THE GENERAL THEORY OF SHARES AND DISTRIBUTION OF DIVIDEND IN A COMPANY UNDER THE COMPANIES ACT 1965: WITH SPECIAL REFERENCE TO ITS LEGALITY UNDER THE ISLAMIC PERSPECTIVE

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ABSTRACT
Under company law, a share is the interest of a shareholder in a company. By the same token, shares also reflect the interest of a shareholder in a mudharabah or musharakah contract under the Islamic laws. Presently, a company which has been registered under the Companies Act 1965 is often regarded as a conventional company as opposed to a syariah-compliant company. Nevertheless, it is possible to harmonize the provision in the Companies Act 1965 with Syariah principles in relation to shareholding issues. This article focuses on the rights attached to ordinary shares and preference shares under the Companies Act 1965 and the compatibility of such rules with the Syariah principles. The concern is also to determine the legality of basic principles in relation to the distribution of dividend to shareholders in the light of Islamic perspective.

1. INTRODUCTION
By and large, the Muslim jurists recognized the *mudarabah* and *musharakah* contracts as two forms of business organisations and such contracts were created during medieval Islamic civilization. Nevertheless, it is not correct to set aside the contracts of *mudarabah* and *musharakah* from being utilized in the modern companies nowadays.

Under Islamic law, the contracts of *mudarabah* and *musharakah* are paramount forms of business organisation. In essence, the application and suitability of these two forms of business organisations has to be reconsidered in view of the existence of the modern company. This is because modern companies with distinct legal personality only existed after the 19th century, long after the introduction of *mudarabah* and *musharakah* contracts in the Muslim society. However, this is not to say that all modern companies are not

Syariah compliant merely on the basis of a lack of recognition of this type of business organisation in medieval Islamic civilization. Besides that, a *musharakah* contract is traditionally used to identify the general partnership relation as known in the civil law system whereby an identity of the shareholders or partners is important since it involves mutual agency or mutual guarantee (Saleh, 1981).

A company's emphasis on availability of share capital rather than the identity of the partners except in small private companies or incorporated associations requires that the Islamic perspective on capital contribution be further elucidated.

In Malaysia, the development of Islamic banking and finance as well as the Islamic capital market has urged renewed concern in Islamic *muamalat* or commercial transactions. However, the focus has been on financing ventures and private debt securities. Thus, it would be remarkable to decide whether an Islamic company would be viable, bearing in mind the entrenched common law rules in relation to the current company law.

This article proposes to consider the nature of shares and the legality of ordinary and preference shares under the Malaysian Companies Act 1965 and its compatibility with the Syariah principles. It is also paramount to determine the legality of basic principles in relation to the distribution of dividend to shareholders in the light of Islamic perspective.

2. CENTRAL IDEA OF A COMPANY AND ITS CLASSIFICATION UNDER THE COMPANIES ACT 1965

A company is an incorporated association and it is also one type of business organizations. Generally, it becomes a separate legal person once it is formally incorporated under the law. It has an existence apart from the persons who formed it (Woon, 1997). The function of a company in a legal sense is to hold property and carry on a business or other activity for a common purpose of gaining profits. In addition, the main statute regulating companies in Malaysia is the Companies Act 1965 whereby it deals with registration of companies, membership and internal management, debt capital, financial reporting and audit requirements as well as administration of companies in financial difficulties (Mohd Sulaiman and Bidin, 2008).

In brief, the Companies Act 1965 classifies registered companies in a variety of ways. The more significant classifications are according to the liability of members (limited liability or unlimited liability), their public status (public or private companies), their relationship with other companies (holding and subsidiary relationship), the place of incorporation (local and foreign companies) and the type of business (investment companies) (Rachagan, Pascoe and Joshi, 2004). Once the decision is made to use, for instance, a private company as the form of business association for a particular enterprise, then the choice becomes one between the different types of companies that can be formed under the Companies Act.

With regards to the classification of company according to the members' liability, companies limited by shares are the most common form of company under this particular classification (Mohd Sulaiman and Bidin, 2008). Since the companies limited by shares are more relevant for the purpose of our discussion and it is also closely related to the theory of shares, we shall now deal with it by giving a brief clarification of its principle in the light of Companies Act 1965.

By virtue of Section 4(1) of the Companies Act 1965, a company limited by shares is a company formed on the principle of having the liability of its members limited, by the memorandum of association (MOA), to the amount (if any) unpaid on the shares respectively held by them. Therefore in these companies, members contribute or agree to contribute when called upon to do so, money or property as share capital. Besides that, Section 18 of the Companies Act 1965 also requires these companies to state in their MOA, the amount of share capital and its division into shares of a fixed amount. The liability of members in a company limited by shares to contribute in respect of company's debts on a winding up is set out under Section 214 of the Act.

3. GENERAL FEATURES OF MUDARABAH AND MUSHARAKAH FROM THE ISLAMIC PERSPECTIVE

Generally, there are two main forms of business organisations under the Islamic laws which are *mudarabah* and *musharakah*.

Mudarabah is a special kind of partnership whereby one partner gives money to another for investing in a commercial enterprise. The investment comes from a partner who is called *rabbul mal* while the management and work is the exclusive responsibility of the other who is called the *mudarib*. The *rabbul mal* may specify a particular business for the *mudarib*, in which case he shall invest the money in that particular business only and he may leave it open for the *mudarib* to undertake whatever business he wishes whereupon the *mudarib* shall be authorised to invest the money in any business he deems fit.

A *rabbul mal* also can make a contract of *mudarabah* with more than one person through a single transaction. It means that he can offer his money to both A and B so that each one of them can act for him as *mudarib* and the capital in such *mudarabah* contract shall be utilised by both of them jointly. However if they wish to engage in an extraordinary piece of work which is beyond the normal routine of traders, they cannot do so without getting express permission from the *rabbul mal* (Usmani, 1998). In a word, a *mudarabah* strictly means that only one side provides the capital while the other side provides the labour or skill. In such a case, the profit is divided between the two parties but only the capital contributor bears the loss.

Another form of business organisation according to Islamic perspective is *musharakah*. The root word for *musharakah* is '*syaraka*' which is interpreted as 'to share, to be or become partners or to participate with'. The word '*share*' in *musharakah* contract refers to the investor's participation with other shareholders in contribution to the capital of the business and share in the profit of a business as well as the loss incurred as a result of the particular business (Muhammad al-Ghazali, 2001).

On top of that, *musharakah* contract may be classified under two main divisions which are firstly, based on the types of capital contributed by the parties and secondly, based on contribution of capital and sharing of profit. Under the first division, it can be further subdivided into three categories which are *sharikat al-amwal*, *sharikat al-a'mal* and *sharikat al-wujuh*. On the other hand, there are two categories of *musharakah* under the second division which are *sharikat al-mufawadah* and *sharikat al-inan*.

In short, *sharikat al-amwal* is a type of *musharakah* contract whereby the parties agree to contribute their property for the capital whereas in *sharikat al-a'mal*, the parties only agree to contribute their labour or skill as capital. It is also interesting to note that in *sharikat al-wujuh*, the parties do not contribute either property or skill but undertake to acquire property on their personal credit, sell it and finally share the profit from the sale.

Meanwhile *sharikat al-mufawadah* which falls under the second division of *musharakah* refers to an agreement where there is equal contribution of capital as well as profit and loss. However in *sharikat al-inan*, it signifies an agreement without complete equality of capital and profit. According to some Muslim jurists, *sharikat al-inan* implies an investment company (Ibn Qudamah, 1972).

Based on the above analysis, the distinctions between the agreements of *musharakah* and *mudarabah* can be summarised based on several principles. Firstly, the contribution of share capital in *musharakah* arises from each of the business partners whereas in *mudarabah*, the funding would be the main duty of the *rabbul mal*. Secondly in *musharakah*, every partner can get themselves involved in the business's management and may work for it whereas in *mudarabah*, the *rabbul mal* has no right to take part in the management which is carried out by the *mudarib* except only to the extent of specifying a particular area of business for the *mudarib* to utilise. Thirdly in *musharakah*, each business partner would share the loss to the extent of the ratio of their investment while in *mudarabah*, the loss if any, is suffered by the *rabbul mal* only because the *mudarib* does not invest anything.

Hence, after scrutinising the essential principles with regards to the concept of *musharakah* and *mudarabah* from the Islamic perspective, we may observe that the basic features of *musharakah* agreement are quite similar with the structures of company under the Companies Act 1965 whereas the fundamental characteristics of *mudarabah* agreement are analogous with the features of our modern-day concept of partnership agreement.

4. NATURE OF SHARES UNDER THE COMPANY LAW AND THE SHARIAH REGULATIONS

As far as company law is concerned, the case law which laid the foundation in understanding the nature of shares is *Borland's Trustees v Steel Bros & Co* where Farwell J states that:

"*A share is the interest of the shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by the shareholders inter ser in accordance with [section 33]. The contract contained in the articles of association is one of the original incidents of the share*".

Further, in the case of *Peters' American Delicacy Co Ltd v Heath*, Dixon J held that "*primarily a share in a company is a piece of property conferring rights in relation to distributions of income and of capital*". Thus from the above authorities, a share may be regarded as a bundle of rights and obligations. The exact rights and obligations that a share represents depend on the company's constitutional documents which are the memorandum and articles of association.

Under Malaysian company law, Section 98 of the Companies Act 1965 provides that shares in a company shall be a movable property which is transferable in the manner provided for by the company's articles. Thus when a share is transferred, the transferor hands over to the transferee the whole package of rights that the share represents. Shares are the property of the shareholder and as such, the owner of shares has the normal rights of ownership i.e, a shareholder may sell his shares, give them away or pledge them as security for a loan (Woon, 1997).

On the other hand, the concept of share under the Islamic perspective would literally indicates the participation of a shareholder with other shareholders in contributing towards the capital, participation in the distribution of profits and (except of *mudarabah* agreement) bearing of loss. It is also possible to define shares as *sukuk* or documents that have equal value and are acceptable for exchange by way of trade as well as something that defines the rights of a shareholder in a *musharakah* agreement from his contribution to the capital. These rights are exercisable by the shareholder especially in entitlement to profit (Abu Zayd, 1983). The term 'share' also signifies ownership rights representing the underlying property in a company including real properties, usufructs, rights, money and debts (Hassan, 2001).

5. TYPES OF SHARES UNDER THE COMPANIES ACT 1965 AND ITS LEGALITY UNDER THE SYARIAH PRINCIPLES

In essence, a company can issue shares of different types with different rights attaching to each type of shares. It is also a good practice to set out the rights attaching to each type of shares in the company's memorandum or articles although this is not strictly required except in relation to preference shares.

Companies may issue shares of different classes in order to accommodate the different needs and preferences of different types of investors. Subject to certain restrictions, directors of a company can decide the terms of issue for new shares. Although not restricted to these matters, different classes of shares will generally be created where the company wishes to issue shares with different rights in relation to entitlement of dividends, priority in relation to the payment of dividends, voting rights, priority in repayment of capital in a winding up or right to share in surplus assets on winding up.

At this point, the legal issue now is whether there are any restrictions on the rights that can be attached to shares. By virtue of Table A from the articles of association, Article 2 confers on the directors the authority to issue shares with certain preferred, deferred or other special rights. An example of special rights is the enhanced voting rights attached to shares in private companies. This particular enhanced voting right may provide, for instance, that the shareholders will have double or triple votes in certain cases. On the other hand, Section 55 of the Companies Act 1965 which applies to a public company with a share capital and its subsidiary only provides for one vote for each equity share issued at a general meeting. On top of that, the Bursa Malaysia Listing Requirements may also affect the public company's ability to issue shares that have enhanced voting rights. This is because the Bursa Malaysia Listing Requirements require 'one vote, one share' for all ordinary shares. In other words, there will be certain restrictions which are being imposed on the rights that can be attached to shares particularly for a public company (Mohd Sulaiman and Bidin, 2008).

In Malaysia, it is common for a company limited by shares to issue ordinary shares and preference shares (Woon, 1997). However, ordinary shares are not given an explicit definition in the Companies Act 1965 and are often known as such in contrast to preference shares. The normal rights of ordinary shareholders are right to share in dividends with other ordinary shareholders, the right to vote at general meetings, the right to be repaid capital upon winding up after all other claimants have been paid and right to share in surplus profit or asset upon winding up.

With regards to the preference shares, Section 4 of the Companies Act 1965 defines it as a share by whatever name called which does not entitle the holder thereof to the right to vote at a general meeting or to any right to participate beyond a specified amount in any distribution whether by way of dividend or on redemption in a winding up or otherwise. Preference shares typically have several rights which are attaching to it such as the right to receive a fixed dividend provided there are profits available for distribution and a dividend is declared by the company, the right to be repaid the principal on a winding up in priority to ordinary shareholders and no voting rights unless dividends are in arrears, upon any resolution to vary the rights attached to such shares or to wind up the company (provided under Section 148(2) of the Companies Act 1965) (Mohd Sulaiman and Bidin, 2008).

In the case of *Re Hume Industries (FE) Ltd*, Tan Ah Tah J said, "*the presumption is that the rights set out in the memorandum and articles are exhaustive*". However if a company's constitution is silent as to the preference shareholder's rights and there is no other source that a preference shareholder can point to in order to establish his or her alleged rights, the preference shareholder may rely on common law presumption to establish his or her alleged rights (Rachagan et al. 2004). Furthermore, in the case of *Webb v Earle*, the company issued participating preference shares but the company's articles were silent as to whether the shares carried with it the right to cumulative dividends or not. Later on, the company once again issued preference shares but this time the company expressly stated that the latter issue of preference shares was cumulative. The court held that the first issue of preference shares was presumed to be cumulative even though this was not expressly stated.

It is also important to take note that under the Companies Act 1965, preference shares can be further divided into several categories which are cumulative preference shares, non-cumulative preference shares, redeemable preference shares and convertible preference shares.

Preference shares may be cumulative or non-cumulative. The holder of a cumulative preference share carries forward their entitlement to a distribution from one year to the next if no dividend is declared in a particular year. In contrast, the holder of a non-cumulative share is only entitled to the specified rate of dividend out of the profits of the current year where the dividend is declared and paid. Therefore, holders of a non-cumulative preference share will lose their entitlement to any dividend that is not declared or paid in the relevant year.

By virtue of Section 61 of the Companies Act 1965, it also allows companies to issue redeemable preference shares if authorised by the articles of association. It may be redeemed by a company at a fixed time in the future or at the option of the company subject to the terms of the issue. The funds for the redemption of redeemable preference shares must be out of profits available for dividends or from the proceeds of a new issue of shares made for the purpose of the redemption and the share can only be redeemed if it is fully paid up as stipulated under Section 61(3) of the Companies Act 1965. The company's article can also provide that the holders of the redeemable preference shares may serve notice on the company requiring it to redeem its redeemable preference shares.

At this stage, the question arises as to whether the company can refuse to comply with the notice served on the grounds that the company has no profit to redeem its redeemable preference shares. In the case of *Commissioner of Taxation v Coppleson*, the Federal Court of Australia held that the obligation to redeem depended upon the availability of profits or of the proceeds of a fresh issue of shares. If neither were available, the company would not be in breach of its obligation to redeem even though notice had been given by the shareholder. However in the case of *UOB Venture Investment Ltd v Tong Guan Garden Holdings Pte Ltd*, the Singapore Court held that where notice is served on a company in accordance with rights under a contract and there is failure on the part of the company to redeem its shares under such contract, this would result in the company breaching its contractual obligations. The holders of the redeemable preference shares may then sue the company for damages resulting from the breach of contract or apply for an order of specific performance against the company. Thus if we accept the approach in the *Coppleson's* case, a shareholder would not have any assurance that his shares would be redeemed at the stipulated time. It would depend entirely on whether the company had available profits or could issue new shares in order to do the redemption. As such, it would mean that an option given to a shareholder to demand redemption might turn out to be worthless.

An additional type of preference share sometimes issued is a convertible preference share. These shares usually carry a right to a fixed dividend for a particular term and then allow for or require conversion to ordinary shares at the end of the term. Usually, the conversion ratio will reflect in some way the value of ordinary shares at the time of the conversion (Mohd Sulaiman and Bidin, 2008).

To put it briefly, the classification of shares under the Companies Act 1965 and under most common law jurisdictions is based on the rights attached to the shares.

We shall now analyse the compatibility of those classifications of shares with the Syariah principles. From the Islamic perspective, it is permissible for a Muslim to buy and sell ordinary shares as well as to get benefit from dividend of a company which is not involved in the manufacture or sale of prohibited goods in Islam such as liquor, pig, drugs and so on. The business also must not be based on any gambling activity. In addition, the ordinary shares are among the instruments which have been approved by the Syariah Advisory Council of the Securities Commission Malaysia.

With regards to the legality of preference shares, the Syariah Advisory Council (SAC) of the Securities Commission Malaysia resolved at its 20th meeting on 14th July 1999 that the non-cumulative preference share is permissible based on the concept of *tanazul*. The SAC ruled that non-cumulative preference shares are permissible based on *tanazul* where the right of entitlement to profit of an ordinary shareholder is given willingly to a preference shareholder. *Tanazul* is agreed upon at an annual general meeting of a company which decides to issue preference shares in an effort to raise new capital. This principle is also known as *isqat haq* in Islamic jurisprudence.

In relation to cumulative preference shares under the Companies Act 1965, it can be issued where the entitlement to dividend is accumulated to the next year if the dividend was not paid. We may say that the payment of profit is compulsory and will accumulate so long as no dividend is paid irrespective of whether or not there is loss. However, this would go against the concept of profit sharing because the result for such an agreement is that the shareholders for cumulative preference shares are entitled to dividend irrespective of availability of profit. The agreement of the shareholders in a contract of *musharakah* that a shareholder will not share in profit or loss, or that only some will bear the loss or that some are protected from bearing any loss is against the Syariah principles because it means that there is sharing in profit alone (al-Khayyat, 1994). This is supported by the legal maxim, "*al-ghurmu bi al-ghunmi*" which can be translated as "the detriment is as a return for the benefit". In other words, a person who obtains the benefit of a thing takes upon himself also the loss from it (Tyser et al. 2001). The legal maxim is taken from the hadith of the Prophet Muhammad S.A.W which can be translated as follows:

A'isyah reported that Rasulullah S.A.W as saying: "*Profit follows responsibility*" (al-Ash'ath, 1974; Muhammad ibn Isa, 1983).

Therefore from the above authorities, cumulative preference shares are not permissible in Islam since it defeats the purpose of profit and loss sharing in a *musharakah* contract.

On top of that, some preference shares are issued as redeemable. It refers to a type of preferred share that a company has the right to buy back at a specific date and for a specific price. One of the key resolutions made by the Syariah Advisory Council of the Securities Commission Malaysia in 2006 was that redeemable preference shares are in line with the Syariah principles. In order to confirm with the Syariah principles, the purchase price set at the time of issuance must be based on the principle of *wa'd* in which the issuer (company) promises to buy back the preference shares from the shareholders at a future date based on the purchase price promised at the date of issuance. In brief, the term *wa'd* is known as unilateral promise and refers to a commitment made by one person to another to undertake a certain action or verbal disposal beneficial to the other party. The basic purpose of binding promise is to gain assurance that the promisor will fulfill his responsibilities as stated in the promise. Hence, the promisor is legally binding to fulfill it (Mohamad et al., 2010).

With regards to redeemable preference shares, Syariah considers that return of capital can only be done upon winding up or upon the disclosure of company's accounts (Siddiqi, 1985). Practically speaking, redemption of redeemable preference shares is a return of capital. Redemption may be allowed based on the strict legal procedure that redemption can only be done based on available profits or from the proceeds of the issue of new shares. This would mean that the capital will remain the same since the capital taken out by the shareholders have been topped up through the availability of profits or the new investment by the injection of new shares. To sum up, the issuance of redeemable preference shares is allowed in Islam based on the resolution made by the Syariah Advisory Council of the Securities Commission Malaysia.

A convertible preference share simply means that the preference share can be converted into ordinary shares in future depending on the terms of the preference share issued to the shareholder. In 2009, the Syariah Supervisory Council of Bank Islam Malaysia Berhad had approved the Islamic convertible preference shares and indirectly construed that a convertible preference share is permissible under the Syariah principles. By virtue of Section 66 of the Companies Act 1965, the rights which are attached to such preference shares must be stated in the memorandum or the article of association. On this issue, modern scholars like Ridwan Abu Zayd agreed that any right of preference needs to be included in the company's memorandum or article of association (Abu Zayd. 1983). By applying this rule, it shows that the right of a shareholder to convert the preference shares must also be stated in the company's memorandum or article of association.

In a word, almost all types of shares are permissible under the Syariah principles except cumulative preference shares since it defeats the purpose of profit and loss sharing in a *musharakah* contract as has been clarified above.

6. PRIORITY IN THE RETURN OF CAPITAL IN THE EVENT OF LIQUIDATION FOR THE PREFERENCE SHAREHOLDERS

Under company law, shareholders usually have a right to a return of capital on a winding up, provided that there are enough assets remaining after all other legitimate claims against the company have been paid. Preference shareholders typically have priority in the return of capital in the event of liquidation over ordinary shareholders (Mohd Sulaiman and Bidin, 2008).

However according to Shariah Standards (No. 12) of Accounting and Auditing Organization for Islamic Financial Institutional (AAOIFI) which follow the view of all Muslim jurists on the matter, this priority is not permissible since the lost must be divided between the shareholders exactly in accordance with the ratio of investment. Therefore, it is not permitted for the partners to agree on holding one partner or a group of partners liable for the entire loss or liable for a percentage of loss that does not match their shares in the corporation. Nevertheless, the Shariah Standards make an exemption from this ruling by stating that, "*it is, however, valid that one partner takes without any prior condition, the responsibility of bearing the loss at the time of the loss*".

In a word, a priority in the return of capital in the event of liquidation which is given to preference shareholders over ordinary shareholders is not permissible unless one partner takes the responsibility to bear the loss out of his willingness at the time of the loss.

7. RATIO OF DIVIDEND FOR SHAREHOLDERS AND ITS POSITION UNDER THE ISLAMIC PERSPECTIVE

Under company law, a company's profits may be distributed to shareholders. Such distributions are called dividends and represent a return on the shareholder's investment in the company. Section 19(1)(c) of the Companies Act 1965 expressly gives companies the power to distribute property among its members. This power also includes the power to pay dividends. It is a basic rule of company law that dividends can be paid only out of profits. This rule is included in Section 365(1) of the Companies Act 1965 and Article 100 of Table A. Furthermore, directors who wilfully pay or permit to be paid any dividend out of what they know is not a profit, are guilty of an offence under Companies Act and are also liable to the creditors of the company for the amount of debts by the company to them respectively to the extent of which the dividends so paid have exceeded the profits as stipulated under Section 365(2) of the Companies Act 1965.

In the case of *Hilton International Ltd (in liq) v Hilton & Anor*, it was held that dividends including capital dividends may be paid only out of profits. The issue whether there are profits and if so how much thereof should be paid out as dividend is essentially a matter of commercial assessment. On top of that in the case of *Chip Thye Enterprise Pty Ltd (in liq) v Phay Gi Mo and Ors*, the court held that the company had no available profit that could justify the payment of dividends and that the dividends were declared when the company was insolvent. Therefore, it proves that the availability of profits is an important consideration for the payment of dividends to be made.

As far as ordinary shares are concerned, the Annual General Meeting of shareholders will determine the percentage out of the profits to be distributed to the ordinary shareholders as dividends, for example as "15%" out of profit. However as far as preference shares are concerned, the practice is usually to specify either a fixed percentage or fixed amount of dividend, for instance "4 cents per preference shares". In other words, the entitlement of dividend for the preference shareholders is fixed irrespective of profit. Those are the practices in a modern company nowadays.

Now, we shall examine the legality of such practices under Islamic laws. In relation to agreement on profit and loss sharing, the view of all the Muslim jurists is that the profit must be determined as a proportionate share and cannot be a fixed amount. The partners are free to decide on the proportion for the sharing on profits. Thus, a ratio must be agreed upon for instance, a profit of 10% but it cannot be a fixed amount such as RM50 or RM100 out of the profits (Mas'ud al-Kasani, 1910).

Shafi'i and Maliki jurists are of the view that the sharing of the profits in a *musharakah* agreement must be in accordance with the capital invested. Imam Al-Shafi'i stated that the profit will be determined strictly and in accordance with the proportion of capital contribution. As far as *mudarabah* agreement is concerned, the Muslim jurists agreed that it is up to the parties to determine any proportion of profit as long as it is not a fixed amount (Siddiqi, 1985).

However, the view of Imam Ahmad is that the ratio of profit may differ from the ratio of investment, if it is agreed between the shareholders with their free consent (Ibn Qudamah, 1972).

Article 1337 of the Mejelle stipulates that the division of the share in the profit must be declared by division, for instance like a half, a third or a fourth. The parties can enter into an agreement for the division of the profit to be made in accordance to the capital contributed or that the profit be distributed as agreed irrespective of the capital contributed (whether equal or not) (Tyser et al. 2011). These are also the views of the Hanafi jurists (Mas'ud al-Kasani, 1910).

Nevertheless, the theory of fixing the ratio of the dividend for the preference shareholders is not against the Syariah principles. In order to make it as a Syariah compliant practice, what could be done is to fix a certain percentage of dividends instead of a fixed amount.

Essentially, a shareholder receives a dividend in proportion to their shareholding. In other words, the company law emphasizes that the shareholders' entitlement to dividend is pro-rata which construes that each shareholder will be entitled to the dividend in proportion to the units of shares issued to the shareholder.

Further, consideration also needs to be given to the fact that shares are intangible property and ownership of shares is reflected in owning the documents representing ownership rights over the shares in a company (Hassan, 2001). The division of shares is according to unit or stock. It is paramount to facilitate the calculation of participation in the profits of a business. The division of the shares into units or stocks is done by looking at the nominal value of the shares. Under common law, the value of each unit of shares is known as nominal value whereas the modern Muslim jurists have categorised it as '*al-qimah al-ismiyah*'. It construes that each share has the same value and a shareholder is allowed to buy several units of shares. Therefore, the total amount of dividend payable would be different from one shareholder to another based on the units of shares bought. This is not against the Syariah principles since in *sharikat al-inan*, the capital contributed by the investors need not be the same amount. As a result, the total amount of dividend entitled by a shareholder also might not be the same between one another since it depends on how many shares bought by the shareholders and such practice is permissible in Islam.

Another issue is whether or not the determination of dividend ratio can be made later than the time of contract. According to Hanafi, Shafi'i and Hanbali jurists, if the participants (Board of Directors and shareholders) failed to specify the dividend rate at the time of the contract, then it will be determined according to their capital contribution. Therefore, the failure to ascertain such dividend rate at the time of contract will not invalidate the contract (al-Khayyat, 1994). However, some Hanbali jurists require determination of dividend rate at the time of contract and failure to do so will invalidate the contract (Yunus al-Bahuti, 1983). Thus, there is a difference of opinion as to the time for determining the dividend rate for shareholders. Nevertheless, the Caliph Ali ibn Abi Talib ruled that the proportional division of profit could be arranged or divided in accordance with what the parties had agreed (Hassan, 1997). Furthermore, the general rule according to Imam Abu Hanifah and Hanbali jurists is that profit is according to what is agreed whilst loss is borne based on the capital (al-Khayyat, 1994). For this particular issue, the above discussion seems to conclude that the determination of dividend rate can also be made later than the time of contract based on the opinion given by the majority of Muslim jurists.

8. TIME FOR PAYMENT OF DIVIDEND

A dividend usually has to be declared based on the financial accounts of the business before it becomes payable. Article 98 of Table A provides that the company in general meeting may declare a dividend but the dividend must not exceed the amount recommended by the directors. In the case of *Kang Chong Yeow; Ex P Mivan Far East Sdn Bhd*, the High Court reaffirmed that a dividend must be first declared before it becomes a debt by the company to the shareholders. Furthermore in the case of *Re SQ Wong Holdings Pte Ltd*, the court held that the directors have discretion whether or not to recommend a dividend even on the preference shares, but this discretion must be exercised fairly and honestly in the interests of the company. The persistent refusal to declare dividends in certain circumstances may also be oppressive or unfair for the shareholders. In the case of *Chiew Sze Sun v Cast Iron Products Sdn Bhd*, the petitioners' complaints were, among other things, that no proper accounts of the respondent company were being kept and that no dividends had been paid. The court held that this amounted to the affairs of the respondent company being conducted and the powers of the other respondents being exercised, in a manner oppressive to and in disregard of the interests of the petitioners. From the above cases, it shows that the exercise of discretion relating to the declaration of dividend by a company should not affect the interest of shareholders as a whole.

According to Hanafi and Shafi'i jurist, the determination of actual profit and loss is to be made at the termination of the business and not while the business is ongoing. Besides that according to Hanafi jurists, the entitlement of a shareholder to the dividend exists when profit accrues (Siddiqi, 1985).

Distribution of dividend as a return of profit from the investment of shareholders should also be done periodically because the shareholder intends to obtain profit and benefits from the participation in the business (al-Khayyat, 1994). Therefore the Muslim jurists argue that if the dividend is distributed only upon winding up or closure of company's accounts, it will not be possible for the shareholders to get a return from their investment for a long period of time since the business may be in existence for a long period (al-Khayyat, 1994). Hence, the current practice is that the company's accounts are prepared yearly or periodically in order to ascertain the profits of the business during that cycle and to issue dividend accordingly. Retained profits or earnings will be utilized in the new business cycle.

Since dividend is declared and distributed after the annual general meeting, the meeting takes the place of a new agreement among the shareholders on the continuity of the business as well as the ending of business for the previous financial year. Based on the above analysis which is regarding the Islamic perspective for the dividend entitlement, it shows that the refusal to declare dividend while the profit accrues will be contradict to the Syariah principles since the shareholders are entitled to the distribution of dividend from the available profit of the company.

9. CONCLUSION

To put it laconically, both the Companies Act 1965 and Syariah principles recognise that shares may be issued with different types of rights attached. The Syariah rules on the legality of a type of share are clearly determined by looking at the rights attached to the particular type of shares irrespective of the classification used.

As far as preference shares are concerned, the validity depends upon the issue of whether or not any preferential rights are compatible with the Syariah principles. Cumulative preference shares are not permissible in Islam. Nevertheless, the Companies Act 1965 does not make it mandatory that preference shares shall be cumulative in nature. Thus, the issuance of preference shares which do not have cumulative preferential dividend will not contravene the Companies Act 1965 as well as the Syariah principles itself.

The differential rate of dividend between ordinary and preference shares is allowed because the difference amount of shares being bought among the shareholders. The theory of fixing the ratio of the dividend for the preference shareholders is also not against the Syariah principles. In order to make it as a Syariah compliant practice, what could be done is to fix a certain percentage of dividends instead of a fixed amount.

Islam is a religion which relates directly to all spheres of life, including the legality of shares as well as the rules pertaining to the distribution of dividends to shareholders in a company. Therefore it is paramount to ensure that the investment of shareholders in a company is canalized in the proper Islamic direction.

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