

# RETHINKING THE TALES OF THE SHARIE'A: GOD IS NOT A JURISTIC PERSON, BUT THE MOSQUE IS

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## I. INTRODUCTION

Corporate personality is understood to be a Western notion, but is it also Islamic? Responding to this question is a must for today given the ever-expanding and ever-growing number of Islamic financial, commercial, and business entities.<sup>1</sup> Today, one can argue that we are living in a corporate world. Companies, corporate law, corporate liability, corporate

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1. See generally IMRAN A. KHAN NYAZEE, *ISLAMIC LAW OF BUSINESS ORGANIZATION CORPORATIONS* (1998); NICHOLAS HEER, *ISLAMIC LAW AND JURISPRUDENCE* (1990).

taxation, corporate bankruptcy, to name a few, are everyday facts (common notions). Yet, do businesses have legal personality? Western jurisprudence resolved the matter in the affirmative nearly a century ago. What does Islamic *fiqh* (jurisprudence) have to say?

It is generally well-known that the presence of a right, without an individual, is an absolute, definite legal impossibility. Each right should always relate to a competent or presumed capable person to enjoy it. Thus, the Islamic *Fuqah'a* (scholars) described the theory of legal personality as a starting point for the legal capacity theory.<sup>2</sup> According to these jurists, an individual, whether natural or artificial, is an entity who is able to obtain the *Sharie'a* divine and legal aspects. Human beings, with a sane and sound mind, entirely recognize natural personality.<sup>3</sup> However, moral, juristic, personality is bestowed only on those bodies recognized by law as having a legal personality.

While religious legal systems are often thought of as rigid, Islamic law has shown itself fully compatible with modern corporate needs. As such, the notion of corporate legal personality is compatible with Islamic law. This article will first discuss the Ottoman Code of Commerce of 1850 ("OCC"), and its introduction of the notion of corporate legal personality to a code based on the Islamic legal tradition. The OCC serves as a historical precedent where the concept of corporate legal personality was deemed compatible with Islamic jurisprudence. Then, this article will discuss the concept of *dhimmāh* (legal capacity/personality) and the split amongst various jurisprudential schools over whether corporations can possess it. Ultimately, this article argues that, under the *Hānāfi* and *Shāfi'i* schools of thought, corporations can be said to possess legal personality to satisfy the doctrine of *māslāhāh mursālāh* (public interest). Finally, this article will look to several instances in which Muslim scholars deemed certain Islamic institutions as possessing legal personality. Given that Muslim jurists have granted legal personality to other fictitious entities, it is logical to also grant legal personality to corporations. Upon the conclusion of this article, it should be clear that secular courts needing to apply Islamic law must recognize that Islamic law has fully incorporated modern notions of corporate legal personality.

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2. See generally MAHOUD A. EL-GAMAL, ISLAMIC FINANCE: LAW, ECONOMICS AND PRACTICE (2006).

3. AHMAD M. AL-ZARQA', AL-MADKHAL LIL AL-FIQHI AL'AM [INTRODUCTION TO THE GENERAL ISLAMIC JURISPRUDENCE] 743-747 (Azman Ismail & Ahmad Zaki Salleh eds., 2014).

## II. HISTORICAL BACKGROUND: THE OTTOMAN CODE OF COMMERCE OF 1850

The Ottoman Code of Commerce of 1850 represents one of the first efforts to introduce the notion of corporate legal personality to the Islamic world. Before 1850, there existed a law of commercial code of sorts called the Ottoman *Mājāllā*.<sup>4</sup> According to Chibli Mallat, the *Mājāllā* was the result of “a real effort introduced, both in terms of rules and in terms of legal categories, to produce a code inspired by the Islamic legal tradition.”<sup>5</sup> The *Mājāllā* did not contain provisions for corporate legal personality distinct from the legal personalities of a group’s individual members.<sup>6</sup> But the OCC represented a formal break with the *Mājāllā*; instead, it “was a direct transposition from the French tradition.”<sup>7</sup> According to Mallat,

Since the attempts began in the 1850s for commercial codes to be introduced in the Middle East, the field of company law has been torn between the necessity of a faceless legal dimension which is represented by the independent moral personality of a company, and the recognition of known and fully liable individuals in the effective running of the trade.<sup>8</sup>

The OCC represents the introduction of non-Islamic commercial thought into Islamic governance, and one such foreign commercial thought was the idea of corporate personality. The OCC included articles, copied from the French commercial code, regarding *al-ghāyr musāmmāt* (translated to “*société*” in French, and translated to “corporation” in English). This legal term embodies the idea of a generic corporate identity, an identity separate from and independent of the individuals that make up the corporation.<sup>9</sup> The specific nature of the corporate identity is “qualified by the designation of the object of the enterprise.”<sup>10</sup> Then, it seems that corporate identity (or personality) under the OCC is derived from the corporation’s purpose. The corporation is “administered by time-bound

4. See Chibli Mallat, *Commercial Law in the Middle East: Between Classical Transactions and Modern Business*, 48 AM. J. COMPAR. L. 81, 96 (2000).

5. *Id.* at 101-02.

6. “But for the arguable exceptions of wāqf (trusts), and bāyt al-māl [...] (the public treasury), partnerships in Islamic law were never recognized as ‘corporate entities’ which would be separate from the partners undertaking the trade.” *Id.* at 101.

7. *Id.* at 100. In 1984, a new Iranian law was passed that said all Iranian awqāfs were to be managed by the Pilgrimage, Endowment, and Charity Affairs Organization. Each wāqf was acknowledged as a legal entity, so it evaded the destiny of Ottoman cash awqāfs, which lost their legal personality in 1954. This law ensured that the trustee was the legal agent of the wāqf. But in Malaysia, the government is the mutāwālli rather than a mutāwālli appointed by the wāqif. *Id.*

8. *Id.* at 102.

9. *Id.* (citing Art. 20 of the Ottoman Code 1850).

10. *Id.* (citing Art. 21 of the Ottoman Code 1850).

agents who are revocable,” and these “administrators are [personally] liable only for the execution of the mandate they have received,” rather than for the corporation’s own rights and obligations.<sup>11</sup> The compatibility of Islamic law and the notion of corporate legal personality finds its historical precedent in the OCC.

### III. *DHIMMĀH*: CORPORATE JURISTIC PERSONALITY UNDER ISLAMIC *FIQH*

Although the Ottoman Code of Commerce of 1850 suggests that the notion of corporate legal personality is compatible with Islamic law, it is important to understand that not all schools of Islamic jurisprudence would agree that corporations can possess legal personality. While all Islamic *fiqh* (jurisprudence) focuses on the legal rights and duties of individuals, not all schools of jurisprudential thought agree that corporations have the capacity to possess such rights or duties. Only through the interpretations proposed by the *Hānāfi* school and the *Shāfi’i* school can it be said that corporations have legal personality.

Similar to Western jurisprudence, the person is the central concept of Islamic legal theory. Islamic *fiqh* is a science of making laws from the *Sharie’a* sources. In this process, *mujtāhidūn* (high ranking Muslim jurists) create *ahkām shar’iyā* (legal rules) that define a person’s rights and duties, and these rules focus primarily on an individual’s acts.<sup>12</sup> In other words, personhood and rights or duties go hand in hand. In *Sharie’a*, a “person” is defined as someone who acquires *ahkām shari’yā* in the form of rights and obligations.

Furthermore, an individual’s capacity to be fit for such rights and obligations is called *dhimmāh* (legal capacity).<sup>13</sup> Professor ‘Abd-Razzāq al-Sanhūrī, the Egyptian founder of the Civil Code of 1948, explains that *dhimmāh* is a “juristic description that is presumed by the legislator to exist in a human being and according with which [the person] is able to oblige and to be obliged.”<sup>14</sup> Alternatively, *dhimmāh* can also be described as an

11. *Id.* at 103 (citing Art. 22 & 23 of the Ottoman Code 1850).

12. It does not involve knowledge of imān (faith), morals and mysticism, which are the subject matter of ‘ilm al-kalām (Islamic theology) and ‘ilm al-tasāwwuf (Islamic science of spirituality). *Id.*

13. See Judson A. Crane, *Uniform Partnership Act and Legal Personality*, 29 HARV. L. REV. 838, 839-842 (1916) (“A legal person is an entity treated by the law as the subject of rights and obligations. 7-There is considerable legislation, aside from attempts to codify the law of partnership, which treats the partnership as a legal person [...] it the subject.”). *Id.*

14. ‘ABD AL-RAZZĀQ AL-SANHŪRĪ, MASADIR AL-HAQQ FI AL-FIQH AL-ISLAMĪ [THE SOURCES OF RIGHT IN ISLAMIC LAW] 20 (1997).

“imaginary container or vessel that holds both the capacity for acquisition [of rights and obligations] and the capacity for execution [of rights and obligations].”<sup>15</sup> Hence, *dhimmāh* has two parts: *ahliyāt al-wujub*, which means the legal capacity for the attainment of rights and commitments, and *ahliyāt al-ādā'*, which means the capacity to exercise and to execute those rights and duties.<sup>16</sup> Either way, one cannot possess legal personality, and thus be a person, in Islamic law without having *dhimmāh*.

Accordingly, it is entirely incorrect that *Sharie'a* does not acknowledge or accept the concept of the juristic (moral) person, although classical Muslim jurists did not use that precise term.<sup>17</sup> The *dhimmāh* doctrine is a principle equivalent to the notion of a juristic person which paved a valid ground for the legal personality theory.<sup>18</sup> However, the idea that a company or a partnership—as in civil law and Arab modern laws—may be considered a juristic person did not develop among Muslim scholars until recently under the influence of Western laws.<sup>19</sup> Moreover, Islamic scholars are divided over the issue of corporate legal personality. The split in interpretation lies between the conservative view proposed by scholars and the adherents of seminal jurist Al-Sārākhsi, and the views proposed by the *Hānāfi* school and the *Shāfi'i* school.

According to the conservative view espoused by adherents of Al-Sārākhsi, the seminal Islamic jurist, artificial entities cannot possess

15. *Id.* From birth to death, a living natural human being is deemed an individual under the law if he/she can hold rights or obligations, and thus, a slave is not legally considered a person. *See, e.g., Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 287 (1990); *see also Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417 (1977).

16. It is argued that *dhimmāh* is the reason for the application of legal rules (*shār'i ahkām*). A natural person becomes a legal person when they possess *dhimmāh*. *See, e.g., Airedale N.H.S. Trust v. Bland* [1993] AC 789 (HL) 804 (appeal taken from Eng.).

17. It is argued that *dhimmāh* is the reason for the application of legal rules (*shār'i ahkām*). A natural person becomes a legal person when they possess *dhimmāh*. *Id.*; Dawoud S. El-Alami, *Legal Capacity with Specific Reference to the Marriage Contract*, 6 ARAB L. Q. 190, 190-91 (1991).

18. El-Alami, *supra* note 17.

19. *See* Joseph Schacht, *Islamic Religious Law in THE LEGACY OF ISLAM* 398 (Joseph Schacht & Clifford Edmund Bosworth eds., 1974).; NABIL SALEH, *THE GENERAL PRINCIPLES OF SAUDI ARABIAN AND OMANI COMPANY LAWS* 79-80 (1981); *see, e.g., Ponce v. Roman Catholic Church*, 210 U.S. 296 (1908). In this regard, “[t]he Roman Catholic Church has been recognized as possessing legal personality by the treaty of Paris with Spain of 1898 and its property rights solemnly safeguarded. In so doing the treaty followed the recognized rule of international law which would have protected the property of the church in Porto Rico subsequent to the cession. The juristic personality of the Roman Catholic Church and its ownership of property was formally recognized by the concordats between Spain and the papacy and by the Spanish laws from the beginning of settlements in the Indies. Such recognition has also been accorded the church by all systems of European law from the fourth century of the Christian era.” *Id.*

*dhimmāh*. Al-Sārākhsi interprets *dhimmāh* as being related to *alāmānāh* (trust/obligations) per the following *Qur'ānic* text: “[w]e [*Allāh*] did indeed offer the Trust [obligations of *Sharie’a*] to the Heavens and the Earth and the Mountains; but they refused to undertake it, being afraid thereof: but man undertook it; he is indeed unjust and foolish.”<sup>20</sup> In other words, the attribution of religious rights and obligations to the concept of *dhimmāh* is related to human beings’ social mission and divine duty as viceregents of *Allāh*. Muslims accepted *Sharie’a* and its obligations as a combined legal and social system and became the *dhimmāh* (seat of obligations).<sup>21</sup> Thus, Al-Sārākhsi’s outcome is that only a human being is a repository fit for *dhimmāh*.<sup>22</sup> Other Muslim jurists echo this point of view, commenting:

(*Amānāh* [trust] refers to the capability of fulfilling the heavy responsibility placed by Divine injunctions, something that depends on a particular degree of reason and awareness and moving forward therein and deserving Divine vice-regency depends on this very capability. The species of the creation that do not have this capability, no matter how high or superior their placement, simply cannot advance from their given place . . . .<sup>23</sup>

Consequently, Al-Sārākhsi’s adherents do not recognize artificial entities as having juristic legal personalities, reasoning that these entities lack the ability to recognize the communication between God and man, which creates the duties under *Sharie’a*.<sup>24</sup>

However, neither this *Qur'ānic* verse nor any prophetic *Hadīth* (tradition) expressly forbids the provenance of *dhimmāh* to any artificial entity. Hence, one may believe that corporate legal personality is acceptable, based on the principle of Islamic jurisprudence (developed by

20. *Al-Qur’ān* 33:72. See Baber Johansen, *The Legal Personality (dhimma) and the Concept of Obligation in Islamic Law*, at [http://www.econ.yale.edu/~egcenter/Johansen\\_paper.pdf](http://www.econ.yale.edu/~egcenter/Johansen_paper.pdf) (last visited Mar. 10, 2020).

21. IMRAN A. KHAN NYAZEE, *THEORIES OF ISLAMIC LAW: THE METHODOLOGY OF LJTIHĀD* 21(2002).

22. This—inaccurate—denial in Islamic law of “communal legal personality” is a significant divergence from how the concept of non-human legal entities developed in English law. Robert L. Raymond, *The Genesis of the Corporation*, 19 HARV. L. REV. 350 (1906); Amnon Cohen, *Communal Legal Entities in a Muslim Setting Theory and Practice the Jewish Community in Sixteenth-Century Jerusalem*, 3 ISLAMIC L. & SOC’Y 75, 75-77, 90 (1996).

23. MUHAMMAD TAQI USMANI, *AN INTRODUCTION TO ISLAMIC FIN.* 103-108 (2002) (citing MUHAMMAD SHAFI’I, MA’AARIF AL-QUR’ĀN (Eng. tr. Muhammad Shamim, 8:250)).

24. See generally Zainal A. Zuryati et al., *Separate Legal Entity Under Syariah Law and its Application on Islamic Banking in Malaysia: A Note*, 6 INT’L J. OF BANKING, ACCT. & FIN. (2009). It should be noted that this verse—historically—revealed and discussed an event of conferment of *Allāh’s* *Khilafah* (viceregency) on Adam.

the *Shāfi'i* school) that “*what is not prohibited is permitted.*”<sup>25</sup> Whether the notion of corporate personality is legitimate may also be answered by another Islamic norm designed by the *Hānāfi* school: “*everything is forbidden unless permitted by the Sharie'a.*”<sup>26</sup> Under the *Hānāfi* understanding, permissibility may first be pursued through unambiguous confirmations found in the *Qur'ān* or the *Hadīth*. In the absence of such authentic rules, recourse may be had to subordinate sources, such as, the doctrines of *qiyas* (analogy), *istihsān*, (juristic preference), and *māslāhah mursālāh* (public interest).<sup>27</sup>

*Māslāhah Mursālāh*, the doctrine of public interest, allows for the State to make laws on any matter that is in the interest of society as long as there are no clear prohibitions against them in the *Qur'ān* or *Sunnah*.<sup>28</sup> This notion originates from the following *Qur'ānic* verses: “*Allāh wants ease and comfort and not hardship*”; “*God never intends to impose hardship upon you*”; “*We have sent you (O Prophet Muhammad) but as a mercy for all creatures*” and support comes from the Prophet Mohammad’s saying: “*No harm shall be inflicted or reciprocated in Islam.*”<sup>29</sup> *Māslāhah* has three categories: *darorriyāt* (essentials), *hajiyāt* (needs), and *tahsinivāt* (embellishments). Recognizing corporate legal personality would likely satisfy all three categories of *māslāhah*.

Recognizing that corporations have legal personality would likely meet the *māslāhah* doctrine’s mandate that a State’s legislation belong to the *darorriyāt*, *hajiyāt*, or *tahsinivāt* categories. Based on *māslāhah*’s *darourivāt* (essentials) classification, the State may consider it essential to the maintenance of economic necessity that it recognize the concept of corporate personality and thus permit the creation of corporations as

25. See generally RECEP DOĞAN, *USUL AL-FIQH: METHODOLOGY OF ISLAMIC JURISPRUDENCE* (2015).

26. *Id.*

27. RAJ BHALA, *UNDERSTANDING ISLAMIC LAW: SHARĪ'A 302-09* (2016).

28. *Id.*, at 358-59. See also Anowar Zahid & Kamal Halili, *Corporate Social Responsibility to Employees: Considering Common Law vis-à-vis Islamic Law Principles*, 20 PERTANIKAJ. SOC. SCI. & HUM. 87-100 (2012).

29. *Al-Qur'ān* 2:185, 5:6, & 21:107; ‘ALĠMUĤAMMAD JAMAĤ & AĤMAD IBN MUĤAMMAD IBN ĤANBAL, *MUSNAD AL-SĤĀMĪYĪN MIN MUSNAD AL-ĪMĀM AĤMAD IBN ĤANBAL* (Dār al-Thaqāfah; Mu’assasat al-Kutub al-Thaqāfiyah, al-Dawḥah, Dawlat Qaṭar, Bayrūt, Lubnān, al-Ṭab’ah 1 1990). For instance, for the endurance and healthy development of human life, greening environment and the sustenance and ecological protection is important. Neither the *Qur'ān* nor *Sunnah* lays down any ban in this regard, but they rather endorse and promote their conservation. The *Qur'ān* says, “*There is not an animal on earth nor a creature flying on two wings, but they are nations like you*” and the Prophet advises protecting them when he says “*Show mercy and you will be shown mercy*” *Al-Qur'ān* 6:38; MUĤAMMAD ĪMAM AL-BUKĤARI, *AL-ADAB AL-MUFRAD* [PROPHETIC MORALS AND ETIQUETTES] 166 (Yusuf Talal Delorenzo trans., Dakwah Corner Publications Sdn. Bhd. 2014).

business organizations.<sup>30</sup> If the law concerning the establishment and management of a company is breached, the State must penalize the wrongdoers so that the common good and creation of wealth is not impeded.<sup>31</sup> Penalizing wrongdoers is a fulfillment of the “safety” aspect of the *darouriyāt* classification. The second class of *maslāhāh* is the “needs” classification. This classification consists of concessions that grant basic things to allow the essentials of life to continue existing during difficult situations.<sup>32</sup> For example, an Islamic State may mandate that shares of large corporations be listed in stock exchanges for trading, while, at the same time, exempting small and medium-sized enterprises (SMEs) from listing, thus enabling them to trade freely their securities in the over-the-counter market.<sup>33</sup> The *tashiniyāt* (embellishments) classification of *māslāhāh* is ancillary by importance, but complementary to the necessities classification in that the realization of the former enables the latter. For instance, the government may offer tax refunds for donations and charities and urge business organizations to voluntarily give charity to the needy and the poor (which is an embellishment).<sup>34</sup> So, in the absence of any authentic *qur’ānic* or *hadith* provisions, it is possible to recognize corporations as having *dhimmāh* (legal personality) by way of the *maslāhah* doctrine under the *Hānāfi* school. This recognition might meet societal needs and bring economic growth and commercial progress to a given nation by managing the corporation’s rights and obligations through the stated three categories of *darroriyāt*, *hajiyyāt*, or *tahsiniyāt*.

However, questions remain as to when *dhimmāh* ends for fictitious entities, such as corporations. Generally, as *dhimmāh* exists in tandem with an individual, it starts when the individual is born alive and ends upon death.<sup>35</sup> However, fetuses and embryos can enjoy specific rights and therefore have a restricted *dhimmāh*.<sup>36</sup> Likewise, *dhimmāh* might continue existing after an individual’s death up to the time when all rights and obligations are resolved. In this domain, Muslim scholars offer three opinions regarding the end of *dhimmāh* for fictitious personalities under the

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30. BHALA, *supra* note 27.

31. *See generally* MOHAMMAD HASHIM KAMALI, SHARIAH LAW: AN INTRODUCTION (2008).

32. *Id.*

33. KAMALI, *supra* note 31, at 356-60. If not, the economy might be deprived of their contribution to the wealth making. *Id.*

34. *Id.* In this manner, the poor may participate in economic interests with that charity money as an alternative of being.

35. AL-ZARQA’, *supra* note 3, at 743-46.

36. *Id.* at 747. Those rights are *nāsāb* (family name); *mirāth* (inheritance); *wāsiyyāh* (legal bequests), and *wāqf* (trust). *Id.*



*Sharie'a*. The *Mālikī* and some *Hānbālī* jurists believe that *dhimmāh* terminates upon the individual's death and the obligation to settle *dyun* (debts) becomes linked to properties if there are any. If there are no properties, duties to settle debts lapse.<sup>37</sup> On the other hand, *Shāfi'ī* and the rest of the *Hānbālī* scholars think that *dhimmāh* continues to exist after the person's death until debts and other duties are cleared (e.g., if someone is injured by being pushed into a hole by someone who subsequently dies, the liability for the injury will remain in the *dhimmāh* of the deceased).<sup>38</sup> However, *Hānāfi's* believe that *dhimmāh* does not end at the person's death but instead is only diminished, and the only way for the debt to continue is for there to be passed-on property to attach it to; otherwise, the debts lapse.<sup>39</sup> Thus, there is no clear theoretical answer for when *dhimmāh* ends for corporations.

Nevertheless, under the *maslāhāh* doctrine, the interests of the Muslim community (the public interest) take precedence over the individual (private) benefits based on the principle that "priority is given to preserving the universal interest over [the] particular interest." In other words, it means achieving and protecting the mutual interest of the general public based on *Sharie'a* law.<sup>40</sup> It is in furtherance of this principle that modern Muslim scholars accept that the presence of a fictitious personality forms the foundation of the existing socio-legal structure.<sup>41</sup> These scholars gave a few Islamic institutions, such as *wāqf* (trust), *masjid* (mosque) and *beit al-māl* (public treasury), as well as schools, orphanages, and hospitals, a *dhimmāh*, a sort of moral personality.<sup>42</sup> In granting legal personality to these institutions, these schools recognized the institutions' capacity to achieve

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37. *Id.* at 748-749.

38. Al-Sanhūrī, *supra* note 14, at 21.

39. *Id.*

40. Mohamed A. 'Arafa, *Islamic Policy of Environmental Conservation: 1,500 Years Old – Yet Thoroughly Modern*, 16 EUR J. L. REFORM 456, 494–501 (2014) ("Social interests and public benefits are addressed according to their significance, actuality and certainty in this regard. Islamic law classifies interests into (a) *daruriyat* (necessities), or those things indispensable to the preservation of the *Al-adaruriat Al-khams* (five *Sharie'a* objectives of life, religion, lineage, property, and prosperity); (b) *hajiyyat* (needs), meaning those things whose absence leads to actual hardship and suffering; and (c) *tahsiyyat* (supplementary benefits), which means things that refine life and enhance ethical values."). *Id.*

41. See generally IMRAN NYAZEE, *ISLAMIC JURISPRUDENCE: USUL AL-FIQH*, (3d ed. 2016) (provides the foundation for any meaningful study of Islamic law).

42. *Dhimmāh* is the capability, a qualification, whereas capacity is the exercise of that capability, in which the person should have the degree of reason and awareness to receive such capability.

religious duties, such as the payment of *zākāh* (mandatory financial donations).<sup>43</sup>

#### IV. LEGAL PERSONALITY OF ISLAMIC INSTITUTIONS: INNOVATIVE PRAGMATIC MODELS

The theory of *dhimmāh* (juristic legal personality) has been accepted by the Muslim world, especially in those countries that base their regulations on Islamic law rather than positive Western laws, such as Kuwait, Saudi Arabia, the United Arab Emirates, Oman, and Qatar. These nations acknowledge the concept of legal personality for artificial entities alongside, and in combination with, legal personality for natural people. Classic Islamic specialists, using institutions such as mosques, the State, and *wāqfs* (trusts and endowments), provide adequate case law to create a basis for the theory of legal personality for corporations.

##### A. *Māsjid (Mosque)’s Legal Personality*

The discourse on a mosque’s legal personhood has been dynamic over time. On one hand, some case law indicates that mosques have legal personality separate and apart from their congregants. *Jumā Mosque Congregation of Babu v. Azerbaijan* is a landmark case about church autonomy—the right of religious groups—to organize themselves as they see fit. This right includes the right of houses of worship to choose their leaders without government interference.<sup>44</sup> In 1937, the *Jumā* (Friday) Mosque was closed to the public. Under the Soviet Government, the mosque was converted into a carpet museum, and later, a new local community of Muslims took possession of the former mosque.<sup>45</sup> In 1992, following a formal request by that community, the Sabail District Executive Authority (SDEA) allowed the establishment of the *Jumā* Mosque Congregation as a religious organization and recommended that the Justice Department register it as a legal entity; a religious organization, capable of acquiring and enjoying rights and bearing legal obligations. The mosque thereby acquired legal personality.<sup>46</sup> However, it is not “legal personhood”

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43. See NYAZEE, *supra* note 41.

44. *Jumā Mosque Congregation v. Azerbaijan* (admissibility) (15405/04), 57 Eur. Ct. H.R. (2013). *Jumā* Mosque, “Friday Mosque,” was used as a Muslim house of worship until Azerbaijan became part of the Soviet Union.

45. *Id.*

46. See, e.g., *Fatullayev v. Azerbaijan*, App. No. 40984/07, 623 Eur. Ct. H.R. (2010) (“[I]odged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms [...]”).

that gives the mosque its eternity (its perennial status as a mosque), but rather the eternity of its owner, *Allāh* (God).<sup>47</sup>

On the other hand, the *Māsjid Shahid Gang v. Shiromani Gurdwara Parbandhak Committee* establishes that there is still uncertainty about whether a *māsjid* (mosque) may be classified as a juristic person. In *Māsjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee*, the relief sought was a declaration that a ruined building was a mosque in which all Muslims had a right to worship. The Muslim plaintiffs requested an injunction to restrain any improper use of the building and a mandatory injunction to reconstruct the building.<sup>48</sup> This suit was motivated by the notion that if the mosque could be labeled a “juristic person,” this would establish the precedent that a mosque remains a mosque forever and that limitation (adverse possession) cannot be applied.<sup>49</sup> The Lahore High Court determined “a mosque [to be] a juristic person,” but the Bombay High Court dismissed the appeal and did not accept the mosque as a juristic person. The Bombay High Court rejected the principle that “a Hindu idol is a juristic person and on the same principle a mosque as an institution should be considered as a juristic person.”<sup>50</sup> It was held that “there is no analogy between the position in law of a building dedicated as a place of prayer for Muslims and the individual deities of the Hindu religion . . . [on the basis of very sound reasons such as adverse possession, (Art. 144, Limitation Act), earlier decisions (S.11 CPC) and provision in the *Sikh Gurdwara Act*].”<sup>51</sup> Ultimately, whether mosques have legal personality is an issue that has not been settled universally, but it is possible to answer in the affirmative if an approach is taken per the *Jumā Mosque* case.

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47. It is generally agreed that no one can own a mosque because *Allāh* Himself owns it; ownership of a mosque would imply ownership of the Owner, which is impossible. See Halyani Hassan, Zuhairah Abd Ghadas, Nasarudin Abdul Rahman, *The Myth of Corporate Personality: A Comparative Legal Analysis of the Doctrine of Corporate Personality of Malaysian and Islamic Laws*, 6 AUSTL. J. BASIC & APPLIED SCI. 11 (2012).

48. *Sehajdhari Sikh Federation v. Union of India & Ors.* 2012 (1) RCR (Civil) 384.

49. *Gurleen Kaur and Others v. State of Punjab & Ors.* 2009 (3) RCR (Civil) 324.

50. See *Rajnarain Singh v. Chairman, Patna Administration Committee, Patna & Anr.*, AIR 1954 SC 569, ruled that “... the modification of the whole cannot be permitted to effect any essential change in the Act or an alteration in its policy, so also a modification of a part cannot be permitted to do that either.”

51. It should be noted that the Lahore High Court had accepted the mosque as a juristic person in many earlier decisions, which the Privy Council swept aside by saying that those decisions are limited to *Punjab* alone while there was no authority from any High Court on the other side, as *Rajasthan* and *Mādrās* High Courts. See, e.g., *Shankar Das v. Said Ahmad* (1884) 153 PR 59 (1914) (India); *Maula Bux v. Hafizuddin* (1926) 13 AIR Lah 372 AIR (1926) Lah 372.6 (India).

B. *Al-dwālāh (State) 's Legal Personality*

States, or individual nations, can be said to have legal personality under Islamic law separate and apart from that of its citizens. The pioneer of public international law in the Arab world, Professor Mohammad T. Al-Ghunāimi, argues that the *Qur'ān* demonstrates that States possess legal personality. For instance, the Holy Book says: “*and when we would destroy a township we send commandment to its folks who live at ease [meaning those responsible for the wellbeing of the nation and the heads of State], afterward they commit abomination therein, and so the Word [of doom] hath effect for it, and We annihilate it with complete annihilation.*”<sup>52</sup> Professor Al-Ghunāimi interprets this text to mean that violation of God’s command by leaders (heads of State) results in His punishment for the whole nation. “This structure, necessarily, connotes the recognition of a legal personality for the State since an individual cannot be a legal organ except as a legal person.”<sup>53</sup> According to the Islamic *Qur'ānic* norm, “[a]nd no burdened soul bear another’s burden.” Therefore, accountability is initially inflicted on the State as a juristic person, and subsequently on the persons who created it.<sup>54</sup>

Under the Islamic State, Prophet Mohammad adopted the *Mādīnāh* Charter (State Constitution), in which Article 1 reads: “[t]his [...] govern[s] the relations among all people [believers or not] across and from one *Ummāh* [nation].”<sup>55</sup> The term *Ummāh* is used to include Muslims and non-Muslims independently organized (in other words sovereign) within the terms of the Charter under Mohammad’s leadership (government) in the land of *Mādīnāh* (the territory). So, *Ummāh* fulfills the elements of a modern State; population, land, government, and independence.<sup>56</sup> As a legal personality, it held particular rights and owed certain obligations to the citizens.<sup>57</sup>

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52. Al-Qur’ān 17:16.

53. MOHAMMAD TALAAT AL-GHUNAIMI, *THE MUSLIM CONCEPTION OF INTERNATIONAL LAW AND THE WESTERN APPROACH* 124 (Springer Dordrecht 1968).

54. *Id.* at 125. In this regard there might be a contradiction as another verse reads: “*And guard yourselves against a chastisement which cannot fall exclusively on those of you who are offenders, and know that God is severe in penalty*” which means that the torment for the wrongdoers’ actions will not only apply to them but also will be imposed on the whole community. Al-Qur’ān 8:25 & 35:18.

55. *Id.* at 54-55.

56. *Id.* at 62.

57. Yetkin Yildirim, *The Medīnā Charter: A Historical Case of Conflict Resolution*, 20 J. ISLAM & CHRISTIAN–MUSLIM REL. 439 (2010). For instance, it had the right of allegiance from the citizens, irrespective of faith. Article 20 cites: “No separate peace will be made by anyone in Mādīnāh when Believers are fighting in the Path of *Allāh*.” *Id.* In exchange for allegiance, citizens

### C. *Wāqf's (Trusts and Endowments) Legal Personhood*

*Wāqfs* (trusts and endowments) are another clear example under Islamic law of entities possessing legal personality separate and apart from the legal personality of those who maintain them. “A *wāqf* is an unincorporated trust established under Islamic law by a living man or woman (*wāqif*) for the provision of a designated social service in perpetuity.”<sup>58</sup> Once the *wāqif* (settlor) establishes the trust, he/she stands legally separate from it and cannot exercise any rights of possession over it.<sup>59</sup> The *wāqif* may be appointed as *mutāwālli* (trustee/administrator) to act, as an agent or representative, on behalf of the *wāqf* for the benefit of the beneficiaries.<sup>60</sup> All the *mutāwālli*'s authorities, rights, and contractual obligations are intended for this purpose. Thus, whatsoever the *mutāwālli* does for the *wāqf* does not include his/her own *dhimmāh* unless an act leads to his/her personal liability.<sup>61</sup> Accordingly, a *wāqf* has a distinct *dhimmāh* (legal personality) that may be recognized by the *mutāwālli*'s power to borrow loans for the *wāqf*—and with the *qādi* (judge)'s permission—use

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were granted many kinds of protection. So, Article 16 reads: “[t]hose Jews who follow the Believers will be helped and will be treated with equality [social, legal and economic equality is promised to all loyal citizens of the State].” *Id.* It should be noted that the *khilāfāh* (leadership) was a *dhimmāh* (legal personality) which had rights and obligations which the *Cāliḥs* (leaders) exercised on behalf of the citizens. *Id.*

58. Timur Kuran, *The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations*, 35 L. & SOC'Y REV. 4, 842 (2001). In other words, (“*Wāqf* (inalienable properties or properties left in perpetuity) by definition is the act by which certain properties cease to be a subject of any transaction such as sale, rent, ownership, or inheritance, or to be used as a *rāhn* (deposit), or as a gift, provided that their products, advantages and benefits are devoted to a permanent.”); JAMAL J. NASIR, *ISLAMIC LAW OF PERSONAL STATUS* 247 (1986). Perpetuity is one of the fundamental conditions for the validity of the *wāqf* and its legal status posed an intricate juridical problem. See generally Muhammad A. Zubair, *The Classical Islamic Law of Waqf: A Concise Introduction*, 26 ARAB L.Q. 121 (2012). In other words, the problem of perpetuity is resolved via the legal fiction under which the *wāqf* property is vested in God. *Id.* Scholars unanimously identified the separation of the substance and usufruct in *wāqf* property. *Id.* Whereas the substance is reserved (either in the ownership of the founder or God), the usufruct belongs to the beneficiaries. *Id.*

59. Mahdi Zahraa, *Legal Personality in Islamic Law*, 10 ARAB L.Q. 193, 205 (1995) (“Such a juristic *dhimma* is a restricted concept to the extent that it enables the administrators of such entities to implement their functions and perform their office.”). *Id.*

60. *Id.* The rights and responsibilities carried out by an administrator also survive through transition of administrators, which indicates that the rights and responsibilities are truly held by the *wāqf* or *māsjid* as a distinct legal entity with its own *dhimmāh* rather than held within the *dhimmāh* of the administrator; if an administrator hires a service to clean the carpet of a mosque but is dismissed before he pays it, it does not remain the responsibility of the administrator to pay for the carpet service—it becomes the responsibility of the new administrator. *Id.*

61. In the classical Islamic *Fiqh*, it has been argued by Professor Mustafa al-Zarqā (1904-1999), For example, a *qādi* (judge) who has been appointed a *mutāwālli* of *wāqf* can decide a case concerning that *wāqf* unless it has been made in the judge's favor (as a beneficiary).

the money on behalf of the *wāqf* for maintenance purposes without any liability for the *mutāwālli*.<sup>62</sup> Hence, *wāqf* has a permanent legal status, separate from and independent of the *wāqif*, any change in the *wāqif*'s or *mutāwālli*'s status (e.g. life/death) will not affect the *wāqf*.<sup>63</sup>

Moreover, a *wāqf*, as a separate and legal entity, can own property, despite a split among jurists as to the possibility of the endowment of these juristic persons' properties.<sup>64</sup> The *Mālikī* and *Shāfi'ī* Schools allowing gifts or legacies made directly to a mosque.<sup>65</sup> The moderate *Hanāfi* school stated that "a property purchased with *wāqf*'s money does not form a part of it, rather it becomes its property [...], [and the] money donated to a mosque belongs to its proprietorship and does not merge with the mosque itself, as a *wāqf*."<sup>66</sup> Hence, a *wāqf* can own property and money as a natural person, buy and sell, borrow and lend, sue and be sued, and be assigned the attributes of an artificial person.<sup>67</sup> While the *wāqif* (settlor) thereby abandoned possession of the *wāqf* property, it was not acquired by any other person;

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62. It has been argued that "[t]he proofs of loan against the *wāqf* stands without the intervention of the responsibility of the *mutāwālli*." Timur Kuran, *The Provision of Public Goods Under Islamic Law: Origins, Impact, and Limitations of the Waqf System*, 35 LAW & SOC'Y REV. 841, 842 (2001). In other words, *Wāqf* (inalienable properties or properties left in perpetuity) by definition is the act by which certain properties cease to be a subject of any transaction such as sale, rent, ownership, or inheritance, or to be used as a deposit (*rāhn*), or as a gift, provided that their products, advantages and benefits are devoted as permanent. Zahraa, *supra* note 59, at 204 (citing NASIR, *supra* note 58, at 247). Perpetuity is one of the fundamental conditions for the validity of the *wāqf* and its legal status posed an intricate juridical problem. In other words, the problem of perpetuity is resolved via the legal fiction under which the *wāqf* property is vested in God. Scholars unanimously identified the separation of the substance and usufruct in *wāqf* property. Whereas the substance is reserved (either in the ownership of the founder or God), the usufruct belongs to the beneficiaries. Muhammad Zubair Abbasi, *The Classical Islamic Law of Waqf: A Concise Introduction*, 26 ARAB L.Q. 121, 124–26 (2012).

63. Yet, a *wāqf* shall not fail because there is no *mutawalli* appointed based on the principle "no trust shall fail for want of a trustee." See Zahraa, *supra* note 59, at 205 ("Otherwise, such entities will find immense obstacles in performing their rights and duties and become *de facto* redundant."). *Id.*

64. Paul Stibbard, David Russell QC & Blake Bromley, *Understanding the Waqf in the World of the Trust, Trusts & Trustees*, 18 OXFORD UNIV. PRESS 785, 785-810 (2012) (matters of administration are dealt with by the religious authorities or state-controlled boards, whose conduct of their affairs). *Id.* The difficulty will be to guarantee that the religious (or other charitable) aspects satisfy the needs of both Islamic jurisprudence and the concept of appropriate religious or charitable activity being entirely charitable under the law of the jurisdiction concerned. *Id.*

65. Timur Kuran, *The Absence of Corporation in the Islamic Law: Absence and Persistence*, 53 AM. J. COMP. L. 785, 785-815 (2005).

66. YAWER QAZALBASH, PRINCIPLES OF MUSLIM LAW 309-19 (2003).

67. MUFTI MUHAMMAD TAQI USMANI, AN INTRODUCTION TO ISLAMIC FINANCE 146 (1999). Same as rights, a *wāqf* has duties under *Sharie'a*, such as a *mutāwālli* is an employee of the *wāqf* and eligible to remuneration out of the *wāqf*'s income. *Id.*

rather, it was “arrested” or “detained.”<sup>68</sup> In *All India Imām Organization v. Union of India*, the Supreme Court of India treated the *Imāms* as the mosque’s employees and ruled that the *wāqf* boards are liable for their salaries, since the boards are the regulatory and administrative authorities for the *wāqfs* in India.<sup>69</sup> A *wāqf*’s ability to own property is characteristic of its having independent legal personality.

Nevertheless, there are some *fuqah’a* (scholars, or *Majlis ‘Ulama* in South Africa) who disagree with the above viewpoint, who nevertheless argue that a *wāqf* is not a juristic person because *Sharie’a* does not recognize artificial persons.<sup>70</sup> These scholars argue that a *wāqf* is a property whose ownership is vested in *Allāh* (God) after its creation. *Allāh* is the owner of the universe, including *wāqfs*. Any property bought for a *wāqf* does not merge with it as a property and is not endowed. It becomes separate from the donor and becomes *Allāh*’s property as well.<sup>71</sup> Regarding the legal status of such property, generally all creation belongs to *Allāh*, including men, animals, and other beings, animate and inanimate.

Yet, for practical necessity—as a dynamic and practical life-oriented legal system—Islamic jurists generally recognize that not only human beings possess *dhimmāh*, but that *wāqfs* and similar entities possess

68. Monica M. Gaudiosi, *The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College*, 136 U. PA. L. REV. 4 1231, 1234 (1988). See Syed S. Hamid, *Influence of Western Jurisprudence over Islamic Jurisprudence: A Comparative Study*, 4 NORTHERN UNIV. J. L. 13, 16–17 (2013). The only significant distinction between the Islamic *wāqf* and English trust was (“the express or implied reversion of the *wāqf* to charitable purposes when its specific object has ceased to exist,” though this difference only applied to the *wāqf ahli* (Islamic family trust) rather than the *wāqf khāiri* (devoted to a charitable purpose from its inception.”).

69. The Court held: by Section 15 of the *Wāqf Act*, the *wāqf* Board is vested not only with supervisory and administrative powers over the *wāqf* but even the financial power vests in it. One of the primary duties is to ensure that the income from the *wāqf* spent on carrying out the purposes for which the *wāqf* was created. Mosques are *wāqf* and are required to be registered under the Act, over which the Board exercises control. Purpose of their creation is community worship. The principal functionary to undertake it is the *Imām*. It is the responsibility of the *wāqf* Board to ensure proper maintenance of religious service in a mosque. To say, therefore, that the Board has no control over the mosque or *imām* is not correct.

70. See, e.g., Malik M. Hafeez, *An Analysis of Corporate Governance in Islamic and Western Perspectives*, 2 INT’L J. BUS., ECON. & L. 3 (2016). One criticism that may be raised about the property endowment of commercial businesses is the departure from the object. In corporations, the company is stick by its object and though the company is the owner of its properties, the domain of the ownership and the capacity of the company is limited to its object expressed in the Statute (the operations and activities of trade and commerce), which is predicted in the law and cannot exceed its limits but to implement and accomplish the company’s goals and carry out its policies.

71. See Zahraa, *supra* note 59, at 205 (“The properties of the *wāqf* and other charitable institutes are now so large that almost all Islamic countries have to establish a ministry called *wāzārāt al’ wāqāf* [wāqf Ministry].”). *Id.*

*dhimmāh* as well. As scholar ‘Abdul Qādir ‘Audāh argues, “[t]he Islamic law has, since its dawn, recognized the existence of juristic persons. The jurists have discussed the state treasury and *wāqf* as juristic persons. Similarly, they have considered the schools, orphanages, hospitals, etc., as the juristic persons and competent to hold and exercise the rights.” *Wāqfs* carry out both religious and socio-legal or temporal obligations, such as business transactions. These obligations require the possession of legal personality in order to operate under Islamic law and for the sake of temporal accessibility. As *wāqfs* can retain financial rights and carry out duties, they should be given the status of having legal personality. If this is not recognized and *wāqf* are taken to be properties, their ownership would be dubious.

*D. Icons and Idols in Customary Law: The Hindu Idol*

Another example of an artificial entity possessing legal personality is the Hindu idol, under contemporary Indian law. The legal personality of Hindu idols in contemporary Indian law can be said to derive from ancient Hindu legal thinking, manifested in the English common law system and firmly rooted in the classical Indian legal tradition.<sup>72</sup> In the landmark case, *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*, the issue was whether a Hindu idol was merely movable property (an object) and subject to displacement by the *shebait* (priest), who would care for its worship or something/someone else.<sup>73</sup> The Judicial Committee, stated, “[a] Hindu idol is, according to long established authority, upon the religious customs of the Hindus, and the recognition thereof by Courts of Law, a ‘juristic entity.’” It has a juridical status with the power of suing and being sued [...] it is unnecessary to quote the authorities for this doctrine thus stated is firmly established.”<sup>74</sup> It is by tradition, therefore, that Hindu idols have the power to sue, to be sued, and to own property (as a logical prerequisite for

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72. “The personality of the Hindu Idol is something of an oddity in the Indian legal system. It is essentially ancient Hindu legal philosophy juxtaposed with and given recognition by an alien legal system—the English common law.” Kartick Maheswari & Vishnu V. Shankar, *Stone Gods and Earthly Interests: The Jural Relations and Consequence of Attributing Legal Personality to Hindu Idols*, 16 STUDENT BAR REV. 46, 46-67 (2004).

73. *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*, 52 Ind. App. 245, 250 (P.C.) (per Lord Shaw) (The Court held “the will of the idol as to its location must be respected, and that accordingly the suit should be remitted in order that the idol might appear by a disinterested next friend to be appointed by the Court; that the female members of the family, having the right to participate in the worship, should be joined; and that a scheme for regulating the worship [of the idol as between the three brothers who were embroiled in this dispute] should be framed.”). *Id.*

74. *Id.*



the power to be sued).<sup>75</sup> One could read this case as recognizing a “legal fiction” which is no different by way of analogical deduction from considering a corporation as a “juristic entity” or “person” for purposes of the law.<sup>76</sup>

The Hindu idol’s legal personality rests on the “spiritual purpose” that it embodies or represents.<sup>77</sup> Like in positive Roman law, where charitable endowments could be given legal personality through the will of the charitable donor, similarly, Hindu idols are considered to be granted legal personality by the worshippers’ will.<sup>78</sup> In recognizing that it is the faith of worshippers rather than the State that gives juristic personality to Hindu idols, the Indian Supreme Court said, “it is enough if the devotees or the pilgrims feel that there is some superhuman power which they should worship and invoke its blessings.”<sup>79</sup> However, an idol is a person only in its capacity as the representative and symbol of the particular purpose that is indicated by the worshipper.

Furthermore, being that Hindu idols can possess legal personality, they are legally capable of holding ownership rights. The *Yogendra Nath Naskar v. CIT* case confirmed the ownership right of idols or deities by bringing them under the ambit of taxation. Moreover, under Hindu law, property may also be charitably vested in Hindu idols.<sup>80</sup> In this case, the *devata* (deity) is distinct from the “debutter,” which is the property charitably endowed to that deity; the property itself does not become the juristic person, but rather the idol (which is supposed to embody the deity) becomes the juristic person.<sup>81</sup> Still, similar to the will of the founder giving legal personality to charitable endowments under Roman law, the will of

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75. Maheswari & Shankar, *supra* note 72, at 49-50. Accordingly, this case where the Privy Council does appear to have done justice to Hindu religious sensibilities, though only at great cost to the logical constancy of Anglo-Indian case law, for the case in question involved the attribution of agency to a thing.

76. See, e.g., *Bank of New South Wales v Commonwealth* [1948] 76 CLR 1 (Austl.); *Body Corporate, Villa Edgewater CTS 23092 v. Federal Commissioner of Taxation* [2004] AATA 425 (Austl.) (“While all humans are legal persons, and all adults of sound mind have unlimited capacity to enter into contracts, *not* every legal person is a human [...] an abstraction or even an inanimate physical thing” as a juristic or legal person.”). *Id.* See BRUCE WELLING, *CORPORATE LAW IN CANADA: THE GOVERNING PRINCIPLES* (CANADIAN LEGAL TEXTBOOK SERIES) 100 (Scribblers Publishing, 1991).

77. “[T]he law as it stands now is in complete unanimity: the Idol as representing and embodying the spiritual purpose of the donor is a juristic person recognized by law and in this person, the dedicated property vests.” *Id.* at 51. See Maheswari & Shankar, *supra* note 72, at 55 (quoting *Ram Jankijee Deity v. State of Bihar*, 5 S.C.C. 50, 59 (1990)).

78. Maheswari & Shankar, *supra* note 72, at 49.

79. *Id.* at 55.

80. *Id.* at 54.

81. *Id.* at 49.

the worshipper is what gives Hindu idols personality. “[T]he law as it stands now is in complete unanimity: the Idol as representing and embodying the spiritual purpose of the donor is a juristic person recognized by law and in this person, the dedicated property vests.”<sup>82</sup> Any kind of wealth may be donated—not just property.<sup>83</sup>

## V. CONCLUSION

The problem of recognizing corporate legal personality in Islamic law reflects a long-standing dilemma: how to reconcile foreign legal concepts and changing needs with the mandates of *Sharie’a*. For example, historically the Roman legal norms that pervaded into the Islamic *fiqh* could not be enforced from “above.” There could be no blanket “reception” of Roman law, and indeed, the form of political authority would have been antagonistic to such an incident, as the Roman legal values had to be integrated from “below.”<sup>84</sup> Jurists became the link between people’s traditional interactions and the written *qāwānin* (laws).<sup>85</sup> By *qiyas* and *ijtihad* (analogy and reasoning), the *mufti* justified actions to fit the general principles of *Sharie’a* law.

Later, when Islamic finance and banking arose, it became crucial to adopt a more precise interpretation of how exactly *Shārīe’ā* should be applied to a business (corporate model) that implicated prohibited activities (e.g., charging interest on loans). Financial products and services had to be constructed to be compatible with Islamic teachings and, by extension, the corporations that sold those services were required to be organized in a way which enabled supervision to guarantee compliance. At present, for a good corporate governance approach, companies must incorporate the principles of Islamic governance (consultation, transparency, accountability, ethical justice, equity, spiritual succession, and organizing for virtuous conduct and forbidding sin) to cover the gaps which the conventional Anglo-Saxon/US Codes do not address. It seems, therefore, that businesses have led the way in embracing constitutions and organizations which address the need to comply with Islamic law, as well as Western corporate law, regulations, and codes of corporate governance (e.g., OECD principles of good corporate governance). Muslim scholars or *Muftī*(s) give guidance or *fātwās* (rulings)

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82. *Id.* at 51.

83. *Id.* at 49. Also, “[t]he other alternative for the donor was to create an institution or foundation himself. This would be a new juristic person that depended for its origin upon nothing else but the will of the founder, provided that it was directed to a charitable purpose.” *Id.* at 48.

84. Ayman Daher, *The Shar’ia: Is Roman Law Wearing an Islamic Veil?*, 3 HIRUNDO: THE MCGILL J. CLASSICAL STUD. 91, 95 (2005).

85. *Id.* at 105.

to companies on critical or dubious issues. A board of directors will seek a jurist who will provide a favorable interpretation of Islamic law and provide consistency within the *Shārīe'ā* edicts to support its planned strategy.

As the law stands now, there may not be a simple way to reconcile the foreign elements of corporate/artificial legal personality and Islamic law. In the end, either Hindu spiritual custom or the positive common law will have to give way to the edicts of *Shārīe'ā*. However, the example of Roman law's influence on Islamic law should illustrate how the concept of corporate legal personality could find its way into Islamic law. Roman influence on Islamic law, whether seen as a religious, philosophical, or a socio-political movement, managed foremost legal reform. Likewise, the Roman impact on Islamic law that did occur was a gradual combination of Roman ideas through the *Sharie'a* mechanisms. This impact pursued a pattern of legal evolution. Middle Eastern law has had a linear shape that goes from the *Hammurabi* Code, through Assyrian Law, Rabbinic Law, Greek Law, Roman Law, Byzantine Law and ultimately to Islamic Law. While the name of the legal regime that is in effect changes, the persons living under it do not. It is these folks that brought the rules from one tradition into another and basically resumed and continued to live their lives as they always had; they left it to the jurists to go through the mental gymnastics of resolving their acts with "the law." *A fortiori*, this use of legal regime is preferable to Western legal classes when this class may have the detrimental effect of altering the sense of Islamic theories, creating darkness over their autonomy and ingenuity.

The concept of corporate legal personality should be considered compatible with Islamic law for several reasons. First, the Ottoman Code of Commerce of 1850 established that the concept could be incorporated into a code based on Islamic law. Second, many countries which have based their laws on Islamic law have acknowledged the concept of artificial legal personality alongside natural personality, recognizing legal personality in institutions such as *wāwfs*, mosques, and States. These examples establish that *dhimmāh* (legal personality) may be given to artificial entities like companies, since there is no obvious proscription in the *Qur'ān* or *Sunnah*. Additionally, Hindu law's treatment of idols as juristic persons separate and apart from their worshippers stands as a good analogy as to how corporations can be juristic persons separate and apart from those who execute their operations. Third, if one is not persuaded to admit or accept this interpretation, permissibility may still be claimed by way of the *māslāhāh* (public interest) doctrine, Muslim jurists recognize the possibility of Islamic corporate personality, reasoning that the concept of *dhimmāh* evolved during the history of the *Sharie'a*. These jurists view *dhimmāh* as

an ethical concept bestowed on human beings to empower them to assume and carry their mission as viceregents, and further reason that it is vital to adhere to a moderate interpretation of the concept which encompasses entities like mosques, *wāqfs* and corporations. Adhering to such a moderate interpretation would facilitate economic activities that are vital to life.

However, corporate legal personality should not be accepted without limitation. Some Islamic rulings on the concept may change over place and time, depending on the needs of society; these differences would also maintain basic Islamic principles. As Nyazee mentioned:

The truth is that the concept of a fictitious person can only operate within the flexible sphere of the law [. . .] The fixed part of the law does not need this concept and will reject it. If this concept is thrust upon the fixed part, a number of inconsistencies may develop in the law. The case of flexible sphere is different. The *imām* (head of the State or the State) can introduce the concept of juristic person within the flexible sphere, but this should not affect the law operative in the fixed part.<sup>86</sup>

Nevertheless, it can be established that corporate personality is compatible with Islamic jurisprudence, even if, as a doctrine, its contours become subject to future.

The problem is that while the personality of corporations can be settled in law, its theoretical justification still seems ambiguous. The problem reveals the existence of two, not always complementary, legal systems—the Roman system of positive law and the Islamic *fiqh* system. However, the problem of legal personality is not impassible. The path of logic on one side and religion and equity on the other is contradictory in several cases. Court jurisdictions have had to make hard choices between equity and logic. Nevertheless, it can be established that corporate personality is compatible with Islamic jurisprudence, even if its contours may be subject to reconfiguration.

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86. NYAZEE, *supra* note 1.