

THE ORIGIN AND PURPOSE OF *DHIMMAH* ACCORDING TO THE EARLY *UŞŪLIYYŪN*

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Abstract

In Islām where God is established at the centre of grand ontological system of the worldview, the meaning and purpose of responsibility (*taklīf*) is clear from where it is derived. The responsibility is solely derived from God, and it is addressed exclusively to a natural person, the man. However, the meaning and purpose of responsibility has been going a debate in the contemporary discourse where the contemporary jurists have discussed the responsibility is extended its meaning to a non-human being or non-man, such as *corporation*, under the notion of the doctrine of *dhimmah* (substratum of responsibility). This study intends to clarify their claim by investigating the origin and development of the *dhimmah* which are in the discussion of the early legal theorists (*uṣūliyyūn*). A semantic analysis of the term *dhimmah* and its related key terms indicate that *dhimmah* is truly a God's exclusive endowment for a man, and not for other entities other than man. In addition, *dhimmah* refers to the original covenant that man's soul has sealed with God during the Primordial Covenant (*mithāq*). The findings further indicate a new hierarchy of responsibility of a man *vis-à-vis* the corporation can be established, where the former is derived from religion, while the later is from the state. This study will provide a philosophical and metaphysical framework in legal theory in Islām which is currently lacking, and can be of benefit for the students of legal theory as well as philosophy of ethics..

Keywords: *Dhimmah*, *Taklīf*, Man, Corporation, and Legal Theory.

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1.0 RESEARCH BACKGROUND

Taklīf is a term that bears theological and legal vocabulary denoting the fact of an imposition on the part of God's obligations on His creatures, for them to subject to the Law. This obligations, nevertheless, is directed to none other than by man, a human being or a natural person, which is known in Islamic legal term as *mukallaf*. In the Qur'ān, *taklīf* is mentioned on six times, though in a different expression, to express that Allah does not require of anyone to uphold the responsibility what is beyond his capacity (*wus'*) (*lā yukallifu illāhu nafsān illā wus' ahā*).

The discourse on *taklīf* was discussed in the domain of theology and legal in the discourse between the theologians such as al-Asha'arī, al-Mātūrīdī, and the Mu'tazilī, as well as all the Islamic legal *madhāhib*. In the domain of theology, D. Gimaret highlights that the existence of *taklīf* raises three fundamental questions; firstly, how do we know the obligations which God imposes on us. Secondly, why does God impose obligation on us. Thirdly, can God oblige man to do the impossible? All these three questions have been thoroughly debated between the Ash'arī school and Mu'tazilah school. On the question how do we know God obliges us, according to Mu'tazilah, it is known by reason (*al-'aql*) and revelation (*sam'* or *wahy*). Through reason, man knows to respect elders, to pay debt, to follow the rules etc. Whereas through revelation, the obligations are more specific such as the obligation to perform the five daily prayers, to perform fasting during *Ramaḍān* and so forth. Mātūrīdīs' view is identical toward this. However, Ash'arī is of the view that everything is known through revelation, and because of it, God then will reward or punish accordingly.

Given the historical discussion in the foregoing, it can be concluded the Asha'arī as well as the Mātūrīdī have established the *ahl sunnah wa al-jamā'ah*'s position on the question of *taklīf*. Now it is in the field of legal the question of *taklīf* has been challenged to another level—in light of the knowledge progression permeated by alien concepts and terms. The question of *takkif* is now being extended to non-human which is the 'corporation'.

2.0 PURPOSE OF THE STUDY

Contemporary jurists namely Abdur Rahman, Ahmad Hassan, Anas Zarqa, Taqi Usmani, Mahdaa Zahraa, and many others who follow them, argue that Islam acknowledges 'legal person', therefore, legal person entity known as 'corporation' possess legal responsibility, *dhimmah*. The 'corporation' is defined as an association or aggregation of people in a company constituted as an artificial 'legal person' quite separate and distinct from the people who may form its membership. It is distinguished by a number of characteristics that make it a more flexible instrument for large-scale economic activity, particularly for the purpose of raising large sums of capital investment.

Among its chief features are; (i) limited liability, meaning the capital suppliers are not subject to losses greater than the amount of their investment; (ii) transferability of shares, whereby rights in the enterprise may be transferred readily from one investor to another

without reconstituting the organization under law; (iii) juridical personality, meaning the corporation itself as a fictive “person” has legal standing and may thus sue and be sued, may take contracts, and may hold property in a common name; and (iv) indefinite duration, whereby the life of the corporation may extend beyond the participation of any incorporators.

By virtue of *dhimmah*, it allows the corporation to have some responsibilities, such as buying and selling properties, owning properties, and sue and to be sued in the court under its own name. It is even debated that the entity like ‘Islamic banking’ which is established under the ‘corporation’ should pay zakat or not, because the entity acquires profits annually that entitle them to the zakat obligation, like the natural person whom their wealth has reached its *hawl* (period of wealth) and eligible to pay zakat.

Given the perplexity on the issue, it is imperative to clarify our position based on the established definition of *dhimmah* as expounded especially by the early legal theorists (*al-uṣūliyyūn*) because they were the group of scholars who immensely discussed it.

■ 3.0 LITERATURE REVIEW

Several studies have been made on the earliest discussion pertaining to legal person. The issue of legal person was first brought in the corpus of modern Islamic intellectual discourse by Abdur Rahim (d. 1952). He coins the *artificial person* under the chapter of *ahlīyyah*, which is for the first time in modern literatures of *uṣūl al-fiqh* written in English the term *artificial person* is incorporated and mentioned. For the sake of clarity and comprehension, his statement is fully quoted as follows;

It may be doubted whether the earlier jurists would recognize an artificial or juristic person. The State or community is regarded by them as holding and exercising the rights of God on His behalf through the Imām. Similarly the deceased is spoken of as having rights and obligations and not his estate, for the law deals both with a man’s spiritual and worldly rights and obligations and even the worldly rights and obligations of a person cannot be said to be altogether lost on his death, inasmuch as he is entitled to have his funeral expenses and his debts and other obligations discharged out of the estate. But later jurists seem inclined to recognize an artificial person, for instance, they would allow a gift to be made directly to a mosque, while the ancient doctors would require the intervention of a trustee.

From Rahim’s brief remark on the *artificial person*, there is nothing much could be deciphered on his thought about it. He does not elucidate further what the problem is possibly arisen from the legitimation of legal person in Islām. However, he has opened a new intellectual vista of the Muslim scholars on the issue of legal person.

Ahmad Hassan is of the view that the Muslim jurists do not recognize the legal person which he terms it in Arabic as *shakhṣma ‘nawī* or *‘itibārī*, on the basis that the legal capacity which is *dhimmah* implies intelligence. For him, the legal person is devoid of *dhimmah*. However, this is the theoretical position of the Muslims jurists as Hassan claims. It appears, according to him, the practical position is different from the theoretical, because the Muslim jurists do apparently recognize the legal person. For example, the state or community hold certain rights that they are allowed to receive a gift, a bequest, or a religious endowment to be made directly to a mosque, religious seminary, sanctuary, hospital, and similar other public institutions. *Bayt al-māl* for instance, can inherit the property of the deceased. He concludes by referring to those examples, that the Muslim jurists do recognize legal capacity for the natural man as well as the legal person.

Taqi Usmani argues that the legal person or juridical person is accepted in Sharī‘ah, despite its fictitious entity, because it is treated as natural person. If a person deceased insolvent, according to Islamic law, his creditors have no claim except to the extent of the assets he has left behind. However if the liabilities are exceed his assets, the creditor cannot claim from his heirs or relatives and certainly the creditors will suffer. Taqi argues there is a logical consequence of accepting juridical person akin to natural person, because they are both *ceteris paribus*; whereby if the juridical person is accepted on the basis that it is equivalent to natural person, *ipso facto* the concept of limited liability that is being practiced to companies or institutions, which they are established under the concept of legal person, is also acceptable. There are other scholars who follow the same line of argument, to mention some of them, Mahdi Zahraa, and Alī Muḥy al-Dīn al-Qurrah Dāghī.

■ 4.0 METHODOLOGY

A semantic analysis of the term *dhimmah* and its related key terms is employed to understand the meaning of it. *Taklīf* is derived from the verbal noun of *kallaḥa*. It is said “*kallaftu al-rajulu*” (I assigned [something] to the man). It means, “I ordered something that is difficult for him” (*ayy amarahu bimā yasyuqu ‘alayhi*). Legally, *taklīf* is defined by the majority of the jurists as the requiring (*ilzām*) of an action in which is difficulty and trouble. In Qur’ān the expression to denote *taklīf* is used in the form of action, *nukallif*, *yukallif*, *tukallafu* as well as noun, *al-mutakallifīn*.

As for the term *dhimmah*, linguistically it means a covenant, a guarantee, or a security. Technically, according to Wahbah Zuhaylī it is a collection of rights for a person and whatever debts from him or her (*majmū‘ mā li al-shakhṣ min ḥuqūq wa mā ‘alayhi min iltizāmāt*). It means that *dhimmah* is something that appears in the form of the person’s wealth as for him or her to settle the debts (*anna dhimmaḥ tataṣawwar fī ṣūrah māl li al-shakhṣ ṣāliḥ li waḥdā ‘al-duyūn*). Thus, *dhimmah* is the understanding of it (*maḥmūmihā*), whereas the underlying corporeal is the person’s wealth. He is also of the view that this definition is close to the jurists’ definition whom has given a precise definition that *dhimmah* is the substratum of the responsibility (*maḥal*).

The concept of *dhimmah* was developed by the *fuqahā’*. This is according to al-Taftazānī in his *al-Talwīḥ* that he says, “*dhimmah* is something that has no meaning and Sharī‘ah does not require it, it is indeed an invention of the jurists as to justify the religious responsibility upon the *mukallaf* (*anna al-dhimmaḥ amr lā ma‘na lahu wa lā ḥājah ilayhi fī al-shar‘ wa innahu min mukhtari ‘āt al-fuqahā’ yu‘abbirūna ‘an wujūb al-ḥukm ‘alā al-mukallaf*). Before the time of al-Taftazānī”, it is found that among the earliest record that *dhimmah*

was discussed by the *fuqahā'* in relation to the responsibility (*taklīf*) is found in the work of al-Sarakhsī, al-Bazdawī and his commentary by 'Alā al-Dīn. Al-Sarakhsī's contemporary, Muḥammad 'Alī al-Tahānāwī (d. 1158), a Ḥanafī jurist and lexicography has recorded in his celebrated scientific and technical dictionary *Kaṣyḥāf Iṣṭilāḥāt al-Funūn wa al-'Ulūm* that he derived the explanation of the *dhimmah* from *al-Talwīh* and its glossaries by al-Fāḍil al-Chelebi and al-Barjandī in the Chapter of *al-Kafālah* (Guarantee).

Al-Jurjānī has given a scientific and succinct definition of *dhimmah*. He uses the term *dhimmah ṣāliḥah*, which literally means *al-'ahd*, the similar definition held by most scholars. However, the technical definition of it, he classifies *dhimmah* into two aspects, either *dhimmah* as an attribute (*ṣifat*), or *dhimmah* as an essence (*dhāt*).

On being an attribute, *dhimmah* is like a quality that owned by man that it is something outside of man. For example, if *dhimmah* is to be understood as an agreement or covenant (*al-'ahd*), therefore, for those who against the rules or regulation, or the obligation, therefore, these people require some sort of covenant to bind them. On being an essence, *dhimmah* is an innate quality that endowed by God to all persons. This spiritual quality is already innate inside of the human being, so that they are obliged to adhere and follow God's obligations. According to al-Jurjānī, most jurists hold by this view.

Al-Jurjānī's definition is predominantly derived from the Ḥanafī's school of law. It can be seen from the term *dhimmah ṣāliḥah* he used. It is originally introduced by al-Sarakhsī and al-Bazdawī, because it could not be found such term in the Shāfi'i, Mālikī, and even Ḥanbalī's works. Hence, it can be deduced here that *dhimmah* has two aspects, an attribute or an essence.

In contemporary *mu'jam*, Sa'dī Abū Jayb in *al-Qāmūs al-Fiqhīyah Lughatan wa Iṣṭilāḥān*, finds that *dhimmah* has six meanings; i) the essence and the self (*al-dhāt wa al-nafs*), because both of these are the container or substratum, or capacity of the *dhimmah*; ii) undertaking (*al-'ahd*); iii) peace (*al-amān*), iv) the reconciliation and peacefulness contract (*'aqd al-ṣulḥ wa al-muhādanah*); v) guarantee (*al-kafālah*); vi) truth (*al-ḥaqq*) and sovereignty (*al-ḥurmah*).

Therefore, it is important to distinguish the difference between *taklīf* and *dhimmah*. *Taklīf* is general (*'ām*), because it comprises of *ahlīyah al-wujūb* and *ahlīyah al-adā'*. It is noted by the jurists (*fuqahā'*) that the rules of *taklīf* and *ahlīyah* is discussed in the Chapter of Prohibition (*bāb al-ḥijr*), while the legal theorists (*uṣūliyyūn*) discuss it in the four principle of ruling; the Lawgiver (*al-Hākīm*), the Law (*al-Ḥukm*), the Subject Matter or the person who is obliged (*al-Maḥkūm 'Alayhi*), and the Object or action (*al-Maḥkūm Bihi*). Abū Ḥafṣ 'Umar al-Nasafī relates the *dhimmah* under the discussion of *Kitāb al-Siyar* which means an undertaking (*'ahd*).

Dhimmah, on the other hand, is particular (*khuṣūṣ*) because it deals with pre-requisite aspect of the responsibility. This is in the sense of the root of *dhimmah* and its relation to the Primordial Covenant that can be traced in many earlier literatures on Islamic jurisprudence. However, the modern literatures as indicated in the work of *Mawṣū'ah al-Fiqhīyah*, Hashim Kamali, 'Abd al-Karīm Zaydān, Mohamad Akram Laldin, Anwar Ahmad Qadri, just to mention some of them, unfortunately does not point *dhimmah* to the original covenant. This is with the exception of some of the works by Wahbah Zuhaylī, Abū Zahrah, and Imran Ahsan Khan Nyazee. They mention the origin of *dhimmah*, but it was brief. It is wondering why the discussion of *dhimmah* is not thoroughly explicated in the contemporary works of *uṣūl al-fiqh*, compared to the early works. The possible explanation of this can be understood as what Wael Hallaq has observed, when he argues that the nature of *fiqh* is primarily to arrive at certain legal judgement. Therefore any theological deliberation is not considered as vital as it should be.

■ 5.0 RESEARCH FINDINGS

We argue in the above based on al-Taftazānī's remark that *dhimmah* was an invention of the early *fuqahā'*. This argument can imply that *dhimmah* is a social and mental construction that the jurists had used their imagination to come out with a concept of *dhimmah*. This line of thinking is exactly of the same argument by the secular social scientist, like Peter L. Berger & Thomas Luckmann, who claim that reality is socially constructed. "Reality", according to them, is defined as a phenomenology which is independent from the control of human being, and it is organized around the "here" of man's body and the "now" of man's present. Man, according to the authors, and its process of becoming man takes place in an inter-relationship with the environment. It means that the environment defines the nature of man, and man's acquisition of knowledge predominantly coming from the external events which is the circumstances occur outside of man. Therefore, as for the authors, "knowledge", either valid or not valid, which produced by the society must be accepted as reality.

The problem of this idea is pointed by al-Attas in his book, *Prolegomena to the Metaphysics of Islām* that the reality in the worldview of Islām "is not formed merely by the gathering together of various cultural objects, values and phenomena into artificial coherence." The notion of artificial coherence rightly pointed to this idea because the nature of its worldview is not natural, but an amalgamation of various cultural objects, values and phenomena.

On the other hand, we argue that this invention by the jurists is a creative one profoundly based on the Qur'ānic verses, and nothing is contradictory. It connotes an agreement that the soul has sealed since the Primordial Covenant (*mithāq*). It existed as the substratum of the responsibility which God has endowed to a sane and sound man. The scholars collectively and firmly base their argument based on the Quranic verse; "Waiz akhaza rabbuka min banī 'Adām min zuhūrihim zurriyatahum wa ashhaduhum 'alā anfusihim alastu birabbikum. Qālū balā shahidnā..." (And [mention] when your Lord took from the children of Adam—from their loins—their descendants and made them testify of themselves, [saying to them], "Am I not your Lord?" They said, "Yes, we have testified." [This]—lest you should say on the day of Resurrection, "Indeed, we were of this unaware").

The Covenant marks the key important event in defining the religion of Islām and the root of the worldview of the Muslims. This is what al-Attas has observed and expounded that the Covenant defines the identity of the Muslims and the religion that the Muslims should follow. It is also the origin and the purpose of their life in the world and hereafter, and the sources of knowledge of reality of things. He says:

...this Covenant is of an essential nature; it is the starting point in the Islamic concept of religion, and is the dominant element in all other Islamic concepts bound up with it, such as those of freedom and responsibility, of justice, of knowledge, of virtue, of brotherhood,; of the role and character of the individual and the society and of their mutual identity in the framework of the state and of collective life.

In Henry Corbin's words, "the religious conscience of Islam is centered upon a fact of meta-history", which he refers to the Primordial Covenant (*yam al-mithāq*). According to Shimmel, here is the starting point for the soul's understanding of free will and predestination, of election and acceptance, of God's eternal power, and man's loving response and promise.

The early *uṣūliyyūn*, Al-Sarakhsī (d. 483/1090), a Ḥanafī jurist, expresses the term *dhimmah ṣāliḥah* to denote the place or substratum (*maḥal*) where the religious obligation is endowed to a sound human being or man during the Primordial Covenant. It is the *dhimmah ṣāliḥah* that live inside the soul of the man legitimates the obligation received by God. His contemporary, al-Bazdawī (d. 493/1100) also points the *dhimmah* to the Primordial Covenant. His commentator, 'Alā' al-Dīn al-Bukhārī in *Kasyf al-Asrār*, makes a thorough deliberation on the Covenant. He argues that the *ahliyah al-wujūb* (legal capacity) is not legitimate except by possessing the *dhimmah ṣāliḥah*. This *dhimmah ṣāliḥah* is an exclusive quality that man possesses, not the other creatures. He further argues that the majority of jurists (*fuqahā'*) establish the position, and those who disagree with it, they will against the majority's decision. Here the majority of jurists are particularly the Ḥanafī's jurists because the other jurists from other *madhhab* did not clearly delineate their position. It is based on Qāḍī Abū Zayd that *dhimmah* is a covenant with God, and when Allah created man, he or she was endowed with a place of trust in his or her soul, which is the intellect (*'aql*) and *dhimmah*. By virtue of the two qualities, man is then entitled of his or her rights, freedom and responsibility.

Al-Taftāzānī (d. 793/1390) elucidates further that the pre-requisite of the people who is given the responsibility (*al-maḥkūm 'alayhi*) is the intellect (*'aql*). Without intellect, neither obligation nor responsibility can be granted. It is intellect, together with *dhimmah* that Allah places these two qualities in man upon creation as a trust and sign of nobility. Through intellect, man is distinguished his or her creation from other beings. Upon commenting on the intellect, he incorporates the philosophical argument on the degrees of intellect as to support his argument. His explication of *dhimmah* and its relation to the intellect is a novel argument, which should be understood as the culmination of the intellectual tradition of his predecessors, such as al-Sarakhsī and al-Bazdawī.

Commenting on the people of being given the responsibility (*al-mukallaḥ*), al-Taftāzānī deliberates further in his commentary of Imām Nawāwī's *Arbā'īn al-Āḥādīth*, that those people are the people who possess sound intellect and sane (*al-'uqalā' al-bālighīn*). Of these two criteria, intellect (*'aql*) is the place where the responsibility (*taklīf*) is dependent. Without which, the responsibility is not eligible for whom their intellect is not sound.

If *dhimmah* is considered apriori or *qāri'ī* (self-evident knowledge), would that mean that man knows already the responsibility that is carried out? It should be. Because man is given intellect to contemplate their existence; the origin of their life, and the ultimate purpose and destiny of their life. All these cannot be obtained merely by speculation or rumours, but definitely through revelation and true reports by the Messenger of God.

Based on the foregoing discussion, it sufficiently shows that the discussion of *taklīf* and *dhimmah* by the early *uṣūliyyūn* were incredibly thorough and it is linked to the origin of man (*insān*) and intellect (*'aql*). Definitely whatever terms that are related with *dhimmah* such as *insān* and *'aql*, all their meanings are projecting into a single coherent reality that is established in the tradition of Islām. It is not to say that the terms are taken arbitrarily. *Dhimmah*, if it is profoundly linked to the theological, metaphysical and legal domain, it can provide a sound and stable philosophy of ethics to the mankind. This argument which follow the deducing approach—which reasoning by necessity—establishes the fact that *dhimmah* is only meant for a normal sane and sound person. It, therefore, denies the contemporary jurists' argument that non-person entity such as 'corporation' also possess *dhimmah*. However, some of them modifies the concept by term it as *dhimmah mu'amalah*—to denote the *dhimmah* is restricted to commercial purposes only—which to some extent is acceptable. By virtue of this, we can agree with Jurjānī's definition of *dhimmah* that it contains two aspects, it could be an attribute of a man and at the same time it could be an essence itself.

6.0 DISCUSSION AND CONCLUSION

The findings of the study will be able to provide an insightful legal and ethical framework on the meaning and purpose of responsibility in Islām in the contemporary days. Even though the findings are primarily based on the textual analysis of the term based on the writings of early scholars of Islām, it establishes the fact that man is a special creation that Allah has given in man a *dhimmah* and intellect (*'aql*) to perform his religious and worldly duty. In light of the Fourth Industrial Revolution discourse that is pervasively debated, the discussion of *dhimmah* is furthermore extremely important as the basis of ethical framework. It is already a question that being discussed; can electronic agents like robot be granted legal personality under Law? If it is to be entertained as having the legal personality and possessing *dhimmah*, it will open a floodgate of unimaginable issues such as the determination of what is the meaning of responsibility? Who should be liable, is it the creator of the robot or the robot itself? How God could reward or punish if the responsibility is vague? And many sorts of questions. This will tremendously change the nature of responsibilities and subsequently the framework of ethics in the near future. That is the reason the study of *dhimmah* is extremely important.

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