rationale underlying the debt being solely the liability of the *Abd-e-Ma'thoon*, the Hanafi Fuqaha state:

*“If they (the creditors) wish, they may pursue the Abd (Abd-e-Ma'thoon) for the entire debt because the factor (or reason) of the obligation (of the debt) emerges from him in reality, and that is the transaction.”*

*(Badaaius Sanaai', Vol.7, page 197)*

The master cannot be compelled to settle the debts because he was not the transactor and he had declared the amount which he guarantees, hence the excess debt is not his liability. The Hanafi Fuqaha state in this regard:

*“If after the Abd has been sold (by the creditors), there remains unsettled debt, this cannot be demanded from the master because there is no debt on him. The slave has to be pursued after his emancipation to settle the debt because the whole of the debt is his liability.”*

*(Badaaius Sanaai', page 197, Vol.7)*

The foregoing explanation should be adequate to dismiss the claim of juridical person, limited liability and absolution of debt read into the relationship which the *Abd-e-Ma'thoon* and the master have with the creditors.

## CONCLUSION

The Shariah has made ample provision to initiate large business ventures. The Islamic systems of *Shirkat* and *Mudhaarabah* are adequate. In a truly Islamic state — and there is none existing today — these sys-

tems could be introduced and made to function correctly without the need to encumber it with the *baatil* kuffaar concept of ‘juridical person’ which spawns the evil creatures of limited liability and automatic absolution of debt in stark conflict with the Ahadith of Rasulullah (sallallahu alayhi wasallam).

It must be understood that a transaction in trade is valid only if the parties involved in the deal are human beings. This vital condition for the validity of transactions and contracts, effectively refutes and knocks out the bottom from the kuffaar concept of ‘juridical person’ with its concomitant evil consequences. Just as a stone cannot be accepted as a god even if it is given legal acceptance by some religions and laws, so too, can a stone and a piece of paper not be accepted as a legal person with powers of transacting in the way a true *insaan* (human being) contracts.

### **CONTRADICTING THE CONCEPT**

After presenting his case for the acceptance and validity of the fictitious person termed ‘juridical person’, Hadhrat Mufi Taqi Saheb observes:

*“But at the same time, it should be emphasised, that the concept of ‘limited liability’ should not be allowed to work for cheating people and escaping the natural liabilities consequent to a profitable trade.”*

This conclusion presupposes that ‘*escaping the natural liabilities*’ is acceptable if the trade is not profitable. But Islam does not accept this hypothesis. Whether trade is profitable or not, there is no escape from natural liabilities. It is wholly unjust and cruel to expect that Zaid has to pay the damages incurred by Bakr’s unprofitable trade. While kuffar law accommodates such injustice and escape of natural liabilities, Islam allows no scope for accepting such incongruities.

Hadhrot Mufti Saheb has presented purely his opinion unbacked by any Shar’i evidence. His entire case has been structured on the kuffaar concept of ‘juridical person’ for which there is absolutely not the slightest vestige of evidence and support in the Shariah. On the basis of an arbitrary assumption, further conclusions are made arbitrarily.

Everyone is aware that cheating, fraud and dishonesty are haraam. Therefore, it is superfluous for Hadhrat Mufti Saheb to raise this moral precept in this discussion pertaining to the purely juridical domain. But in view of the grave danger which accompanies the kuffaar 'juridical person' concept, Hadhrat Mufti Saheb is constrained to introduce the moral dimension. Needless to say, there is widespread fraud being perpetrated under cover of the kuffaar concept of legal person with its concomitant limited liability principle. Fraud is perpetrated on a massive scale by both public and private companies. This is no secret. In all cases of such fraud which is cleverly concealed in cooked-up books, the creditors have to suffer while in most cases the shareholders and directors sit snug with huge sums of money and 'private' assets siphoned off clandestinely and fraudulently from the assets of the so-called 'juridical' ghost.

On the contrary, Islamic concepts and principles do not allow debtors to escape their liabilities whether the trade is profitable or not. In terms of the Islamic concept, the liabilities will hang on the necks of the debtors even on the Day of Qiyaamah. This very concept of Payment in Qiyaamah knocks the bottom out from the argument of limited liability and absolution of debts presented by Hadhrat Mufti Saheb.

Hadhrat Mufti Saheb is too well aware of the massive scams and cheating, dishonesty and fraud which accompany the limited liability idea, hence he felt constrained to offer his advice. But the kufr law does recognize this danger, hence it has instituted measures to check the anticipated fraud which is just natural for people who have no fear of Allah Ta'ala and no proper concept of the Akhirah. In spite of severe penalties prescribed by kuffaar governments for mismanipulation of the poor 'juridical' phantom, fraudsters are not deterred. The scope of subverting the 'juridical' fellow for dishonest personal gain is too wide.

Hadhrat Mufti Saheb suggests that the fraud could be blocked in the following manner:

*“So, the concept could be restricted to the public*

*companies only who issue their shares to the general public and the number of whose shareholders is so large that each one of them cannot be held responsible for the day-to-day affairs of the business and for all its liabilities.”*

Again this suggestion presupposes that public companies by far and large are honest and do not perpetrate fraud, hence only such companies should be rewarded with the “benefit” of the ‘juridical’ man with ‘his’ limited liability attribute. That public companies perpetrate scams and fraud on massive scales is not a secret to those who are abreast with developments in this sphere. They commit the worst acts of fraud. Thousands of small shareholders lose their life’s savings. Huge companies and conglomerates suddenly collapse. Both the shareholders (the general public) and creditors suffer.

Restricting the concept to public companies does not solve the problem of fraud and cheating. The bigger the company, the greater is the fraud and the more difficult to curtail and detect. They are too clever for the stupid trustees which a court appoints as inquirers into the rotten affairs of the collapsed company.

In the aforementioned conclusion made by Hadhrat Mufti Saheb, the following two items have been propounded:

- (1) In view of the large number of shareholders, each one of them cannot be held responsible for the day-to-day affairs of the business.
- (2) In view of No.1, the shareholders cannot be held liable for the debts exceeding the assets.

In so far as averment No.1 is concerned, the Shariah accepts this in even a small partnership of just two persons. The sleeping partner cannot be held responsible for the day-to-day affairs of the business because he simply is not active in the business and is not aware thereof. But averment No.2 is not a necessary corollary of No.1. According to the Shariah, even the dormant partner (shareholder) is liable for the debts in proportion to his percentage shareholding.

However, the Shariah makes one concession. While not absolving the dormant partners of the liabilities of the business, the creditors cannot demand payment from them. The right of demanding is vested in the partners who had actually transacted and incurred the debts. The creditors can demand from the transactors, and the latter can demand from the dormant partners. This is the effect of the operation of only the principle of *Wikaalat* (Agency) in *Shirkat* (Partnership), not of *Kafaalat* (Suretyship).

In conflict with Shar'i principles, Hadhrat Mufti Saheb argues in favour of total absolution of debt, and for this serious issue he presents as *daleel* only the fact of the large number of shareholders. But the Shariah does not accept the number or large number of shareholders as a basis for absolution of debt and for escaping liabilities.

Commenting further on this issue, Hadhrat Mufti Saheb avers:

*“As for the private companies or the partnerships, the concept of limited liability should not be applied to them, because practically each one of their shareholders and partners can easily acquire a knowledge of the day-to-day affairs of the business and should be held responsible for all its liabilities.”*

It is acceptable according to the Shariah that the large number of shareholders who have no active role in the affairs of the business be exonerated from the malpractices of the active culprits. But, the Shariah does not accept the hypothesis that they be absolved of the liabilities which their agents had incurred. If anyone claims the contrary, it devolves on him to produce Shar'i evidence, not opinion, regardless of how rational and acceptable such opinion may appear on the basis of the economic principles propounded by western or any other kufr system of economics.

Pursuing his argument, Hadhrat Mufti Taqi Saheb states:

*“As for the private companies or the partner-*



*ships, the concept of limited liability should not be applied to them, because, practically, each one of their shareholders and partners can easily acquire a knowledge of the day-to-day affairs of the business and should be held responsible for all its liabilities.”*

The concept of limited liability is a purely kuffaar concept for which attempts are being made to make it acceptable to the Shariah. After accepting the validity of this concept, Hadhrat Mufti Saheb seeks to deny the full consequence of the ‘juridical person’. If the ‘juridical person’ concept which is alien to Islam, is accepted, then its effects should not be divorced from it. To apply the limited liability principle to only public companies and to debar private companies from its ‘benefit’ is in conflict with this concept for whose ‘Islamic’ validity much argument has been tendered, albeit fallacious.

Non-Muslims who had originated this concept apply it logically and uniformly to both public and private companies. To restrict it to only public companies is unintelligent and illogic after the validity of the ‘juridical man’ has been accepted. This type of incongruity and conflict develops when Muslims endeavour to give Shar’i legality and status to the ideas of the kuffaar. The concept in the western capitalist system is original, uniform and workable since it conforms to their *nafsaani* behests. But when it is introduced into Islam, it is artificial, incongruous and unworkable because it has to be subjected to a process of abridgement since even in the opinion of the votaries of this concept, it is fraught with perils. But then the abridgement results in a hybrid concept unacceptable to both the Shariah and the capitalist system

Hadhrat Mufti Saheb’s averment that the ‘benefit’ of limited liability should be denied to private companies and partnerships, presupposes that all or most small companies or their shareholders and partners are crooks and frauds while all or most of the directors and shareholders of large public companies are honest gentlemen. The reality is the opposite. Whatever the reality may be, the suggestion ventured by Mufti Saheb is illogic and untenable. He has no valid basis, neither logical nor Shar’i, for his suggestion.

The arbitrary implication that the partners/shareholders of small partnership businesses are dishonest and frauds is lamentable to say the least. Furthermore, such an arbitrary opinion unbacked by evidence cannot be presented as a basis for the illogic proposition of differentiating between public and private companies.

The claim that '*each one of the shareholders and partners*' of small private companies and partnerships '*can easily acquire a knowledge of the day-to-day affairs of the business*' cannot be a valid basis for creating a difference in the obligations of partners in a small partnership and a big or public partnership/company. Besides personal opinion, there is no basis for this, neither in the Shariah nor in the western capitalist system.

The determinant in the duty of fulfilling obligations is the *haqq* (right) of others. In this case the *huqooq* (rights) of the creditors are at stake. Denial of the rights of the creditors on the flimsy pretext of ignorance of the day-to-day affairs of the business is untenable, unacceptable and palpably unjust as well as in conflict with Islam's declared principle of Payment in even the Aakhirah.

The directors of big companies and the active partners of small or private partnerships can easily pull wool over the eyes of the shareholders. It is only when the bubble bursts or is about to burst will the dormant partners realize the truth. In fact, the Shar'i rationale for the need to validate partnership enterprises is that while some people have money, they are ignorant of the ways of utilizing the money constructively to generate profit. On the otherhand, some people lacking money do have the expertise of using the capital to generate profit. But Islam does not validate absolution of debt and shirking of obligations on the basis of such ignorance of the capitalists who advance the initial capital.

The clever one, if he is dishonest, has the ability to conceal the

real state of affairs of the business whether the enterprise is a public or a private one— a business with innumerable shareholders or a small business with just two partners. Honesty and dishonesty are not the attributes of quantity. It does not follow that a large company with numerous shareholders will operate honestly, hence it should be privileged with ‘limited liability’ while small partnerships are run by dishonest partners hence they should be deprived of this privilege. This proposition is unreasonable.

It is illogic and unintelligent to penalise a partnership if it is small or private, and to award it if it is large or public Just as partners of small partnerships cannot be exonerated from their liabilities, so too may the partners of large partnerships or companies not be let off the hook. They enjoyed the profits of the business, so they are Islamically, legally and morally obligated to share the burden of the liabilities proportionately.

The criterion of honesty is not the largeness or the smallness of the partnership/company nor the numerical factor of its partners or shareholders. Neither does Islam accept this criterion nor does western or capitalist economics accept it. The argument of Hadhrat Mufti Saheb and the consequences ensuing in its wake thus have no validity.

Hadhrat Mufti Saheb worked himself into a tight corner in the endeavour to produce a hybrid concept of ‘limited liability’ which does not satisfy either the Shariah or western economics, Hadhrat Mufti Saheb thus states:

*“There may be an exception for the sleeping partners or the shareholders of a private company who do not take part in the business practically and their liability may be limited as per agreement between the partners. If the sleeping partners have a limited liability under this agreement, it means, in terms of Islamic jurisprudence, that they have not allowed the working*

*partners to incur debts exceeding the value of the assets of the business. In this case, if the debts of the business increase from the specified limit, it will be the sole responsibility of the working partners who have exceeded the limit.”*

Hadhrat Mufti Saheb has again lapsed into a self-contradiction in the idea of ‘limited liability’ which he has posited. In this averment, Hadhrat Mufti Saheb has implied an analogy for securing the exoneration from liability of the sleeping partners of a small partnership or private company. The analogical argument implied is as follows:

- ? The numerous shareholders of a public company are sleeping partners.
- ? The sleeping partners in the public company are and should be exonerated from liability exceeding the assets of the company (which in reality are the assets of the shareholders).
- ? The determinant for this exoneration is dormancy (or being a sleeping partner).

Now it is seen that this same factor of dormancy exists in the sleeping partners of a small partnership or private company. Thus, the logical consequence of exoneration from full liability should be extended to the sleeping partners of a small partnership or a private company as well.

So far the logic appears to be sound, i.e. if the determinant in the abovementioned syllogism is accepted as valid in the Shariah. In fact, it is not valid, but we have assumed its validity for a moment in order to bring to the fore the incongruency of the whole argument.

In his averment, while Hadhrat Mufti Saheb exonerates the sleeping partners from full liability, whether such partners hap-

pen to be the partners/shareholders of a small business enterprise or of a big public company, he distinguishes between the active partners (who may be the directors) of a public company and the active partners of a small partnership or the active shareholders (who may be the directors) of a private company. In relation to the private company, Hadhrat Mufti Saheb states explicitly that the debts will be the “*sole responsibility of the working partners who have exceeded the limit*”. But the venerable Mufti Saheb does not pass this same *fatwa* for the working partners/shareholders of public companies.

In so far as the working partners or shareholders of a public company are concerned, Hadhrat Mufti Saheb applies the western concept of the ‘juridical person’ fully thereby exonerating the working partners from their debts. But in relation to the private company, Hadhrat Mufti Saheb formulates an entirely new principle which conflicts with the ‘juridical person’ he is at pains to validate and offer Shar’i legality. And, this new and arbitrary principle is that the same exoneration is not applicable to the active partners of a small partnership or private company.

There is no justification to apply the concept of ‘juridical person’ partially to a private company when the natural, logical and legal (legal in kufr law) consequence of the application of this concept is identical for even a private company. The concept does not provide for differentiation between a public and a private company. The shareholders of both are legally allowed to escape their liabilities. But Hadhrat Mufti Saheb selectively applies the western concept of absolution of debt, described deceptively as ‘limited liability’. But, for this selection there is no basis in either the Shariah or in the western system of economics. In fact, rationally the selective process adopted by Hadhrat Mufti Saheb is seriously flawed with the defect of incongruity. This is indeed not surprising. When an attempt is made to create a fusion of *Haqq* and *Baatil*, the logical consequence is incongruity

which the Shariah rejects.

With regard to the agreement between the sleeping and active partners of a small partnership which Hadhrat Mufti Saheb equates with a private company, the attempt has been made to show that the Shariah accepts the concept of limited liability. Let it be clearly understood that wherever in the Shariah the idea of 'limited liability' appears, it is not the capitalist concept of absolute freedom from debt. It never means that the debt is automatically wiped out with the creditors having no relief and no further claim of demanding their rights. It simply means that a specific partner or partners is/are fully responsible for the debts to the creditors while the others are in turn liable to the active transactors for their share of the liabilities. It does not mean that the creditor's claim lapses or falls away as the kuffaar limited liability concept propounds.

The 'limited liability' of a partner or partners in an Islamic partnership (*Shirkat*) business is not the same as the 'limited liability' concomitant to the western concept of the 'juridical person'. In fact the term 'limited liability' is foreign to Islamic jurisprudence. In the Islamic sense it means the *full liability* for which the partner had assumed responsibility. Prior to the commencement of the business the partner stipulated with his active partner that he (the active partner) should not incur debts in excess of  $x$  amount, and if he does, he is responsible. Thus, when the active partner incurred debts in excess to the  $x$  amount, he himself is liable since the excess is not the debt of the sleeping partner. The Shariah clearly stipulates that in a partnership, each partner while being the *Wakeel* (agent) of the other partner is not his *Kafeel* (guarantor). The creditors can demand from only the one who had contracted and transacted with them, not from the other partner whether he happens to be dormant or active.

However, the one partner can demand payment from the other

partner since he had acted in the capacity of his agent. But he cannot demand from his principal (his partner whose agent he is) more than the amount which was stipulated and agreed on. Thus, it is not the western concept of 'limited liability' which operates here. It is full liability for the amount agreed on.

If the principal sends his agent to buy one loaf of bread, but he goes and buys two loaves, he cannot claim payment for two loaves. The principal will pay for only one loaf. It will be baseless to argue that he pays for only one loaf by virtue of some 'limited liability' concept. It is simply the principle of *Wikaalat* (Agency) which operates here.

In the argument presented by Hadhrat Mufti Saheb the terms *partners* and *shareholders* are used. He uses the term 'shareholders' for the investors in a public company while the word 'partners' is used for the investors in a private company. This implies that Hadhrat Mufti Saheb differentiates between a public and a private company. It was necessary for Hadhrat Mufti Saheb to imagine a differentiation. This differentiation is the effect of the partial acceptance of the consequence of the 'juridical person' concept. Hadhrat Mufti Saheb applies it fully to the public company so that the 'shareholders' may derive the full benefit of absolution of debt which 'limited liability' means. On the other hand, Hadhrat Mufti Saheb strips the 'juridical man' of this power of absolving debt in relation to the 'shareholders' or partners of a private company. Yet there is no difference whatsoever in the partnership concept as it relates to a public company or to a private company, neither according to the western concept nor according to the Shariah.

The verdicts of both the Shariah and western kufr law are uniform. The same rules apply to the shareholders (partners) of public and private companies. Although the effects of the two systems are opposites, they nevertheless are uniform. The 'juridical

man' concept of the kuffaar absolves the shareholders of their liabilities whether they happen to be shareholders in a public or private company. The Shariah on the contrary, holds all shareholders responsible for their liabilities—full liability — whether they are shareholders of a public or private company.

However, Hadhrat Mufti Saheb has landed himself in the unenviable situation of having to borrow from both systems to produce a new concept which is unacceptable to both the Shariah and to the western economic system.

In the new concept which stems from Hadhrat Mufti Saheb's arguments, the limited liability principle of the 'juridical person' applies fully as envisaged by its formulators to the public companies while it does not or should not apply to private companies or the partnerships. Thus Hadhrat Mufti Saheb states:

*“As for the private companies or the partnerships, the concept of limited liability should not be applied to them.....”*

### **ANOTHER ASPECT**

Another aspect apart from the limited liability discussion, is the ambiguous manner in which Hadhrat Mufti Saheb uses the terms private companies and partnerships. Does Hadhrat Mufti Saheb differentiate between private company and partnership (*Shirkat*)? Are the shareholders of a public company partners in an Islamic *Shirkat* enterprise? Or is a public company some other type of a venture? Does Mufti Saheb use the words shareholders and partners synonymously in relation to a private company? Is a private company the same as an Islamic *Shirkat* enterprise? Islam has clear concepts on these issues. Perhaps Hadhrat Mufti Saheb has different concepts formulated by blending the two diametric opposite systems. If so, we would like to say that any such fusion produces greater confusion which cannot be substantiated with Shar'i evidence.



In concluding his discussion, Hadhrat Mufti Saheb makes the following sweeping statement:

*“The upshot of the foregoing discussion is that the concept of limited liability can be justified, from the Shariuah viewpoint, in the public joint-stock companies and those corporate bodies only who issue their shares to the general public.”*

This sweeping statement is indeed the product of an arbitrary opinion. Neither is there justification for its application to the public companies nor to corporate bodies. To say that the Shariah permits this concept for ‘only’ the public companies is absolutely *baatil* in the Shariah. It being baseless in terms of the western ‘juridical person’ concept is glaring. Hadhrat Mufti Saheb has not produced a single valid argument based on the Shar’i principles of *Qiyaas* to substantiate his claim for the validity of the ‘juridical’ mirage.

In conclusion, we can safely claim that this concept of the western kuffaar is a conspicuous example of chicanery and legal deception in the wake of which ensues massive fraud and denial of fulfilment of the *huqooq* of the creditors.

And, Allah knows best.

**BY:**

***Mujlisul Ulama of South Africa***

***P.O. Box 3393***

***Port Elizabeth***

***6056***

***Rep. of South Africa***

## PAYMENT IN THE AAKHIRAH

In the authentic Ahaadith of Rasulullah (sallallahu alayhi wasalam) it is clearly stated that unpaid debt will be compensated with the Fardh Salaat and other virtuous deeds of the debtor.

A'mal-e-Saalihah will be the currency in the Aakhirah with which the debtor will be compelled to pay his debts. In a Hadith, narrated to us by Hadhrat Muhammad Masihullah (rahmatullah alayh), it is said that for every farthing (less than one cent) of unpaid debt, 700 Maqbool (accepted) Salaat of the debtor will be given in payment to the creditor.

However if the debtor was honest and made his best effort to pay, but before settling his debt, Maut claimed him, then Allah Ta'ala, out of His boundless Rahmat will "pay" the debt on behalf of the honest debtor. From this it is clear that there is no automatic absolution of debt which is the effect of the kuffaar concept of limited liability.

Absolution of debt is obtained in this world either by payment or by the creditor absolving the debtor. And, in the Aakhirah, absolution will be obtained by either paying with the currency of the Aakhirah or by Allah Ta'ala "paying" on behalf of the honest debtors. There is no other way.

## "EXCEPT DEBT"

"Hadhrat Anas (radhiyallahu) narrates that Rasulullah (sallallahu alayhi wasalam) said: 'He who recites Qulhuwal-laahu Ahad (i.e. Surah Ikhlaas) 200 times every day, fifty years of sins will be wiped off from him, except the DEBT on him.'  
(*Al-Jaamius Sagheer*)

## THE IMPORTANCE OF HUQOOQ AND THE GRAVITY OF THE DENIAL OF HUQOOQ

Rasulullah (sallallahu alayhi wasallam) said: “*Verily, you have been created for the Aakhirah.*”

We have been sent into this world for a short time to gain spiritual elevation and perfection to the best of our ability. We have not been sent to cultivate material perfection at the expense of sacrificing or harming our Aakhirah. In every sphere of our life, the dimension of the Aakhirah has to compulsorily feature. No aspect of the Muslim’s life should be conducted in isolation of the Aakhirah. Even the economic system which we adopt should necessarily be impregnated with the influences and values of the Aakhirah.

It is a grievous error which Muslims in these day commit when they give the Aakhirah a back seat and make endeavours to bend and subject the Shariah to alien cultures and systems. One such destructive system is the capitalist economic system. Attempts are being made in different quarters to make the Shariah compliant to this kuffaar system by resorting to far-fetched and incongruous interpretation. Totally untenable and invalid analogies are presented in the attempt to accord Shar’i acceptability to alien concepts which Islam repels. One such concept is the utterly fallacious idea of the fictitious ‘juridical person’ with its baatil effects of ‘limited liability’ and automatic absolution of debt. But absolution of debt is in fact the denial of the *huqooq* (the rights) of the creditors. This concept is in diametric conflict with the abundant *Nusoos*— explicit Ahadith— of Rasulullah (sallallahu alayhi wasallam) which state with great clarity and emphasis that even the *Shaheed* (Martyr) will not be absolved of his debt. Payment will be demanded in the Aakhirah. There is nothing allegorical or metaphorical about these *Nusoos*.

In view of the clarity of the *Nusoos* and the position of the Shariah, viz., its juridical verdicts, the attempt to eke out Shar’i basis for the kuffaar concept is indeed most surprising. We can only attribute this attempt to an attitude of liberalism which is acquired when free association takes place between Ulama and Muslim capitalists who are ignorant of the Shariah; who have adopted western ways; whose trade and commerce are entirely capitalistic orientated, and whose life-styles are is at variance with the Sunnah.

The importance of discharging *huqooq*, especially debt, cannot be over-emphasised in view of the abundance of Ahadith which speak with great clarity on the issue of paying debt. The fact that the demand for payment by creditors is held valid in the Aakhirah by the Shariah, should be more than ample

evidence for a Muslim that there is absolutely no scope in the Shariah for automatic absolution of debt which according to the capitalist economic system is the imperative effect of the limited liability principle which in turn has been spawned by the fictitious man dubbed 'the juridical person'.

If the process of *Qiyaas* (Analogical Deduction) culminates in a conclusion which militates against the *Nusoos* of the Shariah, then such *qiyaas* will be set aside as baseless regardless of any rational or logical basis it may have. Our criterion is the *Ahkaam* (Laws) of the Shariah and their underlying *Nusoos*. Anything in conflict should necessarily be struck down. The limited liability idea besides being in diametric contradiction with the Ahaadith of Rasulallah (sallallahu alayhi wasallam), does not conform to even the Shar'i procedure of *Qiyaas*. *There is absolutely no primary premiss (Maqees alayh)* for gaining a Shar'i *hukm* of validity and permissibility for this alien concept.

An attempt was made, albeit abortive, to show that certain Shar'i *masaail* (laws) conform to the limited liability idea. However, we claim with great emphasis that there is not even a superficial basis for this concept in the examples presented as Shar'i grounds for the un-Islamic concept.

In response to a Sahaabi who asked about forgiveness for the sins of a Shaheed (Martyr), Rasulallah (sallallahu alayhi wasallam) said:  
**“Yes, (i.e. His sins are forgiven) if you are firm, sincere and facing (the enemy in the battlefield) not turning your back (in flight), except debt. Verily, Jibraeel said this to me!!**  
*(Tirmizi)*