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The legal personality (dhimma) in Islamic Law:

how to separate personal obligations from goods

an

d secure credit for the insolvent

Legal text of Islamic Law, from the early 9th century on, distinguish between the actual performance of an obligation (e.g. given: payment of maintenance) and its non-performance accompanied by the guarantee of its future performance. The last one is a remedy for those

who for lack of time, bodily strength or material resources are unable to perform acts, pay their obligations or deliver goods that they owe in the prescribed time.

In their case, their legal personality is considered a possible guarantee for future performance.

It is the legal concept that enables them to pay their debts and perform their obligations in the future. This holds true for a wide spectrum of acts: performances of the ritual, marital obligations (payment of dower, of maintenance) and commercial debts or deliveries at a contractually fixed term.

The concept of the legal personality thus integrates the future time into the concept of ritual, commercial and social obligations and serves as a means of preliminary payment that gives the materially destitute the possibility to marry, to participate in the exchange of goods, to incur obligations that they cannot fulfill presently. It is, in other words, the basis for credit relations in the religious, the commercial and the social sphere.

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The Legal Personality (*dhimma*) and the concept of obligation in Islamic Law

1. The legal personality (*dhimma*) and its functions

In Islamic law, the Arabic term *dhimma* refers – among other things - to the person as a seat of obligation. Because the person is a seat of obligation the term acquires the meaning of “legal personality”. The capacity to be a seat of obligations characterizes the legal personality and it looks as if this terminology expresses an original concept of deontology in which the capacity to incur obligations is the condition for acquiring the capacity to have rights. In my contribution I will discuss the role that this term – between the 10th and the twelfth century – acquires for the discussion of credit without securities. In fact, my main thesis is that, in the jurists’ parlance, the term “legal personality” (*dhimma*) acquired the function of replacing the security for loans and other forms of credit.

During the next 45 minutes I will proceed very often through quotations of legal texts and – unfortunately – less often to economic history. At the very end of my paper I will refer to the documentation of social and economic history that mentions some of the problems for which I will have entirely relied on legal sources. This documentation has only very partly been used to link legal, economic and social history. I hope to participate in forging such a link through putting together a small group of researchers working on the hitherto neglected historical sources.

2. The contrast between the legal personality and the goods owned by a person

. The earliest example of a legal text in which the concept of “legal personality” is used as the alternative to direct payment of goods or money, is to be met with in one of the

major works of Muĥammad ibn Idrĥs al-ShĀfiĀ, the *Kitab al-Umm*, written in the early ninth century. The founder of the ShĀfiĀ school of Sunni law who died in 820 c.e. in Egypt, describes the case of a man who wants to marry a woman, can afford to pay her maintenance, but is not wealthy enough to pay her bridal money. According to ShĀfiĀ, one has to ask the woman whether she wants to begin marital life with him without receiving her dowry. If she accepts this choice and moves into his house with him without receiving her dowry, she will no longer be entitled to leave him because of his incapacity to pay her dowry. ShĀfiĀ explains:

“She has given up her right to separate from him. [Her case is analogous] to the case of a man who is the creditor of a bankrupt business partner (*al-Āĥib al-muflis*) and is given the choice between [recovering from among the possessions of the bankrupt person] the specific thing that was his property or to [uphold his claims against] the legal personality (*dhimma*) of his partner. If he chooses [to uphold his claims against] the legal personality of his partner he will no longer be entitled to take the specific thing that was his property [among the possessions of his bankrupt partner]. [In the case of the husband and the wife] the dower remains a debt on the husband unless she gives up her claims on it” (V, 91, see also V, 43).

The creditor, in this case, can either choose the direct access to the goods in the possession of the partner or to preserve his claim against the legal personality of his bankrupt partner. The first procedure satisfies immediately at least a part of his claims. The other one obliges him to wait until his partner restores his capacity to pay the full claim of the creditor. It stands to reason that such a choice makes sense only if the creditor’s direct access to the goods of the bankrupt partner satisfies a lesser part of his claims than the riskier procedure, i.e. to wait until his bankrupt partner restores his solvency and pays all of his debts.

If the creditor chooses the second procedure his bankrupt partner incurs the personal obligation to pay all his debts without a fixed term. If the wife accepts to direct her claims only against the legal personality of her husband, she renounces the immediate payment of the dowry, and remains entitled to claim the debt her husband owes to her at a later point of time. This debt is a personal obligation of her husband (*dayn fi l-dhimma*). The husband owes a debt with no due date. ShÁfiÝÐ explains why the wife, having consented to this solution, loses her right to leave him:

“The fact that she entered with him without [his] payment of the bridal money shows that she consented to uphold her claims against his legal personality [instead of requesting immediate payment]” (ibid., 91/ see also Nawawi, Al-MinhÁj, III, 222/ ShirbÐnÐ, III, 222).

The legal personality here serves as security for the claim of the creditor and of the wife. It releases the bankrupt partner and the husband from the immediate payment of their obligation and instead imposes on their legal personality the obligation to pay the resulting debt at a later point in time, a due date that in both cases is not fixed. In both cases, the solution is not a right of the prospective husband and the bankrupt person. It is an act of generosity that requires the consent of the creditor or of the wife. It is obvious that the requirement of consent is requested because the wife and the creditor renounce a right on immediate payment. Time is money and the loss that stems from later payment needs the consent of the persons entitled to immediate fulfillment of their claims.

3. The legal personality and the law’s anthropology

In the ninth century, the reasoning that underlies ShÁfiÝÐ’s solution is only partly offered to the reader. The rest she has to decipher herself. When, in the eleventh century the Hanafi jurists of Central Asia discuss similar problems, they have developed a natural law reasoning concerning the “legal personality” that they discuss in the texts of a new discipline, “the foundations of the law” (*uÐÙl al-fiqh*), a discipline

that serves to justify and bring about the coherence of the norms of the Hanafi legal system.

The discipline of the “foundations of the law” exerted, from the 11th century on, a strong influence on the Hanafi school of Central Asia. It is in the texts of this discipline that the Hanafi jurists develop a universal concept of the legal personality of human beings, very close to a natural law concept. This concept can be applied to all obligations, be they ritual duties or commercial debts. The eleventh-century Transoxanian jurist Sarakhsī has the following to say on the legal personality:

“The source of the capacity [to incur obligations] exists only once a legal personality (*dhimma*) exists that is suitable to serve as a seat of obligations (*ÒÁliĪatun li-kawnihÁ maĪallan li l-wujÛb*). This seat is the legal personality. Therefore, the obligation is attached to it and to nothing else. For the same reason it is the human being alone [who enjoys this capacity] to the exclusion of all other animals that [all] do not have an appropriate legal personality.”

[...]

“The fetus as long as it is hidden in the womb [of her] mother does not have an appropriate legal personality, because, legally, it has the status of a part of its mother. But it has a life of its own and is predisposed to become an individual with a legal personality. Taking this aspect into consideration it [the fetus] is capable to accept rights that fall due to it, such as manumission or succession or descent or bequests. But because one also takes into consideration the first aspect [the fetus just being a part of its mother] it is not capable of accepting obligations (*li-wujÛbi l-Īaqqi Ýalah*).”

“But once the child is borne it has a suitable legal personality. For that reason, if the baby turns around and [falls] on the property of a human being and destroys it [the newly born child] is liable for it. If his guardian concludes a marriage contract for the [newly born] boy, the boy is obliged to pay the bridal money for his wife. These are the obligations established by the law” (Sar. *UÒÛl* II, 333).

A few sentences later Sarakhsī discusses the place of the legal personality in the plan of creation. He says that God created the human beings in order to reveal himself to them and, for that purpose gave them the capacity to reason and the legal personality so that through the two of them they would be capable to be obliged by God's claims on them. God, in addition, equipped them with the attributes of freedom, ownership of property, and protection by the law of their life, limbs, property, and freedom. "This freedom, this inviolability and this capacity to own property are given to the human beings from the moment of their birth. The discerning and undiscerning [person] are equal in these qualities" (ibid. 334).

The natural law construction in which God provides all human beings with a legal personality, freedom, ownership of property and the capacity to incur obligations is the starting point of the legal construction of *credit*. The jurists adapt its universal construction to the political, social and legal conditions of their time. They hold that those human beings who fight Islam have no legal personality in this sense. In other words, the inhabitants of non-Muslim states are not entitled to the attributes just mentioned. To the Muslims they are, to quote an expression often used by Hanafi jurists "like the dead". Among the inhabitants of the Muslim territory, slaves have only "a weak legal personality", because they cannot own property, are not free and cannot incur obligations. Free Non-Muslims living under Muslim rule enjoy a legal personality that is guaranteed by the Muslim state and protects their life, limbs, and property as well as their freedom because they concluded the "contract of protection" with the Muslim political authorities. They are free and protected owners of property much as free Muslims under Muslim rule, even though the legal effects of their legal personality are, as we shall see, not always identical with those of the Muslims.

4. The personal obligation to act: the ritual

Contrary to the widely held opinion of modern secondary literature in the USA, Europe and the Middle East, the personal obligations that free persons under Muslim rule can

incur do not only cover money and fungible things. It is important for the correct understanding of the notion of personal obligation to see that it also covers ritual acts. Ritual obligations arise, for Muslims, as “personal duty” (*wÁjib fi l-dhimma*) (Sarakhsi, Mabsut, III, 81, 85; the same term is used to characterize the vow: Sarakhsi, Mabsut, III, 135) such as the obligation to perform the obligatory fasting. The obligation to pray is linked to the prayer time that makes the performance obligatory. The intention to pray has to be formulated as a condition for the licit and effective performance of the ritual act. If the duty cannot be performed in the prescribed time it becomes “a personal debt” (*dayn fi l-dhimma*) that replaces the “personal duty” by a substitute performance at a later moment (Sarakhsi, Mabsut II, 15, 128; III, 63, 143/ the pilgrimage that has not been performed constitutes a debt that can be acquitted by the performance of a third person, Sarakhsi, Mabsut, IV, 148, 154, 161). Her legal personality gives the believer a credit vis-à-vis God that she can use to discharge her ritual debts at a later moment of her own choice. The personal obligation concerning ritual acts is thus conceived of as an obligation to act.

As is to be expected, the performance of the Islamic ritual by free Non-Muslims does not produce any effects. According to SarakhsÐ, the Non-Muslim’s persistent unbelief destroys their capacity to validly perform the Islamic ritual.

“The unbeliever”, he says, will not be considered by the law capable to perform [the Islamic ritual] while persisting in his unbelief. [This is not so in order] to make it easier for him. Rather, his legal personality will by law be considered as if it were non-existent concerning his capacity (*ÒalÁÿiyya*) to incur the obligation to perform the ritual. This is meant to implement the despicableness concerning them, so that as far as this norm is concerned the unbeliever is assimilated to the animals which have no legal personality” (UÒÛI, I, 77).

The ritual separates Muslims from Non-Muslims. The legal personality here underlines the inequality between the Muslim and the Non-Muslim that resides in the religious sphere, in the ritual. The practical effect is that the Non-Muslims – contrary to the

Muslims – will not be punished in this world for not performing the Islamic ritual. Their punishment is deferred to the hereafter. But their incapacity to incur obligations in the Islamic ritual has no effect on their capacity to incur obligations in the field of the commercial exchange and household relations nor in the Non-Muslim's capacity to be a free owner of property fully protected by the law.

Two more conclusions may be drawn from the example of the personal obligation in the ritual. First, the “personal debt” or “personal obligation” is conceived of as an obligation to act. Second, the “legal personality” is flexible: it does not produce the same effects for members of different religions and – as far as the ritual duty is concerned – for sick and healthy persons (Sarakhsi, *Mabsut*, III, 124-25). The slave's legal personality has, in the field of the ritual, similar effects to that of the free person.

5. Money as a tool to create, change or preserve social relations within the household (and beyond)

As far as the use of money for the establishment, dissolving and changing of social relations in the household and beyond the household is concerned, the “debt in the legal personality” plays an important role. But the Hanafi jurists underline constantly that, the principle of precise value calculation that dominates the commercial exchange does not apply to the use of money for the establishment or change of personal relations within and beyond the household. These payments, the jurists state, are not performed in the quest for profit. Payments such as the bride money (*mahr*), the money a wife pays for her divorce from her husband (*khul'ŷ*), the emancipation of slaves, the slaves buying their freedom in monthly installments from their master, all one-sided liberalities (*mukĀtaba*), the money paid for the settlement of homicide cases or other conflicts (*ŌulĪ*) are made to establish, change or preserve social relations. They bring new members into the household, such as in the case of marriage, change the status of slaves, release a woman out of a marital relation, create or improve social relations within and beyond the household through gifts or abandonment of claims and appease

offended third persons through a settlement. They are neither prices for nor investment in goods.

The 12th century jurist KÁsÁnÐ distinguishes the commercial exchange from these household-centered social relations in the following words:

“The compensation paid under a voluntary settlement and the dower fall due as considerations for an object that not a commodity (*mÁl*) [...]. Marriage and the voluntary settlement for homicide are built upon the principle of generosity because the human being is normally more indulgent with respect to his person than with respect to his fortune. A small amount of ignorance does [therefore] not lead to a dispute [in these compensations] and does not deny the licit character of the act. With regard to sale this is different. The sale is built on double-dealing and harassment because it is a bilateral contract in which commodities are exchanged and the human being is more vexatious with regard to his fortune than with regard to his person” (VI, 48, see also 49, 54).

In spite of this marked difference of attitudes between the two realms, the notion of a “personal obligation” (*dayn fi l-dhimma*) remains important for all of these non-commercial payments. But the information about the amount to be paid does not have the same importance in marriage contracts as it does in sale contracts. The marriage contract is valid, according to three of the four Sunni schools of law, even when the amount of the bridal money is nowhere specified. If the partners to the contract did not specify the amount of the bridal money they can always replace such a specification through the introduction of the average bride money for a woman of comparable social status as its substitute (SarakhsÐ, V, 62). Much as the ShÁfiÝÐ doctrine which I discussed at the opening of my contribution, the Hanafi doctrine holds that a woman who allows her husband to contract the marriage without defining a pay date for the dower and moves into his house has lost her right to withhold herself from him “because she consented to forfeit her right” (Samarqandi, II, 42). The Hanbali jurists present a great variety of answers to the question whether the integration of the dower

with an unspecified due date is licit, but they seem to favor, at least from the 10th century on, the same solution that ShÁfiÝÐs and the Hanafis advanced (IQ, VIII, 21). The Maliki school seems have found a compromise between its opposition against a dower with an unspecified or much delayed due date and the practice of allowing an unlimited and undefined due date after the marriage has effectively been concluded (IAZQ, NZ, IV, 461; for the history of the different Maliki authorities' opinions see *ibid.* 461-465).

Much as the ritual, the realm of monetary performances for social purposes is closely governed by distinctions and privileges between religious communities and genders. Non-Muslim men are not allowed to marry Muslim women, no Non-Muslims are allowed to hold Muslim slaves, the rules governing Muslim marriages and repudiations are not imposed on Non-Muslims. Only the Hanafis hold that Muslims and Non-Muslims should be treated equally under the penal laws for homicide (Sar. XXVI, 86).

6. The legal personality's classificatory role in the market exchange

The commercial exchange constitutes the only sphere of equality between members of different religions and genders. It is the only one in which non-Muslims and women are encouraged to participate actively on a basis of equality. "Trade", says the tenth-century Iraqi Hanafi al-JaÒÒÁÒ, "is a name applied to silateral reciprocal contracts the purpose of which is the quest for profit (*wa l-tijÁratu ismun waqaÝa ÝalÁ ÝuqÙdi l-muÝÁwaÃa al-maqÒÙdu bihÁ Óalab al-arbÁÎ*) (JaÒÒÁÒ, II, 172). The final criterion whether or not a legal act belongs to the commercial exchange is, whether it has taken the form of a bilateral, reciprocal contract whose main object and aim is the making of profit. This criterion is regularly used by later Hanafi jurists (Sar. XI, 80, 156, 175; XII, 119, 125, 130-31, 133, 313, 215, 216; XIII, 106; XIV, 16; XXII, 19, 38-39, 43/ KÁsÁnÐ V, 154 gives a larger definition without a profit motive, but see *ibid.* 259/ Ibn al-HumÁm, VII, 67, 70). Profit requires precise calculation of the respective values of the object of sale and its price, therefore the commercial exchange is open and accessible to everyone whose rational capacities qualify him for the calculation of

profit and loss. Everybody who fulfills this condition has access to the market. As the eleventh-century jurist Sarakhsī explains

“The Muslim and the Non-Muslims under Muslim rule, the subject of a non-Muslim government and he who comes from non-Muslim territory with a guarantee of security, the free person and the slave who has been authorized to trade and also the slave who has the permission to redeem his freedom, they are all equal in the contract of tenancy because this contract belongs to the contracts of the commercial exchange and in these contracts all are equal” (liḤannahā min Ÿuqūdi l-tijāri wa-hum fī dhālika sawāḥ) (Baber Johansen, *Valorization*, Princeton Papers Spring 1996, p. 72).

Over the centuries jurist after jurist confirms this statement (Sar., XII, 219; XV, 14, 72, 134; XIV, 93/ Kāshānī, V, 135/ Marghānī, VII, 115: wa-ahlu l-dhimmati fi l-bayʿi ka l-muslimīn/ Ibn al-Humām, VII, 115-116/Bābartī, VII, 116).

In the same spirit, Kāshānī, the most systematic scholar of Hanafi legal doctrine writes in the 12th century:

“It is licit to hire an unbelieving wet-nurse, a daughter of fornication, because unbelief and fornication have no negative influence on the milk, because the milk of both [the unbelieving and the fornicating woman] does not harm the child. But it is reprehensible to hire a stupid wet-nurse, because the Prophet has said: don’t let a stupid woman nurse [your children]”.

In the same spirit he discusses a few lines later the religious requirements for the hiring contracts of servants for the household:

“It is not a condition that [the hired person] be a Muslim. It is admissible to rent [things and services] to Muslims, to protected non-Muslims and to persons coming from non-Muslim territories. It is equally licit to rent

things and services from them [...]because this contract belongs to the bilateral synallagmatic contracts (*YūqÙd al-muYÁwaÃÁt*). A Muslim and a Non-Muslim are equally entitled to conclude it and that is also the case with the contract of sale” (BJ, Contingency, 175).

The partners to the commercial exchange are equal with regard to the offer and acceptance of the respective goods. Neither religious affiliation, nor political power or social prestige should give privilege to any of the parties to a commercial contract. The contract of sale is the model for this equivalence in the commercial sphere. It represents a transactional justice which depends on a common value measure of the things exchanged and the idea of reciprocation in arithmetic terms. For the exchange of money for social relations the marriage contract represents the principles of proportional justice in which “equality must be equal for equals” and thus requires a selective and classificatory exchange according to the religious and social status of the participants.

The difference between the exchange of goods for profit in the commercial exchange and of money for social relations in the social exchange takes its most systematic forms in the Hanafi texts from Central Asia during the period between the 10th and the 12th century c.e. It reflects the differentiation between the economic enterprise and the household as it evolved in the urban life of Iranian, Transoxanian and later generally Middle Eastern cities. The household and the corresponding social relations were increasingly differentiated and distinguished from the commercial exchange. It became increasingly necessary to draw a clear line in the sand between on the one hand, the sphere of commerce, in which the slave, the non-Muslim, the woman, the adolescent acted as equals to Muslim free men, and on the other the social relations linked to the household in which the major hierarchies, those between religions, genders, free persons and slaves, and last but not least generations, assigned them different ranks which decided over their access to ritual, marriage, courts etc.

In the market exchange the legal personality (*dhimma*), the capacity to incur obligations, becomes the basis for a classificatory system that distinguishes between

material goods and obligations, between fungibles and specific individual things, between insolvency and borrowing power. All these distinctions are related to the notion of “personal debt”, literally the “debt in the legal personality” (*dayn fi l-dhimma*). This concept is used to regulate standard situations of the contract of sale (*bayʿ*) as well as its subgroups such as the forward buying contract (*salam*), the money exchange (*Ḍarf*), hire and leasing contracts (*ijʿāra*) and we have already seen it at work in the ritual context (see above pp. 6-7) as the obligation to act.

The reason for the distinction between insolvency and the capacity to borrow is the inexhaustible capacity of the “legal personality” to incur debts and obligations. This inexhaustible character is assumed by all Muslim law schools. It fits well into the structure of the synallagmatic contracts of Muslim law. According to ʿAbd Al-Razzaq al-Sanhuri, the synallagmatic contracts of Islamic Law, that is the contracts whose agreements are binding on both partners, do not establish a direct connection between the satisfaction of the contractual terms by the contract partners (*MaḌādir*, VI, 230, 232). Each of the partners is obliged to fulfill his obligations independently of his partner’s satisfactory or unsatisfactory performance. For this reason, in a sale contract, the buyers incapacity or refusal to pay the price does not entitle the seller to dissolve the contract (*Ibid.*, VI, 79, 217-218, 224).

The only thing that the creditor can do is to ask the QāḌī to declare the debtor legally incompetent to dispose of his own goods, to imprison him, to sell his goods and pay the creditor’s claims from the proceeds of the sale (*Ibid.* VI, 218). In the 12th century, KāḌāni has described the procedure and its results. The bankrupt prisoner is not allowed to leave the prison in order to pursue his own occupations or participate in reunions and meetings. He can receive his relatives. But the judge or the prison administrators cannot prevent him from doing business on the basis of his “legal personality”.

“He cannot be forbidden to dispose according to the sacred law. He can sell, buy, donate, give alms, utter recognitions [of debt] for other persons than his

creditors. If he did nay of this it will be executed. The creditors will not be entitled to annul it, because the imprisonment is not the annulment of the capacity to perform legal acts” (Kas. VII, 174-75).

In other words, insolvency and imprisonment do not prevent the debtor to continue sell – not his goods over which he can no longer dispose – but his obligation to deliver goods based on his inexhaustible capacity to incur debts and obligations that is not touched by insolvency and imprisonment. In the same vein, Sarakhsi, may be the most famous jurist of eleventh-century Transoxania, explains why the buyer cannot dissolve (faskh) the contract that binds him to an insolvent buyer:

“ The legal effect arising from the [sale] contract is [the seller’s] ownership of the price. The price falls due through the contract and the ownership of the price is acquired is acquired through the contract [by the seller] but it is acquired as ownership of a personal debt (*wa-innamÁ yumlaku bi l-Ýaqdi daynan fi l-dhimma*). The debt remains existent as long as its seat remains existent (*wa-baqÁPu l-dayni bi-baqÁÝ i maÁallih*). And the legal personality remains after the bankruptcy what it was before the bankruptcy, a seat capable the obligation of a debt in it” (Sar., XII, 198/ see also Ibn al-HumÁm, VIII, 332).

SarakhsÐ adds that the seller’s right to collect the price is not an effect of the sale contract but a subsidiary effect of the seller’s property claim. The seller’s ownership of the price exists through the contract, but the collecting of the price is not settled by the contract. The conflicts over such secondary modalities of ensuring the realization of the contract obligation cannot, according to Hanafi law, lead to the dissolution of the contract. The Hanafi jurists adduce as further argument for their reasoning that “the capacity of the buyer to hand over the price at the conclusion of the contract is not a condition of the admissibility of the [sale] contract. Had this capacity been required by the contract then it would surely have been a condition for the admissibility of the contract” (Sar. XII, 198).