Sacred Corporate Law

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ABSTRACT

This Article investigates the sacred origins of the corporate form. It sheds light on the sacred rituals performed to establish Ancient Roman cities as legal entities. It discusses the role of the Roman Catholic Church in developing the corporate form and in giving birth to a systemized set of rules regulating corporations, which we commonly call corporate law. It analyzes the limitations to the use of the corporate form in Islamic law as well as the streams of Islamic law jurisprudence that recognize legal capacity to specific entities with religious, social, or charitable purposes. It surveys the characteristics of two ecclesiastic institutions that have contributed to the development of the *modern* corporate form, namely monasteries and cathedrals. The insights of this Article help advance a critical understanding of the origins, nature, and attributes of modern business corporations. They also facilitate reflections on the relation between purpose and the corporate form.

CONTENTS

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INTRODUCTION

Business corporations are civic institutions with sacred origins.[1] All corporations have sacred origins.[2] While Ancient Rome and the Church have played the most significant role in developing coherent legislation and theory for corporations, the necessity to sever property from human beings' ownership has been a critical issue across practically all civilizations.[3] Different legal and societal traditions have developed different solutions to achieve asset partitioning.[4]

1. In Avner Greif's words, "[a]n institution is a system of rules, beliefs, norms, and organizations that together generate a regularity of (social) behavior." AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY 30 (2006).

2. *See infra* Part I.

3. *See id*.

4. On the essential role of asset partitioning, see generally Henry Hansmann & Reiner Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000) (discussing asset partitioning); Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333 (2006) (describing the origins of asset partitioning).

Religious law has had a pioneering role in corporate law for two reasons. First, several gods and divinities, across numerous religions, are eternal or sempiternal. Eternal means that they have always existed and will always exist. Sempiternal means that they were born at a point in time, but they will exist forever. Eternal and sempiternal gods and divinities, especially the anthropomorphous, have forced thinkers and legislators to deal with entities able to own property and exercise legal capacity potentially forever. Second, worshiping eternal and sempiternal gods and providing the faithful with a solid organizational infrastructure to exercise their faith has required legal and organizational solutions to protect the assets committed to religious purposes.

Like many divinities, corporations can exist forever and can own assets.[5] These two attributes are at the very core of the corporate form; they have provided an answer to the organizational necessities of most civilizations and determined the disruptive success of corporate entities, including business corporations. Nevertheless, as discussed in this Article, not all legal traditions provide and regulate the corporate form.[6] In fact, despite its sacred origins, the corporate form is not common to all religious legal traditions.[7]

The sacred origins of the corporate form trace back to Ancient Rome, when it was first deployed to establish cities through sacred rituals.[8] Through the Roman Catholic Church (the Church), corporate law and theory bound themselves to sacred authority even more deeply. The Church developed and systematized the use of the corporate form, regulated the attributes of corporations, and gave birth to a set of rules governing the relations among the stakeholders of ecclesiastic corporations, which, in substance, is corporate law.[9]

Sacred law is a source of insights on the corporate form. This holds true even for religious law that does not provide the corporate form. Legal traditions that do not rely on the corporate form but aim at similar results—subtracting property from human beings' ownership and committing it to eternal or long-term causes—have achieved asset partitioning through different organizational models and through jurisprudence.[10] Observing the solutions developed to achieve asset partitioning in absence of the corporate form allows us to critically assess the corporate form and its attributes.

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5. *See infra* Part I.
6. *See infra* Part II.
7. *See id*.
8. *See infra* Section I.A.
9. *See infra* Section I.B.
10. *See infra* Part II.

For example, this Article discusses how Islamic law does not provide the corporate form, and it achieves asset partitioning for assets committed to religious, charitable, and social purposes through jurisprudence or by attributing the ownership of the assets to God.[11] God's or divinities' ownership of assets is not exclusive to Islamic law; the Romans used a similar model to own and govern the assets of a family.[12] Similar models exist in ecclesiastical law, too.[13]

The experience of Islamic law with the corporate form forces one to reflect on the paramount importance of asset partitioning.[14] Islamic law also requires one to reflect on the connection between the corporate form and the purpose of the entity. In addition, since Islamic law does not limit the accountability of individuals with interests in a business, the tension between the corporate form and Islamic law principles provides an invitation to critically weigh benefits and shortcomings of limited liability for shareholders.

An account of the sacred law and jurisprudence governing corporations and asset partitioning facilitates a critical understanding of modern business corporations. To this end, this Article discusses two key institutions in ecclesiastic law: monasteries and cathedrals. Cathedrals and monasteries have been conceived for perpetual worshipping of God in an organized and stable fashion.[15]

By observing the principles and goals that informed the conception and development of monasteries and cathedrals, it can be deduced that the core goal of the corporate form is subtracting assets from human ownership and committing those assets to a *high* cause, potentially forever. In fact, the corporate form makes it possible to aggregate assets and subtract these assets from human ownership.[16] The corporate form also makes it possible to commit the aggregated assets to predetermined causes. Moreover, corporations and corporate ownership can last theoretically forever.[17]

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11. *See id*.

12. *See infra* Section I.A.2. Hindu Idols also have capacity to own the assets donated to them. *See generally* Patrick William Duff, *The Personality of an Idol*, 3 CAMBRIDGE L.J. 42 (1927) (discussing the legal personhood of Hindu Idols).

13. *See infra* Section III.A.4.

14. *See* Hansmann & Kraakman, *supra* note 4.

15. *See infra* Part III.

16. Sergio Alberto Gramitto Ricci, *Archeology, Language, and Nature of Business Corporations*, 89 MISS. L.J. 43, 56 (2019).

17. With respect to the ability of corporations to exist forever, Blackstone wrote that

> it has been found necessary, when it is for the advantage of the public to have particular rights kept on foot and continued, to constitute artificial persons, who may maintain perpetual succession, and enjoy a kind of legal immortality.
>
> These artificial persons are called bodies politic, bodies corporate (*corpora corporata*), or corporations . . . .

So, a corporation is first and foremost a legal technology deployed to own and govern assets, potentially forever.[18] All the additional features of a corporation such as the capacity to enter into contracts and stand in court are ancillary to the core corporate capacity to own property forever. Universities, monasteries, cathedrals, and businesses often take the corporate form.[19] Monasteries and cathedrals aggregate and own assets to ultimately facilitate the worshipping of God. Conversely, business corporations aggregate and own assets to conduct an economic activity. Corporations aggregate assets through external contributions—such as donations or investments—and economic activities.[20]

A corporation's ability to own property and be legally capable is typically referred to as legal personhood. Legal personhood for non-human entities is arguably the highest invention lawyers and policymakers have achieved in the Western tradition.[21] Corporations govern their assets through decision-making mechanics that overcome contractual principles and resemble decision-making mechanics of governments.[22] Just like governments, corporations operate on authority, not consensus. David Ciepley's description of corporations as "franchised governments" well captures many of their essential characteristics.[23]

First, as mentioned, corporations, just like governments, feature decision-making mechanics based on authority.[24] Authority can have sacred roots, secular roots, or both.[25] Second, as the concession theory emphasizes, corporations receive authority and legal personhood from a sovereign entity like a state.[26] In fact, states themselves are understood to receive authority and legitimacy from the people or the divine.[27] Often the narrative about the source and origins of authority and legitimacy of a state combines a divine dimension with popular support.[28]

An example of how corporations' decision-making mechanics and principles resemble those of governments are the procedures to adopt,

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1 WILLIAM BLACKSTONE, COMMENTARIES *566.

18. *See infra* Part I.

19. *See generally* Gramitto Ricci, *supra* note 16 (arguing that the corporate form is a legal technology used to organize endeavors of a various types).

20. *See infra* Part II.

21. PATRICK WILLIAM DUFF, PERSONALITY IN ROMAN PRIVATE LAW 62 (1938); *see* Gramitto Ricci, *supra* note 16, at 47.

22. David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 141 (2013).

23. *Id.* at 151–56.

24. *Id.* at 151–52.

25. *See infra* Part II.

26. Ciepley, *supra* note 22, at 154.

27. *See generally* BRIAN TIERNEY, RELIGION, LAW AND THE GROWTH OF CONSTITUTIONAL THOUGHT, 1150–1650 (1982) (discussing secular and ecclesiastical theories of government).

28. *See generally id.*

amend, or repeal bylaws under Delaware Corporate Law.[29] The procedure to amend corporate bylaws does not appear contractual in nature, as it is not based on the consensus of all the affected parties; rather, it operates on a decisional model based on authority that allows a qualified percentage of the parties to make decisions that affect both those in favor and those against those decisions.

This Article strives to advance the understanding of business corporations by shedding light on their origins and nature, as well as a number of their attributes that are often overlooked. Under the auspices of enriching the debate on fundamental matters in corporate law, this Article offers several insights on the corporate form, including underscoring the *property* nature of corporations. The insights that underscore the property nature of corporations provide a point of view that somewhat counters the *contractual* nature of corporations masterfully argued in Easterbrook and Fischel's work.[30]

By providing an innovative framework, this Article also aims to shift the focus of mainstream corporate law from the analysis of agency costs, as shaped by Jensen and Meckilng's seminal article *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, to an understanding of corporations that highlights the wonders of the corporate form.[31] For example, insights about cathedrals and monasteries advance the understanding of the groundbreaking organizational benefits that the corporate form provides.[32]

Moreover, this Article strives to nurture key corporate law debates such as the relationship between the corporate form and the purpose of corporations as well as to spark reflections on attributes of corporations that are often taken for granted. In Islamic law, the debate about the admissibility of the corporate form largely revolves around the tension in Islamic law between the mandate of individuals' accountability and the necessity of committing assets to specific purposes by subtracting them from human beings' ownership. Such tension highlights the relevance of a critical assessment of policies often taken for granted such as limited liability for shareholders and directors.

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29. DEL. CODE ANN. tit. 8, § 109 (2015).

30. *See generally*, Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989) (discussing the contractual nature of the corporate form).

31. *See generally*, Michael C. Jensen & William H.Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 4 J. FIN. ECON. 305 (1976) (discussing the ownership structure of firms and agency costs)

32. *See generally* Lynn A. Stout, *The Corporation as Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685 (2015) (discussing the wonders that a business corporation, as a technology, can make).

In addition, the Islamic law jurisprudence that accepts legal personhood only for entities that pursue a public purpose—typically religious, social, or charitable—highlights the relevance of a critical assessment of the public dimension of purpose also for contemporary business corporations. The debate on the purpose of business corporations is a classic of corporate law.[33] The insights of this Article help advance the understanding of the nature of corporations and nurture the debate on their purpose.

Part I of this Article investigates the sacred origins of the corporate form and corporate law, looking mostly at the role played by Ancient Rome and the Church. Part II discusses the tension between the corporate form and traditional Islamic law as well as the use of God's ownership to subtract assets from human beings' ownership and the Islamic law jurisprudence that makes it possible to recognize legal entities, according to certain criteria, when they pursue religious, social, or charitable purposes. Part III describes monasteries and cathedrals, two ecclesiastic institutions that exemplify the Church's use of the corporate form and its attributes.

I. THE SACRED ORIGINS OF THE CORPORATION

The first corporations in the Western tradition were Roman cities.[34] Cities were established through sacred rites and legislation.[35] Through

33. Adolph A. Berle and Merrick Dodd exchanged their views on the purpose of corporations in a famous exchange that appeared in the Harvard Law Review. In his contribution, Berle advocated for shareholder value maximization. A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931). Conversely, Dodd highlighted the social role of business corporations. E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932). Later, Berle stated that "[t]he argument has been settled (at least for the time being) squarely in favor of Professor Dodd's contention." ADOLPH A. BERLE, THE TWENTIETH (20TH) CENTURY CAPITALIST REVOLUTION 169 (1954). Then in 1970, Milton Friedman wrote a seminal article in the New York Times, in which he stated that business corporations and their executives have the exclusive mandate to increase their profits and respect the law. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html. The debate on the nature and purpose of business corporations has continued to attract some of the most influential scholars who have proposed alternatives to the shareholder value maximization paradigm. *See generally* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (arguing that the directors of public corporations should maximize the welfare of stakeholders who contribute firm-specific resources); Ciepley, *supra* note 22 (discussing the partly-private-partly-public nature of business corporations); R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984) (detailing the stakeholder theory).

34. DUFF, *supra* note 21, at 62.

35. NUMA DENIS FUSTEL DE COULANGES, THE ANCIENT CITY: A STUDY ON THE RELIGION, LAWS, AND INSTITUTIONS OF GREECE AND ROME 134–38 (Doubleday Anchor Books 1956); *see also* DUFF, *supra* note 21, at 62; Gramitto Ricci, *supra* note 16, at 44–45.

sacred rites, the Romans drew the borders of cities and created entities with legislation that are, in iconic language on the corporate form, "invisible, intangible, existing only in the contemplation of the law."[36] Both today and throughout history, different types of corporations have existed. The essential features of the corporate form are common across all types of corporations. A corporation aggregates and locks in assets forever.[37] The corporate form also provides mechanics, principles, and rules to govern the assets owned and produced by a corporation.

Although all corporations are characterized as entities with legal capacity (which can be understood as a *genus*), different types of corporations (which can be understood as a *species*) have been developed to pursue different goals and to solve different conundra. Different types of corporations can be categorized using a number of criteria. Some distinctions are straightforward; for example, for-profit corporations can be easily distinguished from nonprofit corporations. But other distinctions are more subtle.

In his scholarship, Ciepley discusses the distinction between property corporations and member corporations and argues that modern American business corporations are property corporations, not member corporations.[38] The distinction between property corporations and member corporations is subtle because business organizations fall on a spectrum that has business organizations based mainly on members' characteristics and skills on one of its ends, and business organizations based primarily on property (typically relying on delegated management) on the other end.[39] Moreover, as Ciepley points out, the mere shift from pro-capita voting (i.e., one vote for each member) to pro-quota voting (i.e., voting power proportional to the size of the interest) could affect the certainty of the categorization.[40] Such a distinction plays a significant role in the analytical and normative discussions about the nature and purpose of business corporations. This Article recognizes such a distinction and traces it back to the systemization of the corporate form that Pope Sinibaldo de'

36. Trs. Of Darthmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819). For an analysis of the relevance of the case in understanding the nature of corporations, see generally Margaret M. Blair, *How* Trustees of Dartmouth College v. Woodward *Clarified Corporate Law* (Vand. Univ. L. Sch., Working Paper No. 21-19, 2021) (emphasizing the role of the state in the chartering process). For a detailed description of the sacred rite the Romans followed to establish Rome and other cities, see FUSTEL DE COULANGES, *supra* note 35.

37. Margaret Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 388–89 (2003); Stout, *supra* note 32, at 690–91.

38. *See* David Ciepley, *Member Corporations, Property Corporations, and Constitutional Rights*, 11 LAW & ETHICS HUM. RTS. 31, 38–39 (2017).

39. *See infra* Section I.A.2.

40. Ciepley, *supra* note 38, at 51–52.

Fieschi (Sinibaldo) theorized in his body of work.[41] Ultimately, however, this Article places emphasis on the deepest common nature of corporations as legal entities provided with legal capacity and a governance system based on authority.[42]

The term "corporation" refers to a number of entities with legal capacity that have developed throughout the centuries.[43] The term "corporation," from a legal point of view, is not necessarily related to a specific activity, namely business for profit. There are nonprofit corporations, ecclesiastic corporations, corporations with shareholders, corporations without shareholders, and the list goes on. Monasteries and cathedrals are corporations, just like business corporations are corporations. So, a monastery organized as a corporation and a business organized as a corporation have a common nature. A monastery, as a corporate entity, owns buildings and lands, which constitute the physical dimension of the monastery. It can also own a variety of additional assets such as books and paintings.[44] The monastery, its assets, and its activities are ultimately aimed at worshipping God and carrying out related activities.

The Roman Catholic God is eternal, and the monastery has been conceived and developed to potentially exist forever, to pursue its worshipping ends and ancillary activities.[45] Corporations, in fact, are sempiternal. A business corporation shares its legal and organizational nature with that of a monastery. It aggregates and locks in assets without a time limitation and has a system in place to govern assets and economic activities.

The differences between business corporations and monasteries come down mainly to essentially two aspects: their respective purposes and the presence of shareholders. The purpose of a business corporation is primarily oriented toward the economic activities it conducts, whereas a monastery has primarily a religious scope.[46] In addition, different than a monastery, a business corporation allows certain investors, known as shareholders, to have an equity interest in the activities the business corporation conducts. Moreover, shareholders have a say in certain matters that affect the governance of the corporation, and their governance power is typically proportional to the size of their investment in the business corporation.

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41. *See infra* Section I.B. 2.
42. *See infra* Section I.A. 2.
43. *See* Gramitto Ricci, *supra* note 16, at 45.
44. *See infra* Section III.A.
45. *See id.*
46. On the purpose of business corporations, see *supra* note 7.

Another characterizing trait of business corporations is the transferability of shares along with the governance power and economic interest they carry. Shareholders can buy, hold, and trade shares in a business corporation. So, absent restrictions on transferability of shares, the governance power carried by shares circulates as shares are sold and purchased on the market. In a listed business corporation—i.e., a corporation whose shares are listed on a stock exchange—free transferability of shares entails that the corporation, its board of directors, or its investors cannot select or repel shareholders.[47]

A. Aggregating Assets for Eternal Purposes

Corporations were born in Ancient Rome.[48] The Romans invented legal capacity for nonhuman legal entities in order to organize their governmental system.[49] As mentioned previously, the first corporations were cities.[50] The Romans recognized that cities had legal capacity and could self-govern in compliance with the law.[51] The model can actually be described in a very succinct fashion, but the concept at the core of the corporate form is groundbreaking. It provides the mechanics for asset partitioning, autonomous governance, and potentially sempiternal existence.[52] In other words, humankind developed a legal technology able to own property, operate in society through agents, and survive transient human beings.

1. Establishing Cities

The Romans established a city when the *civitas*, which was the religious and political association of families, the phratries (groups of families),[53] and tribes "agreed to unite and have the same worship."[54]

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47. *But see generally* Edward B. Rock, *Shareholder Eugenics in the Public Corporation*, 97 CORNELL L. REV. 849 (2012) (detailing methodologies applied to attract certain types of shareholders).

48. DUFF, *supra* note 21.

49. *Id.*

50. *Id.*

51. *Id.*

52. ERNST KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY 192, 386–87 (1957).

53. FUSTEL DE COULANGES, *supra* note 35, at 118–20, 127.

54. *Id.* at 134. Fustel de Coulanges clarifies that

> CIVITAS, and URBS, either of which we translate by the word *city*, were not synonymous words among the ancients. *Civitas* was the religious and political association of families and tribes; *Urbs* was the place of assembly, the dwelling-place, and, above all, the sanctuary of this association.

Id.

Cities were ultimately founded on religious bases; the Romans formed cities through a sacred rite that gave birth to the *urbs* all at once.[55]

In the classic *The Ancient City*, Numa Denis Fustel de Coulanges describes the process of the establishment of the city of Rome as an example of how cities were created.[56] The creation of the city of Rome required a formal ritual that included a number of stages such as selecting the site through the guidance of the Gods; offering a sacrifice on the day of foundation; digging a trench (known as *mundus*) in which the founders of the city would throw some earth brought from their home countries; setting up an altar and lighting the holy fire of the city upon it; tracing a sacred furrow; and raising the sacred wall to protect the enclosure.[57]

So Roman cities were founded with sacred rites and "[s]omething sacred and divine was naturally associated with these cities."[58] Consistent with the sacred nature of a city, the anniversary of the foundation of a city was celebrated with a yearly sacrifice in memory "of the sacred ceremony which had marked its birth."[59] The formalized, ritualistic establishment process produced entities able to exist forever, to be sempiternal.[60]

The sacred rite required for the constitution of cities appears as the allegory of the process necessary to charter a business corporation. The Roman way of creating cities was not as simple as chartering a business corporation in the era of technology and free chartering. Rather, it appears as the allegory of the ritual procedure that was necessary for centuries to charter a corporation before free chartering began.[61]

Before free chartering, a corporation was granted a charter only if the corporation's activities and object were deemed to serve the interest of the state. Just like sacred authority was essential to establish cities, secular authority has been essential to establish business corporations.[62] Typically, scrutiny of the purpose of the economic activities was necessary before granting a charter and the corporate form.

The much leaner process required to charter a business corporation today, although still based on receiving authority from the state, does not involve a strict assessment of the activities and purpose of the corporation

55. *Id.* at 134–38.

56. *Id.*

57. *Id.*

58. *Id.* at 142.

59. *Id.* at 141.

60. *Id.* at 142.

61. *See generally* Blair, *supra* note 37 (emphasizing the role of the state in the incorporation process).

62. *See generally* Ciepley, *supra* note 22 (discussing the nature of business corporations in the U.S.).

to be chartered.[63] The oversimplification of the chartering process has hidden the somewhat supernatural process that establishing a corporate entity requires. This, in turn, might have increasingly lightened the requirements to receive a charter. The result is the current disconnect between the establishment of a corporation and the assessment of society's interest in the activities of the chartered corporation.

2. Divinities and Asset Partitioning

To say that a corporation is ultimately a legal technology, with roots in sacred or secular authority, used to own and govern property forever means implicitly placing emphasis on one aspect of legal capacity: the ability to own private property. So, an informed assessment of the role of religion at the origins of the corporate form cannot overlook the role of religion at the origins of private property. In fact, although the average person probably takes an individual's capacity to own private property for granted, this has not always been the case everywhere in the world.[64]

Distinctively, religion played a key role with respect to the capacity to own private property. As Coulanges wrote:

> In the greater number of primitive societies the right of property was established by religion. In the Bible, the Lord said to Abraham, "I am the Lord, that brought thee out of Ur of the Chaldees, to give thee this land, to inherit it;" and to Moses, "Go up hence, . . . into the land which I sware unto Abraham, to Isaac, and to Jacob, saying, Unto thee will I give it."
>
> Thus God, the primitive proprietor, by right of creation, delegates to man his ownership over a part of the soil.[65]

The Western story of private property is intertwined not only with the role of religion, but also with the role of the Roman family, a key institution in Roman law and society.[66] In Coulanges's words:

> There are three things which, from the most ancient times, we find founded and solidly established in these Greek and Italian societies: the domestic religion; the family; and the right of property—three things which had in the beginning a manifest relation, and which appear to have been inseparable. The idea of private property existed in the religion itself.[67]

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63. *See generally* Blair, *supra* note 37 (emphasizing the role of the state in the incorporation process).

64. FUSTEL DE COULANGES, *supra* note 35, at 60.

65. *Id.* at 66 (alteration in original).

66. *Id.* at 61–63.

67. *Id.* at 61.

In Ancient Rome, the concept of private property evolved together with that of asset partitioning.[68] In Ancient Rome, determining what property belonged to a family was key.[69] The assets of a family belonged to the family itself rather than to its members.[70] The family assets were under the surveillance and custody of the gods of the family and could not leave the family[71]. The family property was protected by the furrow surrounding the family's land, which created a sacred enclosure much like that of a Roman city.[72] In fact, "[t]he house is consecrated by the perpetual presence of gods; it is a temple which preserves them."[73] Ultimately, the family gods protected the family property in perpetuity. Family ownership established a form of sacred asset partitioning, and religion protected the family assets from thieves because entering the "house with any malevolent intention was a sacrilege."[74]

Ownership vested in divine entities has allowed individuals to subtract assets from human beings' ownership and to commit those assets for a purpose or a cause.[75] Divine entities are typically eternal or sempiternal. Therefore, ownership vested in divine entities and the consequential asset partitioning can be sempiternal. In sum, divine ownership—a divinity's capacity to own assets—allows human beings to achieve asset partitioning for assets committed to religious and social purposes forever.[76]

Across multiple faiths, divine law relies on ownership vested in divine entities. For example, with respect to monastic law, this Article discusses how the Charter of the Cluny Order provided that the order's assets belong to Saint Peter and Saint Paul.[77] In addition, with respect to Islamic law, this Article discusses how an important stream of Islamic jurisprudence achieves asset partitioning, by relying on ownership vested in Almighty *Allāh* (God).[78]

B. The Church and Systemization of Corporate Law

The Church is likely the institution that played the paramount role in shaping and defining corporate law principles. The belief that the whole

68. *Id.* at 61–63.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 62–63.
73. *Id.* at 64.
74. *Id.*
75. *See infra* Part II.
76. *See id.*
77. *See infra* Section III.A.3. Other examples could be mentioned besides those discussed in this Article, including that of Hindu Idols with legal personality. DUFF, *supra* note 21.
78. *See infra* Part II.

society of Christians, seen as a collective body, was something more than a plethora of individuals is as old as the Church itself. However, it was not until the Middle Ages that theological concepts evolved into legal theories on legal personhood.[79] The body of Christ was associated with the definition of the Church.[80] The aggregation of all Christians (*universitas fidelium*) was understood to be a legal person.[81] The Latin term *universitas* means corporation, and derives from the Latin *in unum vertere*, which means "to turn a multitude into one."[82] The etymology of *universitas* conveys the idea of an entity resulting from the conversion of a multitude into a unity. To regulate existence and functioning of *universitates*, the Church developed a system of principles and rules that can be considered the archetype of corporate law.[83]

The origins of corporate law and corporate theory could arguably be traced to Sinibaldo, who was elected Pope with the name of Innocent IV.[84]

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79. *See generally* JOHN J. COUGHLIN, LAW, PERSON, AND COMMUNITY: PHILOSOPHICAL, THEOLOGICAL, AND COMPARATIVE PERSPECTIVES ON CANON LAW (2012); *see also* John J. Coughlin, *Canon Law and the Human Person*, 19 J. L. & RELIGION 1, 25 (2003); Robert Ombres, *Canon Law and Theology*, 14 ECCLESIASTICAL L. 164 (2012).

80. The description of the Christian community can be seen as many parts in one body, the body of Christ (the *corpus mysticum*), contained in Saint Paul's Letter to the Romans. *Romans* 12: 4–5 (New American Bible) ("For as in one body we have many parts, and all the parts do not have the same function, so we, though many, are one body in Christ and individually parts of one another."). The full explanation is in *1 Corinthians*: 12–27 (New American Bible):

> As a body is one though it has many parts, and all the parts of the body, though many, are one body, so also Christ. For in one Spirit we were all baptized into one body, whether Jews or Greeks, slaves or free persons, and we were all given to drink of one Spirit. Now the body is not a single part, but many. If a foot should say, "Because I am not a hand I do not belong to the body," it does not for this reason belong any less to the body. Or if an ear should say, "Because I am not an eye I do not belong to the body," it does not for this reason belong any less to the body. If the whole body were an eye, where would the hearing be? If the whole body were hearing, where would the sense of smell be? But as it is, God placed the parts, each one of them, in the body as he intended. If they were all one part, where would the body be? But as it is, there are many parts, yet one body. The eye cannot say to the hand, "I do not need you," nor again the head to the feet, "I do not need you." Indeed, the parts of the body that seem to be weaker are all the more necessary, and those parts of the body that we consider less honorable we surround with greater honor, and our less presentable parts are treated with greater propriety, whereas our more presentable parts do not need this. But God has so constructed the body as to give greater honor to a part that is without it, so that there may be no division in the body, but that the parts may have the same concern for one another. If [one] part suffers, all the parts suffer with it; if one part is honored, all the parts share its joy. Now you are Christ's body, and individually parts of it.

81. *See* JEAN GAUDEMET, STORIA DEL DIRITTO CANONICO: ECCLESIA ET CIVITAS 125 (1998) (all translations done by the authors).

82. *See* Gramitto Ricci, *supra* note 16, at 45.

83. RUFFINI, *infra* note 104, at 10–11 (all translations done by the authors).

84. Sinibaldo lived between 1195 and 1254. On the life of Sinibaldo De' Fieschi, see generally the book of the influential Italian historian ALBERTO MELLONI, INNOCENZO IV: LA CONCEZIONE E L'ESPERIENZA DELLA CRISTIANITÀ COME REGIMEN UNIUS PERSONAE (1990) (all translations done

Sinibaldo referred to corporations as fictitious legal persons using theological concepts.[85] Sinibaldo also developed categories to systemize different types of corporations.[86] For example, he created the distinction between a "member corporation" (*collegia personalia*) and a "property corporation" (*collegia realia*).[87] For this purpose, Sinibaldo used criteria that are still present in the 1983 Code of Canon Law.[88]

1. The Church, Corporate Law, and Corporate Theory

While Sinibaldo was Pope, the Church had a quandary on its hands: how to structure an organizational system capable of going beyond geopolitical borders and survive expansion and changes of sovereign states. It was then that the Church developed a form of authority that today is referred to as jurisdiction,[89] which consisted in an expression of power that the Church had over each of the different ecclesiastic entities and the Church's corresponding hierarchical structure of power. The concept of jurisdiction permitted ecclesiastical entities to exercise governance rights and enforce rules beyond the law of the land.[90]

Sinibaldo's theory of the corporation was driven by theological premises but served very practical purposes. The theological element of Sinibaldo's corporation theory was inspired by Saint Paul's notion of the "mystical body."[91] Saint Paul's letters to the Corinthians and Romans both depicted the Christian community (*ekklesia*) as a single organism,[92] a unity.[93] More specifically, Saint Paul used the image of a body—with

by the authors). In its appendix it is possible to read the complete *Vita Innocentii IV scripta a fr. Nicolao de Carbio* [Life of Innocent IV written by friar Nicolao de Carbio].

85. Manuel J. Rodriguez, *Innocent IV and the Element of Fiction in Juristic Personalities*, 22 JURIST 3, 290–94 (1962).

86. *Id.* at 291.

87. *Id.* at 292.

88. 1983 CODE c.115, § 1. Juridic persons in the Church are either aggregates of persons (*universitates personarum*) or aggregates of things (*universitates rerum*). *Id.* § 2. An aggregate of persons (*universitas personarum*), which can be constituted only with at least three persons, is collegial if the members determine its action through participation in rendering decisions, whether by equal right or not, according to the norm of law and the statutes; otherwise it is non-collegial. *Id.* § 3. An aggregate of things (*universitas rerum*), or an autonomous foundation, consists of goods or things, whether spiritual or material, and either one or more physical persons or a college directs it according to the norm of law and the statutes.

89. On the notion of "jurisdiction" in the history of canon law, see GAUDEMET, *supra* note 81, at 219–28 (all translations done by the authors).

90. A striking example is given by the ecclesiastical jurisdiction over "sacred persons" and "sacred things" in England. *See* Edwin Maxey, *The Ecclesiastical Jurisdiction in England*, 3 MICH. L. REV. 360, 360 (1905).

91. *Id.*

92. *Romans* 12: 4–5; *1 Corinthians*: 12–27.

93. *See* Pope Pius XII, *Encyclical Mystici Corpori Christi*, VATICAN (June 29, 1943), https://www.vatican.va/content/pius-xii/en/encyclicals/documents/hf_p-xii_enc_29061943_mystici-

Christ as the head and Christians as the body—to describe the relationship between Christ and Christians.[94] Saint Paul called this image "corpus mysticum."[95] Later, the Church Fathers, including Saint Augustine, reaffirmed and amplified Saint Paul's assertion that the Church was the a spiritual body of Christ.[96]

At the time of Sinibaldo, the range of legal entities (*universitates*) was wide and included not only ecclesiastical entities, such as cathedrals and monasteries, but also secular entities like universities, hospitals, cities, and even bridges.[97] The legal framework regulating legal persons was all but homogeneous. Sometimes, church institutions were not recognized by the secular sovereign and, therefore, could be deemed nonexistent before the law and without legal protection for their properties.[98] Against this backdrop, Sinibaldo theorized the incorporation of the Church and its entities. The medieval papacy developed a coherent categorization and conceptualization of the Church's legal entities.

2. The Church and Corporate Entities as Established by Sinibaldo

Before being elected Pope and head of the Church, Sinibaldo was an eminent canon lawyer.[99] In the *Apparatus in Quinque Libros Decretalium*, he first classified the different types of legal entities, according to institutional criteria, which established the theory of the legal personality.[100] In the thirteenth century, it was common for the Pope to

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corporis-christi.html [https://perma.cc/YDN7-HJJY] [hereinafter Pope Pius XII, *Mystici Corpori Christi*] (mentioning St. Paul's Letters to the Corinthians and the Romans).

94. *See supra* note 80.

95. A critical reading of the concept "Corpus Mysticum" is in Laurence Paul Hemming, *Henri de Lubac: Reading "Corpus Mysticum"*, 90 NEW BLACKFRIARS 519 (2009).

96. *See* Pope Pius XII, *Mystici Corpori Christi*, *supra* note 93.

97. In medieval times, the building and maintenance of a *pons* (bridge) was often considered as a pious act that could relieve the builder from sin. To accomplish these tasks, collectives with a legal personality were founded. After its construction, the bridge could become an autonomous institution bearing legal personality. In such cases, its rights were administered by a community whose members would maintain the bridge and give some kind of assistance to travelers and pilgrims crossing it. A famous example of such a corporation is the Avignon bridge. *See* Marjorie Nice Boyer, *The Bridgebuilding Brotherhoods*, 39 SPECULUM 639, 641–42 (1964)*; see also Bridge-Building Brotherhood: Various Religious Associations Founded for the Purpose of Building Bridges*, CATH. ANSWERS, https://www.catholic.com/encyclopedia/bridge-building-brotherhood [https://perma.cc/4WAL-Z3WM]. In the same vein, guilds and other lay congregations showed interest in religious activities to obtain a recognition of their personhood. For example, guilds sponsored masses, prayers for the dead, church building, religious art, plays, and parade floats based on the Bible or the lives of saints.

98. *See* GAUDEMET, *supra* at 81, at 358, 570 (all translations done by the authors).

99. *See* MELLONI, *supra* note 84, at 26 (all translations done by the authors).

100. *See generally* POPE INNOCENTIUS IV, APPARATUS (COMMENTARIA) IN QUINQUE LIBROS DECRETALIUM (1570) (all translations done by the authors).

decide practical questions in a casuistic way while including general observations in order to support his decisions.[101]

Sinibaldo, who had analyzed numerous institutions in his work, was fully aware of the variety of forms that entities could assume such as prebends, monasteries, churches, or hospitals.[102] He was determined to simplify the organization of the Church and systematize these entities under the overarching jurisdiction of the Church, in the following ways.[103]

First, Sinibaldo theorized the corporate form of the Church itself and placed the corporation at the fulcrum of ecclesiastical law.[104] As a corporation, the Church received authority and legitimacy directly from God. [105] Second, Sinibaldo shaped and regulated the other ecclesiastic corporations using the Church's corporate form as a model.[106] He divided legal persons into two categories: those mainly based on characteristics and skills of members (*collegia personalia*) and those mainly based on assets and patrimony of the entity (*collegia realia*).[107] This distinction resembles that of property corporations and member corporations.[108] According to such a distinction, on one side, the member corporation is an aggregate of members whose personal qualities are relevant for achieving the corporate goals, while on the other side, the property corporation is an aggregate of properties that had procedures for selecting delegated decision-makers and representatives, who in turn aim to achieve the corporate objects.[109]

Sinibaldo argued that "cum collegium in causa universitatis fingatur una persona."[110] In substance, Sinibaldo theorized that a *collegium*, understood as a *universitas*, could be considered as a person.[111] Such language was so revolutionary that it immediately sparked debates among

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101. Maximilian Koessler, *The Person in Imagination or Persona Ficta of the Corporation*, 9 LA. L. REV. 435, 437 (1949).

102. *See* Rodriguez, *supra* note 85, at 306–07.

103. *See* MELLONI, *supra* note 84, at 32 (all translations done by the authors).

104. The work of Sinibaldo is widely explained and commented on by the prominent Italian jurist and historian Francesco Ruffini. FRANCESCO RUFFINI, LA CLASSIFICAZIONE DELLE PERSONE GIURIDICHE IN SINIBALDO DEI FIESCHI (INNOCENZO 4) 10 (1898) (all translations done by the authors).

105. *See* Matthew 16:18-19 (New American Bible)

> And so I say to you, you are Peter, and upon this rock I will build my church, and the gates of the netherworld shall not prevail against it. I will give you the keys to the kingdom of heaven. Whatever you bind on earth shall be bound in heaven; and whatever you loose on earth shall be loosed in heaven.

106. *See* RUFFINI, *supra* note 104, at 10.

107. *See id.* at 16.

108. *See* Ciepley, *supra* note 38, at 38.

109. RUFFINI, *supra* note 104, at 14 (all translations done by the authors).

110. *Id.* at 11.

111. *Id.* at 8.

canon lawyers.[112] The debates centered on whether a nonhuman entity could be labelled as a person and, if so, what ramification that would entail.[113]

As a result of this new theory, Sinibaldo systematized the legal structure of the Church and guaranteed his own jurisdiction over the ecclesiastical corporations.[114] The systematization of ecclesiastic legal entities not only facilitated the development of corporate law, but also facilitated the use and diffusion of the corporate form.[115]

Sinibaldo also clarified that chartering a corporation required a concession from the sovereign authority of the land, stating that "nobody, even a free person, has the power to establish a legal person, nor a city or a municipality without the explicit or unspoken consent of the lawmaker of the land".[116] In his view, the legal personality of an asset corporation would depend on a specific act issued by the authority, after assessing that the corporation's purpose was lawful and worthwhile.[117]

Furthermore, Sinibaldo structured his corporate theory according to two key elements. The first element concerned authority and representation, and it provided an individual with the power to take an oath and swear in on behalf of an ecclesiastical corporation (*collegium*). This overcame the requirement that all members of the corporation took an oath and be sworn in. Ultimately, representation by an individual was possible as "the college is in corporate matters figured as a person."[118] This suggested that a *collegium* was imagined as a *person*. In such a circumstance, Sinibaldo recommended the corporate form be used as a legal device to solve practical problems, which involved "the treatment of a corporation as a separate legal entity."[119]

Sinibaldo theorized and regulated legal capacity and systems of governance for ecclesiastical corporate entities, and he introduced the concept of a juristic person and its accompanying terminology to refer to a legal entity.[120] According to Sinibaldo's taxonomy, a corporation is a

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112. *Id.* at 12.

113. *Id*. This debate is familiar to contemporary constitutional law and corporate law scholars, especially in light of recent decisions of the U.S. Supreme Court in important cases such as *Citizen United v. FEC* and *Burwell v. Hobby Lobby Stores, Inc.*. *See* Citizens United v. FEC, 558 U.S. 310, 354 (2010); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707 (2014).

114. Rodriguez, *supra* note 85, at 307.

115. RUFFINI, *supra* note 104, at 11 (all translations done by the authors).

116. The original Latin text reads: "nulli homines, quantumcunque sint liberi, non tamen possunt constituere universitatem burgi vel villae sine consensu tacita, vel expresso eius, qui ius dicit in illa terra." Innocentius IV, *supra* note 89, at 3, X, De officio ordin. (I, 31), n. 1, folio 92 verso (all translations done by the authors).

117. RUFFINI, *supra* note 104, at 10 (discussing the concept of "institution").

118. Koessler, *supra* note 101, at 437.

119. *Id.* at 438.

120. RUFFINI, *supra* note 104, at 12 (all translations done by the authors).

legal entity, not a human person.[121] In other words, Sinibaldo was aware of the limits of a legal entity. Because corporations are not humans, the law could not extend sanctions that presuppose the existence of a human soul to corporations; for example, *collegia* could not be sanctioned by excommunication like a natural person could be.[122]

The second element addressed the effects of the corporate form. In particular, Sinibaldo aimed at solving a two-sided task. On one side, he aimed at distinguishing the Church, which is a sempiternal institution, from the Christians, who are mortal.[123] On the other side, he aimed at designing a legal entity capable of achieving its religious purpose along with goals of charity, solidarity, and public assistance.

The corporate form contributed to determine the identity of the Church itself.[124] The corporate form largely insulated the Church from the ontological control of the emperor. In addition, it constituted an organizational model for myriads of unrecognized entities. Before Sinibaldo, the *persona ficta* itself did not have any existence within the law.[125] Sinibaldo made legal personhood a pillar of public law. This made the corporate form applicable to a range of ecclesiastic organizations.

Individuals also benefitted from the incorporation theory.[126] By attributing the specific name of "*persona ficta*" to a number of ecclesiastical entities, such as churches, monasteries, charitable bodies, and cathedral chapters, the Church was able to create several types of corporations, each with its own standardized rules and purposes.[127] In turn, by characterizing its ecclesiastical entities as corporations, the Church was also able to provide rights recognized by canon law to individuals subject of ecclesiastical authority. Accordingly, the members of an ecclesiastical corporation could exercise rights and receive legal protection.[128] For example, the members of the cathedral chapters, known as "canons," could

121. *Id.*

122. Rodriguez, *supra* note 85, at 315–16.

123. Koessler, *supra* note 101, at 438-439.

124. *See* Michael Thomas Black, The Theology of the Corporation: Sources and History of the Corporate Relation in Christian Tradition 119 (October 2009) (Ph.D. thesis, University of Oxford), at 119–20 (arguing that since the Edict of the Emperor Constantine of 313, many theories were put forward from time to time to modify the idea that the Church had been created by a deed of the Emperor.) For example, it was surmised that the Church was formed by an act of the Spirit and only confirmed by the Emperor through his recognition. *Id.* This allowed the Church to claim equality with the empire as well as secular sovereignty when the princeps were vacant. *Id.*

125. RUFFINI, supra note 104, at 11–12 (all translations done by the authors).

126. *See* AMANDA PORTERFIELD, CORPORATE SPIRIT: RELIGION AND THE RISE OF THE MODERN CORPORATION 44–46 (2018).

127. RUFFINI, *supra* note 104, at 12 (all translations done by the authors).

128. PORTERFIELD, *supra* note 126, at 46.

seek remedies in ecclesiastical courts.[129] Through its corporations, the Church branched out its jurisdiction beyond its geopolitical boundaries.

To summarize, Sinibaldo's systematization of corporate entities was based on four pillars. First, Sinibaldo gave a new name to the different entities of the Church. Second, Sinibaldo clearly established that the corporation was a fictitious entity created by the law. Third, Sinibaldo clarified that legal entities are separate from individuals, including their members. Fourth, Sinibaldo set limitations on the legal capacity of legal entities, which did not have the same rights as human beings.

The corporate form is arguably one of the key factors that propelled the diffusion of Christianity on a global scale. Corporations have been central in the organization of the Church. They allowed ecclesiastic institutions to function effectively. Moreover, they allowed the Church to protect its existence and its activities from the secular power. And they facilitated the worshipping of God throughout centuries.

While the Church has played a paramount role in forming and systemizing corporate law, Islamic law has not embraced the corporate form. Nevertheless, the tension between Islamic law's resistance to the corporate form and the solutions that Islamic law jurists have developed to subtract assets from ownership of human beings and commit them to religious causes sheds light on the systemic relevance of legal personhood and asset partitioning. Part II provides an account of the relation between Islamic law and the corporate form.

II. ISLAMIC LAW, ASSET PARTITIONING, AND MORALS

Classic Islamic law did not recognize corporations as legal entities.[130] An organization's activities and corresponding liabilities affected the obligations and responsibilities of the involved individuals such as its members.[131] In fact, shielding participants in a business endeavor from the responsibilities that attain their entrepreneurial activities is inconsistent with the principles characterizing classical Islamic law and jurisprudence.[132]

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129. *See* Mario Ferraboschi, *Capitolo*, *in* ENCICLOPEDIA DEL DIRITTO, VI, at 218 (1960) (all translations done by the authors).

130. "[T]he idea that a company may be considered as a juristic person did not develop among Muslim scholars until recently under the influence of Western laws." Nabil Saleh, *Arab International Corporations: The Impact of the Shari'a*, 8 ARAB L.Q. 179, 180 (1993); *see also* 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, 75–76 (1996); Timur Kuran, *The Absence of the Corporation in Islamic Law*: *Origins and Persistence*, 53 AM. J. COMPAR. L. 785, 785–815 (2005).

131. Kuran, *supra* note 130, at 800–15.

132. The current legal scenario is more fragmented as a result of the overlap between Muslim legal tradition and modern colonial and postcolonial codification systems. Modern Islamic scholars typically declare that corporations are legal entities in Islamic law by analogizing corporations to other

Nevertheless, some legal entities with religious or public purposes, like the *māsjid* (mosque) and the *wāqf*, operate in a form that allows them to achieve asset partitioning, which is arguably the paramount privilege provided by the corporate form.[133] For those who strive to conceptualize asset partitioning in Islamic law, *wāqfs* are key institutions to consider. As Professor Timur Kuran puts it "[a] *wāqf* is an unincorporated trust established under Islamic law by a living [person] [(*waqīf*)] for the provision of a designated social service in perpetuity."[134]

The *masjid* and the *wāqf* are founded through the subtraction of property from ownership of individuals.[135] With the act of donation, the original owners give up ownership rights on their property, which becomes committed to the sacred or social purpose such as public service, education, or worship of God.[136] These institutions are dedicated to Allah and meant to survive the death of the founder.[137] The governance of these institutions and of the committed assets is delegated to an individual administrator or placed under the administration of the Treasury or the

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nonhuman entities that are mentioned in Islamic law, such as *wāqf*. Mahdi Zahraa, *Legal Personality in Islamic Law*, 10 ARAB L.Q. 193, 206 (1995).

133. A *wāqf* is a religiously motivated donation of a property that generates revenues and is managed and regulated by Islamic law. Mohamed A. 'Arafa, *Islamic Policy of Environmental Conservation*: *1,500 Years Old – Yet Thoroughly Modern*, 16 EUR. J.L. REFORM 456, 498–501 (2014). "According to the *Hanfi* School of jurisprudential thought, *wāqf* means 'the detention of the [c]orpus from the ownership of any person and the gifts of its income or usufruct either presently or in the future, to some charitable purpose "in charity of poor or other good objects."'" *Id.* at 498 (alteration in original).

134. 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 132, at 204 (citing JAMAL J. NASIR, THE 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. 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).

135. *See generally* Zainal A. Zuryati, Mohamed Yusoff & Ahmad N. Azrae, *Separate Legal Entity Under Syariah Law and Its Application on Islamic Banking in Malaysia*: *A Note*, 6 INT'L J. BANKING & FIN. 139 (2009) (explaining the legal personality of juristic entities in Malaysia).

136. After the foundation, further acts of endowments were registered in the original deed (*waqfiyya)* and kept in the local archives. The *waqfiyya* established the location and identity of the property endowed, objectives, amount of money, and other regulations of the endowment. Maya Shatzmiller, *Islamic Institutions and Property Rights: The Case of the 'Public Good' Waqf*, 44 J. ECON. & SOC. HIST. ORIENT 44, 48 (2001).

137. 'Arafa, *supra* note 133, at 498–501.

Ministry of Religious Affairs.[138] The proceeds of the donated assets are used to accomplish the mission of the institution; however, the donated assets remain untouched, similar to a university endowment.

A. Islamic Law and the Contested Corporate Form

Legal personhood and the corporate form are considered Western concepts, but Islamic law has been assessing their admissibility for a long time.[139] While specialists have voiced an urgent need for more accuracy in determining the answer, the issue remains unsettled. Nevertheless, Islamic law and jurisprudence offer significant elements to investigate the nature and rationales of the corporate form, legal personhood, and asset partitioning.

1. The Person and Personal Liability Under the Sharie*'*a

In *Sharie*'*a*, the Islamic law, a "person" is defined as someone who acquires Islamic ethical values (*ahkām shari*'*yā*) from God in the form of rights and duties.[140] An individual's ability to be fit for such rights and duties is called *dhimmāh*, which translates to "legal capacity" or "legal personality."[141] The Egyptian founder of the Civil Code of 1948, Professor 'Abd-Razzāq al-Sanhūrī, discussed how *dhimmāh* is a "juristic (*shāri*') description that is presumed by the legislator to exist in a human being and . . . with which [the person] becomes able to oblige and be obliged."[142]

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138. Historically, the transfer of ownership was marked by the procedure of foundation inscription. Thus, before a foundation inscription could be put up on a religious building, its owner, generally the founder themself, had to relinquish their title to the property in favor of the institution of their choice. Its *waqfiyya* had to be drawn up, legalized by the qadis in front of witnesses, and registered. In Mamluk, Egypt, the building would not have been considered a *wāqf* unless this procedure had taken place. Moreover, in the absence of written deeds, the inscription could be relied upon to solve any litigation pertaining to that building. The stone wall was considered as a part of the building and likely to be contemporary with it. Leonor Fernandes, *Notes on a New Source for the Study of Religious Architecture During the Mamluk Period: The Waqfīya*, 33 AL-ABHATH 3, 4 (1985).

139. *See generally* Imran Ahsan Khan Nyazee, Book Review, *Islamic Law of Business Organization Corporations*. *Islamic Law and Jurisprudence, Volume 2*, 12 J. ISLAMIC STUD. 329 (2001) (detailing the legal personhood of the corporation in the Islamic jurisprudence).

140. *See generally* MAHMOUD A. EL-GAMAL, ISLAMIC FINANCE: LAW, ECONOMICS, AND PRACTICE (2006) (defining the concept of person within Islamic law).

141. For a definition of "legal person," *see* Judson A. Crane, *Uniform Partnership Act and Legal Persons*, 29 HARV. L. REV. 838, 839 (1916) ("A legal person is an entity treated by the law as the subject of rights and obligations.").

142. 4 'ABD AL-RAZZĀQ AL-SANHŪRĪ, MASADIR AL-HAQQ FI AL-FIQH AL-ISLAMI: DERASSAH MOKARNAH BI-ALFIQH ELGARBI 17–20 [THE SOURCES OF RIGHT IN ISLAMIC LAW: A Comparative Analysis of the Western Jurisprudence], Part I: MOQDIMAH WA SIGHAT AL'AQD [Introduction and Theory of Contract] (Dar Ihi'a'a al-Turath al-Arabi,1998) (all translations done by the authors).

Therefore, the full capacity to bear rights and duties is only recognized in natural persons with sound mind, who have reached the age of maturity.[143]

"*Dhimmāh* is also defined as an 'imaginary container or vessel that holds both the capacity for acquisition and the capacity for execution.'"[144] Therefore, *dhimmāh* has two components.[145] The first component, *ahliyāt al-wujub*, refers to the person's legal capacity to have rights, bear liabilities, make commitments, and owe duties. *Ahliyāt al-wujub* exists *ipso facto* and *ab initio* in every living person.[146] The second component, *ahliyāt al-*ādā', refers to the person's capacity to take action in exercising and executing rights and duties. In other words, *ahliyāt al-*ādā' refers to a person's agency to conduct their own affairs.[147]

Although *Sharie'a* does not allow human beings to charter a corporation, Muslim scholars developed a legal structure, featuring asset

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143. *Id.* at 736–37 (all translations done by the authors). Inadequate or deficient capacity is designated to those having some discretion as children younger than seven years or those considered not of sound mind. *See generally* Chibli Mallat, *Commercial Law in the Middle East*: *Between Classical Transactions and Modern Business*, 48 AM. J. COMPAR. L. 81 (2000) (explaining the classical and the modern models of business transactions in the Middle East); Frederick Parker Walton, *The Egyptian Law of Obligations* (London 1920) (detailing the rules of obligations in the Egyptian Civil Code); Zuhair E. Jwaideh, *The New Civil Code of Iraq*, 22 GEO. WASH. L. REV. 176 (1953) (explaining rules of obligations in the Iraqi Civil Code). In this regard, the Egyptian Civil Code reads,

> Legislative provisions as regards the legal capacity of a person are applicable to all persons who fulfill the conditions embodied in such provisions.
>
> When a person, who was deemed to possess legal capacity . . . , becomes legally incapable in accordance with the provisions of a new law, such legal incapacity does not affect the validity of acts previously done by him.

Law No. 131 of 1948 (Civil Code), *Journal du Commerce et de la Marine*, 15 Oct., 1949, art. 6 (Egypt).

144. Anowar Zahid, *Corporate Personality from an Islamic Perspective*, 27 ARAB L.Q. 125, 133 (2013) (quoting IMRAN AHSAN KHAN NYAZEE, THEORY OF ISLAMIC LAW: THE METHODOLOGY OF IJTIHĀD 75 (2002)); *see also* Valentino Cattelan, *Property* (*Māl*) *and Credit Relations in Islamic Law*: *An Explanation of Dayn and the Function of Legal Personality* (*Dhimma*), 27 ARAB L.Q. 2, 190–200 (2013) (explaining the concept of debt in the Islamic financial system). From birth to death, a living, natural human being is deemed an individual under the law if they can hold rights or obligations, and thus, an enslaved person is not legally considered a person. *See*, *e.g.*, Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261, 287 (1990); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 (Mass. 1977). *See generally* Dan E. Stigall, *A Closer Look at Iraqi Property and Tort Law*, 68 LA. L. REV. 8 (2008) (discussing the concept of property and its sources in Iraqi Civil Law).

145. Some argue 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] A.C. 789, 804. *See generally* Sarah Mirza, *Dhimma Agreements and Sanctuary Systems at Islamic Origins*, 77 J. NEAR E. STUD. 99 (2018) (detailing the concept of *dhimmāh* in the Islamic system).

146. MUSTAFA AL-SIBA'IE & ABD AL-RAHMAN AL-SABOUNI, AL-AHWĀL AL-SHĀKHSFYYĀH FI AL-AHLIYYĀH WĀ AL-WASFYYĀH WĀ AL-TARIKĀT [THE PERSONAL STATUS (FAMILY) LAW: LEGAL CAPACITY, INHERITANCE, AND BEQUESTS] 75–78 (3d ed. Maṭba'at Jāmi'at Dimashq, Damascus University Press 1970 (1966)) (all translations done by the authors).

147. *Id.* at 79–80 (all translations done by the authors). Al-Qarāfi defines the term in question as: "juristic (shari') meaning presumed in an adult allows obliging and being obliged as well." *Id.*

partitioning, that resembles legal personhood through the *dhimmāh* doctrine.[148] It is worth noting that legal personhood (*dhimmāh*) can exist without the capacity to exercise rights and duties (*ahliyāt al-ādā*'); however, legal personhood can never exist without legal capacity to hold rights and obligations (*ahliyāt al-wujub*).[149] Therefore, *dhimmāh* is argued to depend on the capacity to bear rights and obligations (*ahliyāt al-wujub*), which means that the paramount aspect of the legal personality is the capacity to own assets and bear liabilities as an entity that has its own property.[150]

To clarify, *Sharie'a* does not repugn the concept of legal personality, but classical Islamic law (*fiqh*) does not provide legal personhood for corporations.[151] Traditional Islamic law does not conceive entities separate from the natural persons who have a stake in them. According to Islamic traditional jurisprudence, all the economic activities, including business and entrepreneurship, are governed by the principle of personal responsibility.[152] This means that entrepreneurs are responsible when conducting business and need to balance the possibility of profits against the risks of the contemplated economic activities.[153]

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148. *Id*. (all translations done by the authors). *Dhimmāh* was developed in combination with the legal capacity theory and both policies have been well defined to serve the concept of legal personality and explain its elements. *Id.*

149. *Id.* at 75 (all translations done by the authors).

150. *See generally* Oussama Arabi, *Legal Capacity*, *in* ENCYCLOPEDIA OF ISLAM (Kate Fleet, Gudrun Krämer, Denis Matringe, John Nawas & Everett Rowson eds., Brill 2011) (discussing the concept of legal capacity in Islam). In other words, "Legal capacity (*ahliyya*), according to classical Muslim jurists, is of two kinds: capacity of obligation (*ahliyyat al-wujūb*) and capacity of execution (*ahliyyat al-adāʾ*). Capacity of obligation refers to the potential of any human being to possess legal rights and obligations." *Id. See generally* Joseph Schacht, *Islamic Religious Law*, in THE LEGACY OF ISLAM 125–26 (Joseph Schacht & C.E. Bosworth eds., 1974) (detailing the concepts of rights and duties in Islamic jurisprudence). In this regard, Al-Qarāfi defines the term in question as: "juristic (*shari*') meaning presumed in an adult allows obliging and being obliged as well." *See* 3 AL-QARAFI, AL-FURUQ, 226–31 (1998) (all translations done by the authors). In the same vein, Hajj Al-Din Al-Sabki states that: "Our scholars state that *dhimmāh* is presumed meaning in an adult allows him to oblige as well as being obliged and this meaning should make it clear that a human being who is not wise and adult does not have *dhimmāh*." 1 AL-SABKI, AL-ASHBIH WA L-NAZAIR 363–64 (1991) (all translations done by the authors).

151. Dawoud S. El Alami, *Legal Capacity with Specific Reference to the Marriage Contract*, 6 ARAB L.Q. 190, 190–92 (1991). *See* Saleh, *supra* note 130, at 179–80 (detailing the definition of corporation in the Islamic and Arab legal systems).

152. *See generally* Saleh, *supra* note 130 (discussing the concept of legal personality in Islam).

153. This principle was explicit in the Islamic law but implicit in Canon law. From a Christian perspective, limited liability was not merely an innovation due to smart lawyers but an instrumental deviation from ancient doctrines of personal responsibility. *See* Michael Schluter, *Risk, Reward and Responsibility: Limited Liability and Company Reform*, 9 CAMBRIDGE PAPERS 1 (2000) (discussing the idea of risk and the concept of limited liability). *Contra* Stephen F. Copp, *A Theology of Incorporation with Limited Liability*, 14 J. MKTS. & MORALITY 35 (2011) (discussing limited and religious law).

In the case of collective business endeavors, the risks are shared across the entrepreneurs. So, personal responsibility, both individually and collectively, governs Islamic regulation of economic matters.[154] Personal responsibility is considered a principle aimed at promoting a just and cohesive society, while fairly and equitably dealing with the tangible risks that every economic undertaking involves.[155] In the Islamic legal tradition, business organizations need "risk sharing" rather than models based on limited liability and asset partitioning. Risk sharing is interpreted as an effective method to achieve a more stable economic and financial environment than the conventional Western one.[156]

Consequently, some Muslim scholars and jurisprudential streams reject a concept of legal personhood that provides a shield from personal liability.[157] However, neither *Qur'ānic* verses nor any prophetic *Hadīth* (tradition) unequivocally excludes the notion that an entity could have *dhimmāh*.[158] Hence, one may argue that legal personhood is acceptable in light of the Islamic jurisprudence principle—developed by the *Shāfi'ì* School—that "what is not prohibited is permitted."[159] In addition, whether the corporate form and the inherent legal personhood are legitimate may also be answered from another Islamic norm designed, through jurisprudence, by the *Ḥānāfī* School.

2. Jurisprudence of the Ḥānāfī School's Exception

The idea that an entity could have legal capacity did not develop among Muslim scholars until recently.[160] In fact, Muslim scholars have started considering legal personhood for entities under the influence of

154. *See generally* Baber Johansen, The Legal Personality (*dhimma*) and the Concept of Obligation in Islamic Law (unpublished manuscript) (on file with the Harvard Divinity School), http://www.econ.yale.edu/~egcenter/Johansen_paper.pdf [https://perma.cc/6TEY-GN4K] (discussing the concept of *Dhimma* in Islam).

155. *Id.*

156. HOSSEIN ASKARI, ZAMIR IQBAL & ABBAS MIRAKHOR, INTRODUCTION TO ISLAMIC ECONOMICS: THEORY AND APPLICATION 190 (2015).

157. *See generally* Sarah Mirza, *Dhimma Agreements and Sanctuary Systems at Islamic Origins*, 77 J. NEAR E. STUD. 99 (2018) (discussing the concept of legal personhood in Islam).

158. Zuryati, Yusoff & Azrae, *supra* note 135, at 7–10.

159. *See generally* RECEP DOGA, USUL AL-FIQH: METHODOLOGY OF ISLAMIC JURISPRUDENCE (2015) (defining the sources of Islamic law).

160. For further details on the legal capacity (especially to juristic legal persons) in Islamic law, see Mohammad N. Omar, *The Concept of Impediments to Legal Capacity ('Awārid al-Ahliyyah)*, *in* ISLAMIC LAW OF CONTRACT AND THE EGYPTIAN CIVIL CODE OF 1948, at 23–30 (2006) (Ph.D. Thesis, University of Wales). *See also* Copp, *supra* note 153 (discussing the legal capacity notion in sacred law).

Western laws and traditions.[161] As a result of colonialism, Islamic scholars have been divided over the issue of legal personhood for corporations.[162]

The scholars in the *Ḥānāfī* school of jurisprudence, which represents the most moderate school of Islamic interpretation, try to adopt an indirect rationale to admit legal personality for nonhuman entities under Islamic law.[163] They argue that everything is permitted unless prohibited or forbidden by the *Sharie'a* and its main principles.[164] Permissibility is first sought through clear proofs found in the primary sources, which are the *Qur'ān* and the Prophet Mohammad's teaching (*Sunnah*).[165] If there is no

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161. Syed S. Hamid, *Influence of Western Jurisprudence over Islamic Jurisprudence*: *A Comparative Study*, 4 NORTHERN UNIV. J. L. 13, 16–17 (2013).

> There is no acceptable reason to accuse any non-Muslim law or economic system of lacking ethical or ideological content, because all social sciences are based on hidden value judgments which reflect the traditions, ethics and ideals of the man who formulated them. Western jurisprudence is not an exception to this rule as can be easily seen in the following words written by one of its scholars. There is no wonder if legal systems differ from one another because of differences in national values. And for this reason, . . . that we should not expect different Muslim nations to have one and the same legal or economic system even if they exert the same afford to comply with the *Qur'an* and tradition. But, because all Muslims resort to the same legal resources, we expect their legal systems to have a great deal in common. Likewise, Western legal systems resemble one another; but differ greatly from Islamic ones, because each group has its own origin.

Id. Schacht, *supra* note 150, at 398; *see also* NABIL A. SALEH, THE GENERAL PRINCIPLES OF SAUDI ARABIAN AND OMANI COMPANY LAWS (STATUTES AND SHARI'A) 79–80 (1981); Ponce v. Roman Cath. Apostolic Church, 210 U.S. 296, 323–24 (1908). In this regard, the United States Supreme Court has stated,

> [t]he Roman Catholic Church has been recognized as having legal personality by the Treaty of Paris, and its property rights solemnly safeguarded. In so doing the treaty has merely followed the recognized rule of international law which would have protected the property of the church in Porto Rico subsequent to the cession. This juristic personality and the church's ownership of property had been recognized in the most formal way 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; see generally Cihan Artunç, *Legal Origins of Corporate Governance: Choice of Company Law in Egypt, 1887–1913*, YOUTUBE (June 25, 2021), https://www.youtube.com/watch?v=pTvXyw8YeBY [https://perma.cc/HT6Z-VYC4] (discussing the history of corporations in Egyptian Law).

162. *See*, *e.g.*, Frank E. Vogel, *Contract Law of Islam and the Arab Middle East*, *in* VII INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CONTRACTS IN GENERAL 27 (2006); James N.D. Anderson, *Islamic Law and Structural Variations in Property Law, in* II INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 103 (1975).

163. RAJ BHALA, UNDERSTANDING ISLAMIC LAW: SHARĪ'A 302–09 (2016).

164. *Id.* at 305–07.

165. Mohamed A. 'Arafa, *Case 8/1996* (*Egypt*), *in* MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW 7–10 (Rüdiger Wolfrum, Frauke Lachenmann & Rainer Grote eds., Oxford Univ. Press 2018)

> On the other hand, both a *Qur'ānic* text and a Prophet's saying could hold multiple meanings, allowing for numerous interpretations. Accordingly, the Court held that a law that undermines justice and the common good would be unconstitutional. The SCC perspective on Article 2 reveals that it adopts the theory of *siyāssā shāri'yyā*, which means that the system of governance should be consistent with Islamic law, but with some "smart"

proof in the primary sources, scholars look to secondary sources, such as analogical deduction, juristic preference, consensus of Islamic jurists (*ijm'ā*), jurisprudential doctrines, and presumption of continuity.[166]

For instance, the jurisprudential doctrine of public interest (*maslāhāh mursālāh*) provides that a state can make any laws that pursue public interest insofar as they are not prohibited by the primary sources.[167] To apply the doctrine of public interest, the following conditions must be satisfied.[168] First, there must be a need to secure a benefit or to prevent harm for the people in general. Second, there must be no clear provision (*hukm*) in the *Qur'ān*, in the Prophet Mohammad's teaching (*Sunnah*), or in the consensus of Islamic jurists (*ijm'ā*).[169] Third, it must be essential to serve a common good (*maslāhāh*), such as economic progress.[170] Fourth, the pursued common good (*maslāhāh*) shall not conflict with any Islamic principle, such as the prohibition to seek interests (*ribā*) or take excessive risk (*ghārār*).[171] Fifth, the common good (*maslahah*) shall be rational and acceptable to people of sound mind. Sixth, and finally, this method shall not apply to matters of worship (*'ibādāt*).[172]

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reform. So, the Court's position could be summed up in two criteria: that a law must meet to be consistent with Article 2; and that there should be uniformity with authentic Islamic rules and upholding the purposes of Islamic law. The Court did not consider the claim that the theory of *siyāssa shāri'yyā* only allows religious clerics and guilds to interpret *Sharie'a*. Instead, it regarded itself as able to use *ijtihād* whenever the need arose.

Id. Ḥānāfī is one of four moderate Islamic Sunni schools of jurisprudential thought which include *Shāfi'ì*, *Mālikī*, and *Hānbālī*. *Id.*

166. *See generally* M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah*: *Sources*, *Interpretation*, *and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E.L. 135 (2002) (defining the primary sources of Islamic law and detailing Islamic schools of thought).

167. Maslāhāh has three categories: darorriyāt (essentials), hajiyāt (needs), and tahsiniyāt (embellishments). In the absence of any obvious evidence from the Qur'ān and Sunnah, corporate personality may be recognized from a māslāhāh perspective. *See generally* M. HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 238 (3d ed. 2003) (explaining the concept of Maslāhāh in Islam).

168. *Id. See generally* Khizr Muazzam Khan, *Juristic Classification of Islamic Law*, 6 HOUS. J. INT'L L. 23 (1983) (defining the primary and the secondary sources of Islamic law).

169. *Id.;* Nazeem M. Goolam, *Ijtihad and Its Significance for Islamic Legal Interpretation*, 2006 MICH. ST. L. REV. 1443, 1444–46.

170. Irshad Abdal-Haqq, *Islamic Law*: *An Overview of its Origin and Elements*, 7 J. ISLAMIC L. & CULTURE 1, 27, 57 (2002) (noting the different sources of Islamic law and the meaning of the public interest's interpretation).

171. *See generally* NABIL A. SALEH, UNLAWFUL GAIN AND LEGITIMATE PROFIT IN ISLAMIC LAW: RIBA, GHARAR AND ISLAMIC BANKING (Cambridge Univ. Press 1986) (providing details on the practical concern for all the parties involved in international trade between Western and Muslim countries as well as discussing the contemporary debate on risk and profit in the Islamic context).

172. *See generally* SA'ID AL'ASHMĀWĪ, AL-SHARĪ'A AL-ISLĀMIYYA WA-L-QĀNŪN AL-MISRĪ [ISLAMIC LAW AND EGYPTIAN LAW] (1996) (discussing comparative approaches to Islamic business transactions); TĀRIQ AL-BISHRĪ, AL-WAD' AL-QĀNŪNĪ AL-MU'ĀSIR BAYN AL-SHARĪ'A AL-ISLĀMIYYA WA-L-QĀNŪN AL-WAD'Ī [THE LEGAL *STATUS QUO*: BETWEEN ISLAMIC LAW AND POSITIVE LAW] (Dar Al-Shrouq, 1st ed. 1996) discussing commercial transactions in Civil Law).

From the *maslāhāh mursālāh* doctrine, it is clear that under Islamic law, the interests of the Muslim community, including public and religious interests, take precedence over the private interests of individuals.[173] In fact, "priority is given to preserving the universal interest over particular interest," which means prioritizing the public interest over private interests.[174] In furtherance of this principle, some Muslim scholars apply the *dhimmāh* doctrine to Islamic entities such as the *wāqf*, the *māsjid* (mosque), and *beit al-māl* (public treasury).[175]

B. Islamic Entities and Purpose as a Determinant

Some contemporary Muslim scholars recognize the legal personhood of certain institutions, based on their intrinsic social or religious value, as long as they are compatible with Islamic norms and principles.[176] To be compatible with Islamic norms and principles, an institution must have an effective capacity to fulfill religious duties, such as the payment of *zākāh* (mandatory financial donation).[177] Therefore, according to these contemporary Muslim scholars, institutions such as schools, orphanages, hospitals, mosques, and charitable institutions can be recognized legal personhood.

1. The Mosque's Legal Personality

The debate on mosques' legal personhood has been dynamic over time. *Jumā Mosque Congregation of Baku v. Azerbaijan* is a landmark case about religious communities' autonomy—the right of religious

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173. 'Arafa, *supra* note 133, at 494.

174. '*Id.* (citing TAQI AD-DIN AHMAD IBN TAYMIYYAH, AL-SIYASAH AL-SHAR'IYAH FI ISLAH AR-RA'I WAR-RA'IYAH [THE POLITICAL RULES IN ASSESSING THE RULER AND THE RULED BY] (Arabic Book Review, 2008)) (all translations done by the authors).

> 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) *hajiyat* (needs), meaning those things whose absence leads to actual hardship and suffering; and (c) *tahsinyyat* (supplementary benefits), which means things that refine life and enhance ethical values.

Id.

175. *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. Johansen, *supra* note 154.

176. Robert L. Raymond, *Genesis of the Corporation*, 19 HARV. L. REV. 350, 350 (1906). *See generally* Stanley N. Katz, *Legal Personality in Islamic Law*, THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY (Oxford Univ. Press 2009) (discussing legal personhood in the Islamic context).

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

groups—to organize themselves as they see fit.[178] This right includes the ability of houses of worship to choose their leaders without government interference.[179] In 1937, the *Jumā* (Friday) Mosque was closed to the public.[180] Under the Soviet Government, the mosque was converted into a carpet museum; later, a group of Muslims who took possession of the former mosque converted it into a new local community center.[181] 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 entity capable of acquiring and enjoying rights and bearing legal obligations.[182] The mosque thereby acquired legal capacity.[183] Nobody could own the mosque, which belonged to God, and it consequentially achieved perpetual life because its owner is eternal and could own it forever.[184]

However, there was still uncertainty about whether the mosque (*masjid*) may be classified as a juristic person. In *Māsjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee*, the Bombay High Court determined "a mosque . . . [to be] a juristic person."[185] The court ruled that the ruined building was a mosque in which all Muslims had a right to

178. Jumā Mosque Congregation v. Azerbaijan (admissibility) (15405/04), 57 Eur. Ct. H.R. (2013); *see*, *e.g.*, 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). *See generally* Fazal Tanweer, *The Mosque as Juristic Person*: *Law*, *Public Order and Inter-religious Disputes in India*, 10 S. ASIAN HIST. & CULTURE J. 199 (2019).

179. 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.

180. *Id.*, *see also* Ryan Colby, *Azerbaijan Mosque Loses Eight-Year Struggle for Religious Freedom*: *European Court of Human Rights Allows Azerbaijan Government to Stop Mosque Worship and Take Building*, BECKET L. (Feb. 11, 2013), https://www.becketlaw.org/media/azerbaijan-mosque-loses-eight-year-struggle-religious-freedom/ [https://perma.cc/4TWN-KR6R].

181. Jumā Mosque Congregation v. Azerbaijan (admissibility) (15405/04), 57 Eur. Ct. H.R. (2013).

182. *Id.*; *see also* Sehajdhari Sikh Federation v. Union of India & Ors., (2011) CWP No. 17771 (India); Gurleen Kaur and Others v. State of Punjab & Ors. 2009(3) RCR (Civil) 324 on 30.05.2009*;* Rajnarain Singh v. Chairman, Patna Administration Committee, Patna & Anr., AIR 1954 SC 569 (ruling 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").

183. *Jumā Mosque Congregation*, 57 Eur. Ct. H.R. at 12–13.

184. 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. Halyani Hassan, Zuhairah Ariff 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 AUSTRALIAN J. BASIC & APPLIED SCIS. 191, 195 (2012).

185. *Māsjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee*, (1940) 42 BOMLR 1100 (India); *Jumā Mosque Congregation*, 57 Eur. Ct. H.R.; *see also* Colby, *supra* note 180.

worship.[186] The plaintiffs requested an injunction to restrain any improper use of the building and a mandatory injunction to reconstruct the building.[187] This lawsuit was motivated by the notion that if the mosque could be labeled a "juristic person," this would establish that a mosque remains a mosque forever and that adverse possession cannot be applied.[188] However, Indian courts rejected that mosques had legal personhood in other decisions.[189]

2. A Wāqf's As a Legal Person

A *wāqf*, and especially a *wāqf al-khairi* (which is the religious foundation in the public interest), depends on the fulfilment of two mandates.[190] The first mandate is legal in nature and involves subtracting assets from human beings' ownership. This requires transferring the assets under the control of an administrator.[191] The second is economic in nature and consists in guaranteeing a loyal, lawful, and fruitful use of the *wāqf* property.[192]

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186. *See* Dhananjay Mahapatra, *Ayodhya Verdict's Link to Lahore's Shahid Ganj Mosque Demolition Through 80-yr-old Privy Council Ruling*, TIMES OF INDIA, (Nov. 22, 2019), https://timesofindia.indiatimes.com/india/ayodhya-verdicts-link-to-lahores-shahid-ganj-mosque-demolition-through-80-yr-old-privy-council-ruling/articleshow/72184906.cms [https://perma.cc/R9K6-VZ5G] ("In denying juristic person status to Ram Janmasthan, the Supreme Court's Ayodhya land dispute verdict relied on a 1940 Privy Council judgment that had dealt with a Sikh-Muslim ownership dispute leading to demolition of Shahid Ganj mosque in Lahore . . . . while dealing with a petition filed on behalf of Masjid Shahid Ganj seeking a declaration that the mosque and its adjoining properties were a juristic person.") *Id.*

187. Hassan, Abd Ghadas, & Abdul Rahman, *supra* note 184, at 194–98.

188. *Id. See generally* Muhammad Zubair Abbasi, Sharī'a Under the English Legal System in British India: Awqāf (Endowments) in the Making of Anglo-Muhammadan Law (2013) (PhD. thesis, (Oxford University) (discussing the notion of *wāqf* in the British and Indian legal systems).

189. *Māsjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee*, 42 BOMLR 1100; *see also* Rajnarain Singh v. Chairman, Patna Administration Committee, Patna & Anr., (1954) AIR 1954 SC 56. 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. *Id.* at 8 (citing Shankar Das v. Said Ahmad (1884) 153 PR 59 1914; Maula Bux v. Hafizuddin (1926) 13 AIR Lah 372 AIR 1926 Lah 372.6).

190. *See* Orsolya Falus, *Piae Causae Foundations, Waqfs, Trusts. Legal-Historical Interactions*, 16 POLGÁRI SZEMLE 353, 355 (2020), https://polgariszemle.hu/aktualis-szam/185-muhelytanulmanyok/1128-piae-causae-foundations-waqfs-trusts-legal-historical-interactions [https://perma.cc/7MEE-CNZU] (discussing that the *wāqf* and the pious foundations also share another similarity: both limited the circle of beneficiaries to the descendants of the donor). The *wāqf ahli* is a family foundation in support of the donor's descendants; the *wāqf khairi* is a charitable foundation for the benefit of everybody. *Id.*

191. For a historical example of *wāqf* foundation, see LEONOR FERNANDES, THE FOUNDATION OF BAYBARS AL-JASHANKIR: ITS WAQF, HISTORY, AND ARCHITECTURE 21, 24–28 (1987) (discussing that in order to ensure the proper functioning of the *wāqf*, the founder introduces a clause stipulating the yearly reading of the *wāqfiyya* in the presence of the personnel of the complex, followed by the attestation of witnesses).

192. Shatzmiller, s*upra* note 136, at 69.

After the *waqīf* (founder) establishes the *wāqf*, the *wāqf* property stands separate from the *waqīf*'s assets; therefore, the *waqīf* loses ownership rights over the *wāqf*'s property.[193] While the *waqīf* may be appointed as *mutawalli* (trustee) of the *wāqf*' and re-gain control over the *wāqf* property, as a *mutawalli*, they would manage the *wāqf* property and act in the interest and for the benefit of the beneficiaries.[194] All the *mutāwālli*'*s* authorities, rights, and contractual obligations are intended for this purpose.[195] The actions of a *mutāwālli* affect the separate patrimony of the *wāqf*, not the personal patrimony of the *mutāwālli*, unless a *mutāwālli*'s action (or inaction) leads to their personal liability.[196] For example, a *mutāwālli* can take on loans on behalf of the *wāqf*, when appropriate, without incurring any personal liability for the repayment.[197] Hence, a *wāqf* stands separate and independent from the *waqīf* and the *mutawalli*, and survives the death of the *waqīf* and the *mutāwālli*.[198]

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193. *See* Zahraa, *supra* note 132, at 205 ("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.").

194. *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. *Id.* If an administrator hires a service to clean the carpet of a mosque but is dismissed before they pay 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.*

195. Haitam Suleiman, *The Islamic Trust Waqf*: *A Stagnant or Reviving Legal Institution?*, 4 ELEC. J. ISLAMIC & MIDDLE E.L. 27, 36–39 (2016). He argued,

> Similarly to the modern corporation, the *waqf* was acknowledged in Islamic law as a 'juristic person', referred to as *thema* [*dhimmāh*]. The concept of *waqf* points towards an Islamic system that recognizes the significance of the non-profit sector in social and economic development. The *fiqih* of *waqf*, through *Shari'a* law, also offers the required legal and institutional protection to allow this sector the freedom to function separately from self-interest motives and the power of government.

Id. at 28.; *see also* SIRAJ SAIT & HILARY LIM, LAND, LAW AND ISLAM: PROPERTY AND HUMAN RIGHTS IN THE MUSLIM WORLD 147 (2006). Haitam Suleiman & Robert Home, *God Is an Absentee*, *Too*: *The Treatment of Waqf* (*Islamic Trust*) *Land in Israel*/*Palestine*, 41 J. LEGAL PLURALISM & UNOFFICIAL L. 49 (2009).

196. In the classical Islamic *Fiqh* (law), it has been argued by Professor Mustafa al-Zarqā (1904–1999) that, 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). *See* Timur Kuran, *The Absence of the Corporation in Islamic Law: Origins and Persistence*, 53 AM. J. COMP. L. 785, 822–23 (2005).

197. Timur Kuran, *The Provision of Public Goods Under Islamic Law*: *Origins*, *Impact*, *and Limitations*, 35 L. & SOC'Y REV. 841, 842 (2001). It has been argued that "[t]he proof of loan against the *waqf* stands without the intervention of the responsibility of the trustee." HUSSAIN MOHI-UD-DIN QADRI & NASIR IQBAL, ISLAMIC FINANCIAL CONTRACTS: A RESEARCH COMPANION § 3.4 (2021).

198. Yet, a *wāqf* shall not fail because there is no *mutawalli* appointed because of the principle that no trust shall fail for want of a trustee. Zahraa, *supra* note 132, at 205 ("Otherwise, such entities will find immense obstacles in performing their rights and duties and become *de facto* redundant.") *Id.*

The moderate *Hānāfī* 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*."[199] Hence, a *wāqf* can own assets, buy and sell, borrow and lend as well as sue and be sued.[200] However, the *wāqf* itself is not a fully-fledged legal person. Typically, a *wāqf* is based on ownership vested in Almighty *Allāh* (God), who is the owner of the universe, including of *wāqf* and any additional assets bought for the *wāqf*.[201]

It is worth mentioning that the nature of a *wāqf* has been discussed both in judgments and in academia, sometimes adopting conflicting interpretations.[202] For example, in *All India Imām Organization v. Union of India*, the Supreme Court of India treated the *Imāms* as the employees of the mosque, which was recognized as an entity.[203] The decision also ruled that *wāqf* boards are responsible for the payment of *Imāms*' salaries on the premise that *wāqfs* are run by boards in India.[204]

Such an interpretation of the nature of *wāqfs* as entities deviates from the common understanding of *wāqfs*' nature as legal devices based on

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199. YAWER QAZALBASH, PRINCIPLES OF MUSLIM LAW 309–19 (2003).

200. MUHAMMAD TAQĪ USMANĪ, AN INTRODUCTION TO ISLAMIC FINANCE 105 (2002). Just as a *wāqf h*as rights, a *wāqf* has duties under *Sharie'a*; for example, an institute is an employee of the *wāqf* and eligible to remuneration out of the *wāqf's* income. *Id.*

201. Zahraa, *supra* note 132, at 205 ("The properties of the *wāqf* and other charitable institute[ions] are now so large that almost all Islamic countries have to establish a ministry called the *waqf* Ministry (*wāzārāt al'wāqāf*).").

202. *See* 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. 1231 (1988) (discussing the linkage between *wāqfs* and corporations in Islam).

203. All India Imām Organization v. Union of India And Ors, (1993) AIR 2086, SCR (3) 742.

204. *Id. See* Paul Stibbard, David Russell, QC & Blake Bromley, *Understanding the Waqf in the World of the Trust*, 18 TRS. & TRS. 785, 801 (2012) ("[M]atters of administration are dealt with by the religious authorities or state-controlled boards, whose conduct of their affairs is the subject of some controversy.). 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. In this regard, it should be noted that 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.

See MOHAMMAD NASEEM & SAMAN NASEEM, RELIGION AND LAW IN INDIA ¶¶ 246–47 (2020). *See also*, *e.g.*, Narendra Subramanian, *Legal Change and Gender Inequality*: *Changes in Muslim Family Law in India*, 33 L. & SOC. INQUIRY 631 (2008) (discussing the gender inequality in India).

ownership vested in *Allāh* (God).[205] More aligned with the general interpretation of *wāqfs*' nature is the view of the *Majlis* '*Ulamaˆ*, scholars (*fuqah*'*a*) from South Africa, who conclude that a *wāqf* is not a legal person because *Sharie*'*a* does not recognize legal entities.[206] Rather a *wāqf* is an organizational model based on ownership vested in Almighty *Allāh* (God), who is the owner of the universe.[207]

For practical necessity, a stream of Islamic law jurisprudence accepts that *wāqfs* can possess *dhimmāh*.[208] So, *wāqfs* can carry out both religious (God's worship) and secular (business transactions) obligations. More generally, as *wāqfs* can retain financial rights and carry out duties, some scholars recognize their legal capacity.[209]

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205. Gaudiosi, *supra* note 202, at 1233.

206. *See*, *e.g.*, Malik M. Hafeez, *An Analysis of Corporate Governance in Islamic and Western Perspectives*, 2 INT'L J. BUS., ECON. & L. 3, 102 (2016). One criticism that may be raised about the property endowment of commercial businesses is the departure from the object. In corporations, the company must 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. *Id.*

207. Zahraa, *supra* note 132, 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 the *waqf* Ministry (*wāzārāt al*'*wāqāf*)."). *See generally* 'Arafa, *supra* note 133, at 470.

208. *See generally* PETER HENNIGAN, THE BIRTH OF A LEGAL INSTITUTION: THE FORMATION OF THE WAQF IN THIRD-CENTURY A.H. HANAFI LEGAL DISCOURSE (2004) (discussing the role of Islamic institutions in business); Jeffery Schoenblum, *The Role of Legal Doctrine in the Decline of the Islamic Waqf*: *A Comparison with the Trust*, 32 VAND. J. TRANSNAT'L L. 1191 (1999) (discussing the concept of trust in Islam); Henry Cattan, *The Law of Waqf*, *in* LAW IN THE MIDDLE EAST 203, 212–18 (1955). David S. Powers, *The Islamic Family Endowment* (*waqf*), 32 VAND. J. TRANSNAT'L L. 1167 (1999) (discussing inheritance law in Islam). 'Arafa argues that

> *Waqf* is subject to the supervision and control of governmental institutions, where ministries and public offices were established in Muslim nations to regulate and govern the waqf properties . . . . In this regard, Muslim *Ulmma* (jurists) classified *waqf* as follows: *waqf da'eym* (permanent *waqf*, which lasts as long as the possessions last and is productive) and *waqf mo'aakat* (temporary *waqf*, which occurs for a limited period). Accordingly, *waqf* can be: (a) self *waqf* (for the *waqīf*'s benefit); (b) *waqf ahli* (for the relatives' or family's welfare); (c) *waqf khairi* (for the benefit of the community's public interest)[;] and (d) *waqf moktalat* (mixed grant) (for the benefit of self, the public and/or relatives). In charitable waqf, the earnings and usufruct are devoted to generous purposes that may be defined by the *waqf* statement, in which the *Qadi* (judge) has the right to designate these goals according to society's needs. On the basis of the background of the advisors, the benefactor may decide to offer his *waqf* for the general welfare to improve upon goals such as educational needs, construction of worship places or for service to the elderly. Moreover, if the consultant has experience with environmental issues and is able to persuade and encourage the *waqīf* that environmental safety is vital and necessary for a clean and healthy environment, the donor may well be inspired to attain that purpose. The benevolent *waqf* can result in three conservational circumstances.

'Arafa, *supra* note 133, at 498–99.

209. In this regard, the well-known Islamic law scholar Professor 'Abdul Qādir 'Audāh argues that the Islamic law has, since its dawn, recognized the existence of juristic persons. Jurists have referred to the state treasury and *wāqfs* as juristic persons. Similarly, jurists have considered schools,

3. The Islamic Business Corporation Conundrum

Today, in post-colonial Islamic law, a business corporation is considered an entity like the state or a *wāqf*.[210] However, Islamic business corporation entities differ from the state or a *wāqf*, because they do not enjoy the same level of capacity to bear rights and obligations (*ahliyāt al-wujub*).[211] So, the question about legal personality should be viewed from the perspective of functionality, placing emphasis on a *wāqf*'s *ahliāt* (capacity) to hold and exercise rights and duties. Since the state, *wāqfs*, and business corporations have *ahliāt*, some would argue that business corporations have *dhimmāh*.[212]

The theory of *dhimmāh* for business corporations has been accepted by parts of the Muslim world, especially in those countries that base their regulations on Islamic law more than on Western laws, such as Kuwait, Saudi Arabia, the United Arab Emirates, Oman, and Qatar.[213] These nations acknowledge the concept of legal personality for non-human entities. Classic Islamic specialists, using institutions such as *wāqfs*, charitable institutions, and other Islamic foundations, provide adequate case law to serve as a basis for that theory. *Dhimmāh*—in the Islamic context—represents the key issue of determining the legal rights and obligations of a *mukāllāf* (competent person).[214] It is predominantly devoted to human beings who are bestowed with the faculty of awareness. However, it may be recognized to legal entities such as business corporations since there is no obvious proscription in the *Qur'ān* or *Sunnah*, when a number of criteria are met. Nevertheless, some scholars worry that legal personhood for business corporations leads to limited

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orphanages, hospitals, etc. as juristic persons, able to hold and exercise rights. Professor 'Abdul Qādir 'Audāh also explained that legal persons have been recognized in Islamic law since decades; the Islamic *fiqh* (jurisprudence) has considered *bayt al-māl* [State's budget] as the main model along with the *waqf*, but also considered as legal persons schools, shelters, hospitals, etc., and made these entities able to possess "and dispose of rights and do all other acts in that capacity . . . ." However, the Islamic *fiqh* has not recognized criminal liability to these legal persons, since criminal liability is based on free will (intent or *mens rea*) perception and choice, none of which exists in these entities. *See* Shafiq ur Rahman, *Appraisal of Some Scholastic Views on Juridical Personality with Reference to Islamic Banking Companies*, 6 J. ISLAMIC BUS. & MGMT. 97, 105–06 (2016).

210. Zahraa, *supra* note 132, at 206 ("[E]xamples of such companies . . . and contract companies including . . . Companies Based on Capital and Companies Based on the Reputation of one of the Partners.").

211. *Id. See generally* Dawoud S. El Alami, *Legal Capacity with Specific Reference to the Marriage Contract*, 6 ARAB L.Q. 190 (1991) (detailing the concept of legal capacity in the marriage concept in Islam).

212. *See* El Alami, *supra* note 211.

213. *See generally* SALEH, *supra* note 161 (discussing Islamic corporate law in Middle Eastern legal systems).

214. *Id.*

liability for shareholders, which appears in contrast with *Sharie'a*'s values and principles of personal responsibility.[215]

Despite jurisprudential streams that allow entities to have legal capacity when a number of criteria are met, Islamic law jurists are left with an unsettled matter. Islamic rulings on legal personhood may vary as the needs of society change. As Nyazee wrote:

> 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 *imãm* (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.[216]

Ultimately, legal personhood in Islamic law could be understood as a fluid achievement of the *fiqh* process (jurisprudence).[217] It is not an institution solidified in statutory law. As such, legal personhood in Islamic law is contingent on society's interest and need to uphold it. The constant assessment of society's interest in legal personhood is extraneous to Western legal traditions, but it appears as a powerful tool to regularly check the tradeoff between societal benefits and societal costs, including externalities, that the corporate form generates.

After a journey in Islamic law to highlight the relevance of purpose for the corporate form, the next Part of the Article surveys two fundamental ecclesiastic institutions, the monastery and the cathedral. Monasteries and cathedrals are structured in the corporate form.[218] An analysis of their structure and features sheds light on attributes of modern, secular corporations, including business corporations.

III. THE MONASTERY AND THE CATHEDRAL

Besides theorizing and systematizing corporations, the Church has also made masterful use of corporations. The Church has used the corporate form to establish, build, and run cathedrals and monasteries. Notoriously, building a cathedral can span multiple generations. The

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215. *See generally* Ayman Daher, *The Shar'ia*: *Is Roman Law Wearing an Islamic Veil?*, 3 HIRUNDO: MCGILL J. CLASSICAL STUD. 95 (2005) (discussing the comparison between the corporate model in Islam and Roman Law).

216. Zahid, *supra* note 144, at 149 (quoting NYAZEE, *supra* note 144, at 78) (alteration in original).

217. *Id.*

218. This Article distinguishes between the origins of the corporate form and those of a substantial body of laws regulating and governing corporate entities, which could be attributed to Sinibaldo de' Fieschi and more generally to the Church.

corporate form, with its organizational structure, has provided a solution to that. It has also allowed monasteries to own assets, and monks to obey their poverty vows.

Monasteries are often corporations.[219] They can exist in perpetuity; own rare books and artwork; and survive the departure of monks, friars, and abbots. While monks are poor, monasteries can own invaluable assets.[220] Monastic law, like corporate law, regulates the relationships among monks and between monks and the abbot.[221] Famous cathedrals such as the Cathedral of Milan, also known as the Duomo of Milan, rely on the corporate form. Cathedrals typically have three institutional dimensions: the building (the cathedral); the legal entity in charge of the construction and maintenance (the *fabrica*); and the legal entity overseeing the religious, cultural, social, and charitable activities (the chapter or, in Latin, "*capitulum*").[222] Both monasteries and cathedrals pursue the purpose to worship God in perpetuity and, like modern corporations, adopt organizational forms that allow them to survive transient individuals.

A. Monasteries and the Corporate Form

By the eleventh and twelfth centuries, a great number of monasteries spread across Europe. These institutions represented the large variety of religious orders, which were animating the religious life at that time.[223] Among them, the Benedictines were the oldest and most organized. The order was founded in Italy by Saint Benedict of Norcia, in the sixth century.

According to Benedictine principles, the members of a monastic community were considered united, based on the hierarchic interdependence of the single members of the monastery.[224] A monastic community that interacted with political and religious authorities as a unity

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219. Katja Rost, Emil Inauen, Margit Osterloh & Bruno S. Frey, *The Corporate Governance of Benedictine Abbeys: What Can Stock Corporations Learn from Monasteries?*, 16 J. MGMT. HIST. 90, 93–97 (2010).

220. *See* Henry J. Cohn, *Church Property in the German Protestant Principalities*, *in* POLITICS AND SOCIETY IN REFORMATION EUROPE 158 (E.I. Kouri & Tom Scott eds., 1987) (analyzing the problem of the confiscation of the Church assets, especially of monasteries, during the Reformation).

221. Rost, Inauen, Osterloh & Frey, *supra* note 219, at 97.

222. It should be highlighted that the Latin term for "chapter" is "*capitulum*," and it has several meanings. It may mean a chapter of a book, a legal body of the cathedrals, an assembly of the religious fraternity of a single house, or an assembly of representatives of many monastic houses. *See infra* notes 334 and 338 (discussing the origins and the etymology of the word "*capitulum*").

223. *See* Gert Melville, *The Institutionalization of Religious Orders (Twelfth and Thirteenth Centuries)*, *in* THE CAMBRIDGE HISTORY OF MEDIEVAL MONASTICISM IN THE LATIN WEST 783, 784 (Alison I. Beach & Isabelle Cochelin eds., James Mixon trans., 2020) [hereinafter Beach & Cochelin]. For a comprehensive history of the spread of Monasticism in the West, see *id.* at 19–72, 162–94.

224. *See* Emil Inauen, Katja Rost, Margit Osterloh & Bruno S. Frey, *Back to the Future: A Monastic Perspective on Corporate Governance*, 21 MGMT. REVUE 38, 45–46, 49–50 (2010).

enjoyed some organizational privileges. These privileges included the ability to own assets as well as the right to sue and be sued and were exercised through a centralized system of management of properties.

1. Regulation of Monasteries and the *Constitutiones*

Medieval monasteries had a structure largely comparable to that of contemporary corporations.[225] The establishment and functioning of a monastery depended on a charter that governed its legal status, representatives' powers, religious and secular purposes, and internal organization.[226] The charters of monasteries were known as *constitutiones*, *charismata*, *decreta*, *praecepta*, *leges*, *normae*, *institutiones*, *instituta*, *ordines*, or *regulae*.[227]

A charter served as a legal framework that protected communities from external interference.[228] They also set the hierarchy, practices of administration, and spiritual and economic goals. In addition, monasteries regulated themselves through their own charters. Therefore, charters also played a key role as self-governing fundamental rules.

Among the charters of monasteries, the *Regula* of Saint Benedict, written in the year 516, was the fundamental law of Benedictines and a

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225. Richard Roehl, *Plan and Reality in a Medieval Monastic Economy: The Cistercians*, 29 J. ECON. HIST. 180 (1969). Roehl argues that

> The Cistercian economic program might thus be categorized as a "firm" rather than a "national" plan (to employ somewhat anachronistic terminology); that is, [the program] related to the economy of an individual monastery. But it was capable of indefinite reiteration, in as many abbeys as might be desired. Thus[,] provision was made for the growth, the expansion, of the Order.

Id. at 180.

226. *See* Beach & Cochelin, *supra* note 223, at 162–67.

227. These terms were interchangeably used just like charters and articles of incorporations. *See* Albrecht Diem & Philip Rousseau, *Monastic Rules (Fourth to Ninth Century)*, *in* Beach & Cochelin, *supra* note 223, at 162. Furthermore, authors argue that:

> In sum, certainly until the end of the sixth century we have to approach the development of monasticism under three premises. First, there was no one monasticism but rather an infinite variety of more or less "regulated" monasticisms. Second, the textual basis of monastic life—its *regula*, if we want to call it that—could manifest itself in yet another confusing variety of different texts and genres. A *regula* can hide in a story, in an ascetic admonition, in a theological treatise, in a letter, in a charter, in a law, or in the *acta* of councils of concerned bishops. Third, there was, however, a slow development *toward* a "regulated" way of life that did use *regulae* as we know them, in the way that we expect them to be used. Benedict, the Master, and, to a certain extent, Caesarius could already make the claim that there is no alternative to a regulated communal life: you either live *sub regula vel abbate* or you are a *monachus gyrovagus* or *sarabaita*.

Id. at 180–81.

228. *Id.* at 182; *see also* Jean-Pierre Devroey, *Monastic Economics in the Carolingian Age*, in Beach & Cochelin, *supra* note 223, at 466.

model for other monastic legislations.[229] The *Regula* consisted of seventy-three provisions and governed all the activities of the monks.[230] It established the property rights framework regulating the life of monks and the existence of the monasteries.[231] Monks had no property rights, but monasteries were allowed to own property, make contracts as well as sue and be sued, as entities.[232] The *Regula* also gave abbots the power to manage the monastery's property and the right to establish and enforce rules within the monastery's jurisdiction, beyond those of the laws of the land.[233]

2. The Purpose of the Monastery in the Monastic Law

From an organizational perspective, a monastery was structured around a common purpose. The purpose of monasteries and monastic law (*propositum*) was the criterium governing present and future activities of the monastery and the monks.[234] Ultimately, the purpose of all monasteries

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229. Saint Bernard, who was an abbot, used to say: "prima igitur quaestio circa regulam nostrum versatur, de qua, nisi fallor, et reliquae omnes aut paene omnes oriuntur" [The first question revolves around our monastic charter, of which, unless I am mistaken, all the rest, or almost all, depends]. *See* 3 BERNARDO DA CHIARAVALLE, DE PRAECEPTO ET DISPENSATIONE, IN SANCTI BERNARDI OPERA 254 (Jean Leclercq & Henri M. Rochais eds., 1963) (all translations done by the authors).

230. SAINT BENEDICT, THE RULE OF SAINT BENEDICT, (A Pax Book 1931), https://www.solesmes.com/sites/default/files/upload/pdf/rule_of_st_benedict.pdf [https://perma.cc/H5BJ-BFVN].

231. *Id.*

232. *See* Rost, Inauen, Osterloh & Frey, *supra* note 219, at 100–01. For the general principles contained in the *Regula*, see SAINT BENEDICT, *supra* note 230, ch. 32:

> Let the abbot appoint brethren of whose life and character he is assured and to them, as he shall judge fit, let him assign the property of the monastery, the various iron tools and the articles of clothing and all other things whatsoever, to be kept by them and re-collected after use. And of these let the abbot keep a list, so that he may know what he gives and what he receives back when the brethren succeed one another in turn in the work assigned to each. And if anyone shall have treated the property of the monastery in a slovenly or neglectful manner let him be corrected; and if he shall not have then amended, let him be subjected to the discipline of the rule.

233. For a discussion of the notion of "monastic libertas" as a form of exemption from the ordinary judge, even the bishopric one, see Christof Rolker, *Monastic Canon Law in the Tenth, Eleventh, and Twelfth Centuries*, *in* Beach & Cochelin, *supra* note 223, at 626.

234. This idea is not so far from the contemporary conception of the social economic function of corporations. For example, the American Law Institute provided a regulation to balance the economic and social functions of the corporation.

> 2.01 The Object and Conduct of the Corporation
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> (a) Subject to the provisions of Subsection (b) . . . a corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.
>
> (b) Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business:
>
> (1) Is obliged, to the same extent as a natural person, to act within the boundaries set by law;

was worshipping God, but every religious order established different organizational rules in accordance with their specific religious devotions, usually inspired by the practice of their founders. For example, Benedictines followed a contemplative lifestyle made up of prayer and work; Dominicans were preachers devoted to study and education; while Carmelites applied the rule of Saint Albert and focused on service, contemplation, and prayer.[235]

3. The Abbot, the Monks, and Perpetuity

An abbot received the authority to rule a monastery as the representative of Christ. Abbots had jurisdiction over the monastery and their tenure lasted for life.[236] Monks also made lifelong commitments to the monastery.[237] Monastic charters typically regulated every aspect of a monk's existence, including their daily activities, for life (*regulae totius vitae*); and monks had to live by the monastery rules until their death (*usque ad mortem*).[238] Every moment of a monk's life was sanctified by submission to the *Regula* (the monastic law).[239] Vows encompassed the evangelical counsels.[240] Poverty and chastity committed monks to renouncing personal possessions and embracing celibacy. Vows also included obedience, which committed monks to listen intently to the teaching of their superiors.[241] Provisions regulated the internal hierarchy

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(2) May take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business; and

(3) May devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.

PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (AM. L. INST. 1992).

235. Peter Wirtz, *Governance of Old Religious Orders: Benedectines and Dominicans*, 23 J. MGMT. HIST. 259, 266–72 (2017).

236. *See* Gérard D. Guyon, *Un Grand Juriste Européen: Saint Benoît de Nursie* [*A Great European Jurist: Saint Benedict of Nursia*], 2003 CUADERNOS DE HISTORIA DEL DERECHO 49 [hereinafter Guyon, *Un Grand*]; *see also* Gérard D. Guyon, *Le temps et le droit dans la Règle bénédictine*, 35 STUDIA CARNONICA: OTTAWA 133 (2001) [hereinafter Guyon, *Le Temps*] (all translations done by the authors).

237. Guyon, *Le Temps*, *supra* note 236, at 38 (all translations done by the authors).

238. Saint Bernard on this point summarized: "Est sane quidam oboedientiae limes, secundum tempus ipsa temporis extremitas, ut sit terminus oboedientiae qui et vitae [There is, of course, a certain limit of obedience, according to the length of the time itself, so that it may be the end of obedience which is also the end of life]". BERNARDO DA CHIARAVALLE, *supra* note 229, at 262 (all translations done by the authors).

239. *See* SAINT BENEDICT, *supra* note 230, chapters 1, 5, 8, and 16, the latter dictating "How The Work Of God Is To Be Carried Out During The Day"

240. John Bayer, *Living* toto corde*: Monastic Vows and the Knowledge of God*, 10 RELIGIONS, July 2019, at 7–11.

241. *See id.* ch. 3:

As often as any special business has to be transacted in the monastery, let the abbot convoke the whole community and [themselves] state what is the matter in hand. And having

of the community and the necessary elections for establishing it.[242] This regulatory framework was essential to ensure that monks could live and work together successfully.

Unlike lay people living in a secular time (*saeculum*), monks regulated their lives within the eternal existence of the monastery. Perpetuity became the moral legacy of the religious society; a perpetual written text, a person elected for life, and organizational *regulae totius vitae* were the pillars of the corporate organization of the monastery.

4. Monks' Property and Monasteries' Property

The monastic legislation in regard to monks' private ownership was clear and strict: personal poverty was required from monks. Upon entering the religious life, the postulant renounced his property in favor of the poor or of the monastery. Thus, monks had no ownership rights; although they could technically inherit assets, the inheritable assets did not go to them but to the Church, or—as Saint Basil used to say—to "the proper ecclesiastical authority to be disposed of as the latter deems fit."[243]

The nature and extent of these rules were extensively discussed in Christian monastic literature.[244] However, in the *Regula* of Benedict, which represents one of the oldest monastic charters, the practice of monks

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listened to the counsel of the [community], let [them] settle the matter in [their] own mind and do what seems to [them] most expedient. And we have thus said that all are to be called to council because it is often to a junior that the Lord reveals what is best. But let the [community] so give counsel with all subjection and humility that they presume not with any forwardness to defend what shall have seemed good to them; but rather let the decision depend upon the abbot's discretion, so that [they] shall decide what is best, that they all may yield ready obedience: but just as it behooves the disciples to be obedient to the master, so also it becomes [them] to arrange all things prudently and justly.

242. *See* SAINT BENEDICT, *supra* note 230, at ch. 64:

At the election of an abbot let this principle be always observed, that [they] be appointed whom the whole community, being of the same mind and in the fear of God, or even a part albeit a small part of the community shall with calmer deliberation have elected. And let [they] who [are] to be elected be chosen for [their] worthy manner of life and [their] fundamental wisdom, even if [they] be last in order of community seniority . . . .

But let [they] who [are] elected abbot always bear in mind what manner of burden [they have] received, and Who it is to Whom [they] will have to render account of [their] stewardship; and let [them] know that it behoves [them] to be of service rather than to be served. It behoves [them] therefore to be learned in the divine law, that [they] may thence bring forth things new and old; to be chaste, sober, merciful; and let [them] always exalt mercy above judgment, that [themselves] may attain it.

243. 23 S. AURELI AUGUSTINI, DE DOCTRINA CHRISTIANA: LIBER QUARTUS 56 (1930) (all translations done by the authors).

244. *See also* Gian Luca Potestà, *Ubertino da Casale e la altissima paupertas, tra Giovanni XXII e Ludovico il Bavaro*, 4 OLIVIANA (2012), http://journals.openedition.org/oliviana/471 [https://perma.cc/AJ5F-6VJ9] (all translations done by the authors). *See generally* BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW 1150–1625 (1997).

owning personal property was considered evil—a practice that has to be removed from the monastery.[245] Therefore, without an order from the abbot, no one could give, receive, or retain anything as their own, not even books, writing tablets, or styluses. Monks had to ask the abbot for anything they needed, and the abbot's permission was necessary. An abbot could assign some instruments or tools to monks deemed reliable and incorruptible, who, in turn, could keep the assets and assign them to other monks.[246] However, no one would consider a monastery's assets as their own.

Through a legal fiction, the assets of the monastery were held by the patron saints of the monastery. For instance, in 910 William I founded the Monastery of Cluny.[247] The charter explained William I's reasons for donating much of his wealth to create the order and stated that the order was founded on the Rule of Saint Benedictine.[248] The charter regulated the separation of the monastery's property from the monastic community, attributing the assets directly to Saint Peter and Saint Paul, who were the patron saints of the Cluny order.[249] So monasteries often owned their assets through their patron saints much like the Romans vested ownership in divine entities and Islamic jurisprudence vests ownership in Almighty *Allāh* (God).[250]

Since charters typically provided perpetual existence and succession to the monasteries, a monastery's assets would belong to the monastery forever. In general, a monastery and its assets were governed by the abbot and a few monastic officers. However, the *Regula* of Benedict balanced this power by requiring that all important decisions such as major decisions about the monastery's assets had to be made by the entire

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245. *See* SAINT BENEDICT, *supra* note 230, ch. 33:

> Very specially is this vice of private ownership to be cut off from the monastery by the roots; and let not anyone presume to give or accept anything without the abbot's orders, nor to have anything as his own, not anything whatsoever, neither book, nor writing-tablet, nor pen; no, nothing at all, since indeed it is not allowed them to keep either body or will in their own power, but to look to receive everything necessary from their monastic father; and let not any be allowed to have what the abbot has not either given or permitted. And let all things be common to all, as it is written: "Neither did any one of them say or presume that anything was his own." But if anyone shall have been caught indulging in this most baneful vice, let him be admonished once and again: if then he shall not have amended, let him be subjected to correction.

246. *Id.* at chs. 22–23.

247. *See generally* BARBARA H. ROSENWEIN, TO BE THE NEIGHBOR OF SAINT PETER: THE SOCIAL MEANING OF CLUNY'S PROPERTY 909–1049 (1989). On the importance of the Cluny reform, see generally GAUDEMET *supra* note 81, at 332–35 (all translations done by the authors).

248. *See Medieval Sourcebook: Foundation Charter of Cluny, 910*, FORDHAM UNIV. (Jan. 1996), https://sourcebooks.fordham.edu/source/chart-cluny.asp [https://perma.cc/XFG8-VMUN].

249. *Id.*

250. Antonio D'Emilia, SCRITTI DI DIRITTO ISLAMICO 262 ff. (1976).

community of monks, including the youngest brothers.[251] This method of collective decision-making was, at least in theory, justified by the principle of Christian communal unity.[252] Communion was understood not only in a spiritual sense but also in a practical form that included shared decision-making.

B. The Cathedral

Cathedrals are typically the bishops' churches as well as monumental churches.[253] Cathedrals derive their name from "*cathedra*," the throne reserved for the bishop, located in the principal church of a diocese.[254] These monumental buildings are a visible product of the medieval theory of corporation. In other words, cathedrals are the result of an innovative legal technology based on the combination of legal personhood and delegated management, which permits the realization of long-term projects that are able to serve society and future generations.[255] Historically, cathedrals' construction, administration, and maintenance were delegated to specialized legal institutions known as "*fabricae*,"[256] and "chapters."[257]

Both *fabricae* and chapters were corporations, but they were characterized by a different nature, composition, and purpose. On one side, *fabricae* were partly secular entities, for which ecclesiastical and civic representatives sat and worked together toward a common purpose.[258] Their mixed nature facilitated the aggregation of assets through donations, including contributions in kind, for building and maintaining the cathedral.[259] On the other side, chapters mainly organized the worship and

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251. *See* Ferraboschi, *supra* note 129, at 218 (mentioning a letter of Pope Leone to the Sicilian bishops declaring that donations and sales of ecclesiastical assets must be decided after a discussion and with the agreement of all the clergy (*cum totius cleri tractatu atque consensus*)) (all translations done by the authors).

252. This might remind the corporate law scholar of shareholders voting on the sale of all the assets of a corporation and on other fundamental changes affecting business corporations.

253. A cathedral may also be called *ecclesia mater*, which translates to the mother of the churches. *See Cattedrale*, TRECCANI, https://www.treccani.it/vocabolario/cattedrale/ [https://perma.cc/FES7-8TDY] (describing this etymology) (all translations done by the authors).

254. *See* Anna Ravà, *Cattedrale*, *in* 4 ENCICLOPEDIA DEL DIRITTO 517 (1960) (all translations done by the authors).

255. It is no coincidence that cathedrals have been authoritatively used in the corporate law literature. *See* Stout, *supra* note 32, at 697.

256. *See* Pier Giovanni Caron, *Fabbricerie*, *in* ENCICLOPEDIA DEL DIRITTO, XVI, at 196 (1967) (all translations done by the authors).

257. *See* Giacomo Cassani, *Capitolo dei canonici*, in DIGESTO ITALIANO, VI, at 982 (1888) (all translations done by the authors).

258. Caron, *supra* note 256, at 197.

259. *Id.*

promoted the mission of the cathedral, but they were also responsible for looking after the cathedral's corporate property.[260]

1. Fabricae

A *fabrica* is a legal entity entrusted with the task of aggregating assets and governing the financial resources to design, build, and maintain a new cathedral.[261] One well-known example is the "Veneranda Fabbrica del Duomo" in Milan, a *fabrica* established by decree in 1387 to build, run, and maintain the Cathedral of Milan.[262]

In contemporary Italian law, *fabricae* are legal entities that maintain and restore cathedrals and other historical churches.[263] *Fabricae* run churches and cathedrals in the interest of the public, even when the local community is not made up of only Christians. The public goal of *fabricae* consists of preserving and maintaining buildings that usually have a historical and artistic value for entire communities of citizens.

2. Chapters

While *fabricae* are partly secular corporations, cathedral chapters are corporations deeply religious in nature.[264] Chapters were typically established to run cathedrals, during or immediately after their construction.[265] Chapters date back to the eighth century and were originally member corporations that progressively transformed into property corporations. Initially, they were associations of clerics from a certain church forming an entity and were instituted by ecclesiastical authority for the purpose of assisting the bishop in the government of their diocese.[266]

In the early period, the name chapter designated certain corporate ecclesiastical bodies.[267] These bodies referred to the cathedral clergy as a

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260. The chapter controls the corporate property and directs the affairs of the corporation. It is the body that governs the cathedral generally and decides whether the corporate body of the cathedral should enter into a contract or other legal agreement. *See* GAUDEMET, *supra* note 81, at 494 (all translations done by the authors).

261. *See* Caron, *supra* note 256, at 197 (all translations done by the authors).

262. *See generally* Gaetano Greco, *Un «Luogo» di Frontiera: l'Opera del Duomo Nella Storia Della Chiesa Locale. Premessa Storica Sulle Fabbricerie*, *in* LA NATURA GIURIDICA DELLE FABBRICERIE 4, 4–6 (2004) (all translations done by the authors).

263. Caron, *supra* note 256, at 199.

264. For the different meanings of the word "chapter" (Latin, *capitulum*), see Cassani, *supra* note 257, at 982 (all translations done by the authors).

265. As far as the Cathedral of Milan is concerned, a new cathedral's chapter was established in the same period of the construction. Annali della fabbrica del Duomo di Milano. Dall'origine fino al presente, Vol. I., Milano, Libreria G. Brigola, 1877, p. IX-XIV

266. *See* Cassani, *supra* note 257, at 982 (all translations done by the authors).

267. For the origins of the term "chapter," see CONSTANT VAN DE WIEL, HISTORY OF CANON LAW 64 (1990). With respect to cathedrals, the term chapter (in Latin, *capitulum*) is said to be derived

group of clerics separated from the bishop and the bishop's household.[268] Over time, the bishop and clergy occupying a common dwelling obtained the power of controlling the cathedral and its connected estates. Such power created new entities that were able to own the cathedral and its connected estates; these entities were called "chapters."[269]

Early chapters were characterized by a uniform method of life; their organization and legal nature were profoundly influenced by monastic rules. For example, the clergy organized by Saint Chrodegang, Bishop of Metz (d. 766)—an archetype of cathedrals' chapters—was a rule-based community that mirrored the *Regula Benedicti*.[270] By the thirteenth century, cathedrals' chapters were fully-fledged corporations, and their personnel were called "canons"—typically diocesan clerics who had not taken monastic vows.[271] Each canon had a stall in the church and a vote in the chapter.

Chapters, being true ecclesiastical entities, had all the rights such entities possessed by their nature and by positive law.[272] Accordingly, they could hold meetings, ordinary or extraordinary, to discuss and resolve matters concerning the chapter.[273] Unless otherwise provided by a specific statute, the dean or provost had the power to convoke chapters to decide about matters regarding their own affairs.[274] Conversely, the bishop convened chapters to make decisions about diocesan matters.[275]

All the canons present in the city were invited to the meetings.[276] The meetings took place at the prescribed time and place. Business was to be decided by a general and public discussion, followed by a vote. The vote did not need to be unanimous, unless the subject matter affected the canons as individuals.[277] Canon law generally required a majority vote; however,

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from the chapter of the rule book that was typically read in the assemblies of the clergy. After the reading, any business relevant to the house was discussed in "chapter" and, if necessary, approved by the "chapter," as the collective body of the members came to be known. The meeting itself was called the chapter and the place of meeting the chapter house. *See also* Mario Gorino-Causa, *Canonici*, *in* 2 NOVISSIMO DIGESTO ITALIANO 849–50 (1957) (all translations done by the authors).

268. R. Ignatius Burns, *The Organization of a Mediaeval Cathedral Community: The Chapter of Valencia (1238–1280)*, 31 CHURCH HIST. 14 (1962).

269. *See* Ferraboschi, *supra* note 129, at 219.

270. *See* SAINT BENEDICT, *supra* note 230.

271. *See* VAN DE WIEL, *supra* note 267.

272. *See* Ferraboschi, *supra* note 129, at 222.

273. *See id.* at 218.

274. *See id.* at 218–19.

275. William Fanning, *Chapter*, *The Catholic Encyclopaedia*, NEW ADVENT, http://www.newadvent.org/cathen/03582b.htm [https://perma.cc/24Q9-WYJP].

276. *Id.*

277. *Id.*

pursuant to the regulations of some chapters, a two-thirds vote of the members, known as *capitulars*, was necessary.[278]

Like every other ecclesiastical corporation, the chapter had the right of possessing and administering the property over which it had dominion. The chapter could appoint its own officials to administer its possessions, even without the approbation of the ordinary jurisdiction.[279] The administrator of assets, usually the dean or other dignitary, was determined by local statutes or customs.[280]

C. Cathedrals, Monasteries and Corporate Governance

Corporate law scholars recognize principles and governance mechanics of current corporations in ecclesiastic corporations. Ecclesiastic corporations' ability to commit property for a sacred use meant that assets could be "locked in" for a purpose over time.[281] The Church, a sovereign power devoted to the worship of an eternal God, provided monasteries and cathedrals with the corporate form, which entails legal personality, centralized management, and perpetual existence.[282] The corporate form has allowed monasteries and cathedrals to perpetually pursue their goals while maintaining a certain degree of autonomy.[283]

Asset lock-in has provided monasteries, *fabricae,* and chapters with the organizational infrastructure that has allowed them to own and manage property. The features of the corporate form have also provided a line of succession and continuity. They also protected ecclesiastic corporations

278. *Id.*

279. "Ordinary jurisdiction" is the power to govern which flows automatically from an office that a person holds. *See* 1983 CODE c.131, § 1. Canon law does not define the term "ordinary" but simply enumerates those who are to be considered such. The Code of Canon Law lists the following as ordinaries: (1) the Roman pontiff; (2) diocesan bishops; (3) others who are placed over some particular church or community equivalent to a particular church according to canon 368 (e.g., abbots nullius and prelates nullius); (4) the vicars general and episcopal vicars of those enumerated in (2) and (3); (5) for their own members, major superiors in clerical religious institutes of pontifical right and clerical societies of apostolic life of pontifical right who at least possess ordinary executive power. *Id.* c.134.

280. *See* Ferraboschi, *supra* note 129, at 219–21.

281. Blair, *supra* note 37, at 388–389.

282. *See generally supra* Part III.

283. Again, the example of the Avignon bridge brotherhood society explains the progressive attraction of the lay associations to the church and the alignment of private and public interests in achieving the goals of early legal person. *See* Boyer, *supra* note 97, at 641–42. The organization of the society of the brothers of the bridge changed in 1241–1261, when the bishop appointed an outsider to the position of prior, who was the canon of a nearby church, instead of allowing the brethren to elect one of their own as prior. *Id.* The actions of the bishop resulted in the loss by the brothers of their power over the property of the bridge because the town authorities transferred this function to two rectors. *Id.*

and their assets from division, confiscation, or taxation by secular rulers—princes or kings—when the control over the territory change.[284]

Fabricae and chapters facilitated the accumulation and governance of property necessary to build and run majestic cathedrals. Building and running a cathedral was essential for communities; this is particularly evident by observing the structure and composition of ecclesiastic corporations established with that end. An example is the chapter that was established at the time of the construction of the Cathedral of Milan. The chapter was called the "General Chapter" and was initially made up of about forty-five members, including the duke, the archbishop, and the most important officials of the city.[285] Later, for a couple of decades, 300 individuals were chosen from the population to take part in the chapter every year.[286] These 300 individuals were tasked with supervising the construction in day and night shifts as well as with collecting offers and alms.[287] The involvement of stakeholders shows that cathedrals played a key role in society.

With respect to the autonomy of ecclesiastic corporations, an important characteristic was the ability to self-regulate. For example, much like contemporary business corporations with their articles of incorporations and by-laws, a "chapter ha[d] authority to make laws for itself, provided they [were] not contrary to the general canon law." [288] These provisions were typically voted by the capitulars and approved by the bishop. [289] In case of a tie vote, "the dean or bishop ha[d] the casting vote or a double suffrage."[290]

The governance analogies between ecclesiastic corporations and contemporary business corporations reach further than single corporate entities and include how parent corporations control their subsidiaries. Although ecclesiastic corporations cannot achieve control through share ownership, parent monasteries (mother houses) controlled their subsidiaries (daughter houses) through governance mechanics. An example is the content of the *Carta Caritatis Prior* (*Carta Caritatis*), drafted before 1119 by Stephan Harding, the second abbot of Citeaux, in France.[291]

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284. *See* RUFFINI, *supra* note 104 at 12.

285. *See* Fanning, *supra* note 275.

286. *Id.*

287. Annali della fabbrica del Duomo di Milano. Dall'origine fino al presente, Vol. I., Milano, Libreria G. Brigola, 1877, p. IX-XIV

288. *See* Fanning, *supra* note 275.

289. *Id.* In case of a tie vote, "the dean or bishop ha[d] the casting vote or a double suffrage." *Id.*

290. *Id.*

291. *See generally* THOMAS MERTON, CHARTER, CUSTOMS, AND CONSTITUTIONS OF THE CISTERCIANS 1–14 (2015) (ebook) (publishing the text of *Carta Caritatis Prior*).

The *Carta Caritatis* set forth not only principles and goals ruling the Citeaux monastery, the mother house, but also governance mechanisms applied to subsidiary monasteries, known as daughter houses.[292] The relationship between the main monastery and the daughter houses was shaped in a way that ensured shared interests across the monasteries while maintaining the religious hierarchical structure.[293] The *Carta Caritatis* provided the governance rules governing the relationship between the mother house and the daughter houses.[294] It established principles of shared governance across all the houses, including both the mother house and the daughter houses.[295]

The *Carta Caritatis* regulated the assemblies to which the abbots participated to perform their decision-making power.[296] These assemblies were categorized as "general" or "provincial" chapters (*capitula*), depending on the whether they included all the houses or only the houses in a particular ecclesiastical province or kingdom.[297] All the abbots from all the different monasteries participated in the general assembly, known as the General Chapter.[298] Despite the distance between daughter houses, principles and goals were methodically respected because all the abbots would make sure that their monks complied with rules and decisions made in the assemblies.

CONCLUSION

Religions and sacred law have played a fundamental part in finding solutions to achieve asset partitioning in developing the corporate form, and in creating and systemizing corporate law. Shedding light on how religions, in striving to subtract assets from the ownership of human beings and committing them to worship, have shaped asset partitioning and the corporate form provides a wealth of insights on the nature and foundational principles of corporate law. It also nurtures fundamental corporate law debates such as the one on the purpose of business corporations.

The corporate form has sacred roots. Romans' invention of the corporation was founded on sacred rituals and on an original ownership structure based on the legal capacity of Roman divinities. The Church has

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292. *Id.*

293. *See* MERTON, *supra* note 291, at 6, point f.

294. *See generally id.*

295. *See generally id.*

296. *See generally id*.

297. *See* Alisdair Dobie, *The Role of the General and Provincial Chapters in Improving and Enforcing Accounting, Financial and Management Controls in Benedictine Monasteries in England 1215–1444*, 47 BRITISH ACCT. REV. 142, 143 (2015).

298. *See* MERTON, *supra* note 291, at 11–13.

played a role in forming corporate law and theory that is second to none. It systemized the rules governing corporation, and arguably created corporate law. Islamic jurisprudence has provided solutions to overcome the tension between *Sharie'a*'s resistance to the corporate form, rooted in Islamic law's principle of an individual's responsibility, and the necessity to establish institutions featuring asset-partitioning and the capacity to contract and interact with society. These solutions highlight the relevance of fundamental features of the corporate form such as asset partitioning and the capacity to survive any human beings with stakes in the corporation.

While this journey into sacred law provides a wealth of insights about the nature, origins, and features of corporations for contemporary corporate law scholars, the following points of reflection deserve emphasis. First, the corporate form has a property nature. Second, the very structure of the corporate form, including delegated and centralized management, has allowed institutions such as the Church to achieve wonders. Third, the strong ties between a social or public purpose and the corporate form should be more deeply considered in the debate on the purpose of contemporary business corporations.

The Church has been able to build monumental cathedrals whose construction spanned multiple generation, because the assets aggregated and used to build these cathedrals have belonged to *fabricae*. *Fabricae*, as corporations, have been able to pursue their objectives through delegated and centralized management. Similarly, monasteries have been the repository of traditions, cultural heritage, and educational resources for centuries thanks to their corporate form, which, through legal capacity and centralized management, has provided protection to both tangible and intangible assets.

While the risks of agency costs cannot be avoided, the wonders of the corporate form's attributes have proved to be essential not only to pursue long-term projects, but also to ensure that society can benefit from a corporation's achievements for centuries or millennia. Clearly, this vision of corporations deviates from a focus on agency costs and embraces corporations' mechanics as they are. This vision of corporations also considers the interest of society in what corporations do. Traditionally, an assessment of a social, religious, or public dimension in the purpose of a corporation preceded chartering. Free chartering has changed this paradigm. But studying sacred and ancient law brings our attention back to the relation between the corporate form and a social or public dimension of a corporation's purpose.

The role of purpose is particularly evident by observing the Islamic law jurisprudential reasoning that allows certain entities to obtain legal

capacity within a framework that is otherwise resistant to legal personhood for non-human entities. Public interest was the determinant applied by the Romans to assess whether an institution could be granted the corporate form. Sacred and ancient corporate law suggest that the debate on the public dimension of contemporary business corporations' purpose is unsettled; sacred and ancient corporate law also offer a path to reconsider how tight the relation between the interest of society in a corporation's activities and obtaining the corporate form could be.