



## Comparison of Dhimmah and Asset in French Jurisprudence and Law

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### **Abstract**

Reference of jurisprudential texts to religion brings to mind the religious right and the obligation to resemble with divisions of law in France. In the legal system of Islam, dhimmah (treaty or obligation) have been extensively used along ages and in different fields. On the contrary, in the classical law and French law, the title "Patrimoine" (asset or property) is used throughout the commitments. In the religious law, a person who is called a creditor or promisee has direct rights over another person who is called debtor or promisor. Since debt is directly related to individuals' obligations, so to identify exact meaning and concept of religious or individual right, it is necessary to examine its execution which is the very dhimmah in jurisprudence or the property and obligation mentioned by Arab and French lawyers. In spite of the similarities between these two terms, there is no comparable capability between the dhimmah and the asset; for the term dhimma is not compatible with the term "Patrimoine" (asset); hence, in this article, these two terms are to be conceptualized and compared.

**Keywords:** *Dhimmah (obligation); Property; Religious Right; liability*

### **1- Introduction**

The jurists have spoken of *dhimma* (treaty or obligation) in various chapters, including worship, rulings, law, contracts and unilateral legal acts. In case there is a single obligation, *dhimma* is executed in the general sense, but if it is a religious obligation, *dhimma* is executed in a special sense that is accompanied by a guarantee. Thus, separating the original from debt in jurisprudence is based on the theory of *dhimma*, meaning that the basis of this distinction is belonging or non-belonging to *dhimma* (Sanhoury, 1988, 1: 20). Therefore, the subject of discussion in this study is *dhimma* in a special sense, i.e. the financial *dhimma*. The concept of *dhimma* in Islamic law with the property (Patrimoine) in French law has an effective role in identifying religious or personal rights. So in the common sense, *dhimma* as a

credit container in which a person's rights and duties accumulate is very similar to the concept of property and both terms are considered as one of the subsets of the issue of obligations (liabilities). Therefore, *dhimma* with terms such as commitment, undertaking, capacity, etc., is closely related, but it does not have the same application, so that the existence of *dhimma* precedes all of them. The origin of the confrontation between *dhimma* and property is in Arabic law which imitates French law and uses property instead of *dhimma*. Hence, the jurists have used these two terms together with the same meaning. Here hence some questions arise such as “what is *dhimma*?”, “Is *dhimma* the same as terms such as obligation, liability, capacity, etc.?” “Is the term *dhimma* opposes to ‘Patrimoine’?”. Such questions are intended to be answered in the present paper. In the process, firstly the concept of *dhimma* and its features are discussed, and secondly the term property/asset and its features are studied in French law. After getting acquainted with these titles, as jurisprudential and French data are important to recognize religious rights, in the third section, a comparison between *dhimma* and asset would be done.

## 2- *Dhimma*

The content of *dhimma* is examined in three parts: a) generalities about the concept of *dhimma*, b) difference between *dhimma* and similar concepts and c) its features according to Islamic law.

### 2-1. The concept of *dhimma*

*Dhimma* in the general sense includes all the requirements and obligations, and in a special sense, belongs to the owner whenever he/she is engaged in a property (Bojnordi and Moqtadayi, 2013, 2: 139). *Dhimma* terminologically means covenant, guarantee, trust, etc. (Ibn Manzūr, 2004, 6: 43). That is why an infidel who has a pact with the Islamic government is called a *dhimmi* (protected) infidel. *Dhimma* also means guarantee (*diman*). It is in this usage that when someone says, ‘some money is in my *dhimma* to someone else’, this means that he is the guarantor of the same amount for him/her. But it is often used in the sense of covenant and obligation, as it is common to say that this right is in my *dhimma*, meaning to be up to someone (Ibn Abi Al-Ḥadīd, 1378, 1: 273 and Tabatabaei Boroujerdi, 1399, 4: 211). As stated in the Qur’an in the sense of covenant<sup>1</sup> (Allamah Tabatabaei, 1417 AH, 9: 196). In a hadith of Amir al-Mu'minin, *dhimma* is also conveyed to guaranty and liability<sup>2</sup> (Ibn Manzūr, 2004, 12: 221).

There is disagreement about the technical concept of the term *dhimma*. According to some, *dhimma* is a description in a person, according to which a person is qualified to have a right for or against him. Even the appearance of the words of some popular jurists, such as Abu Zayd, shows that *dhimma* is the same as *aql* (reason/wisdom) (Khouri Shirtouni, 1403: 373). In this case, it is not the essence but mainly is a description for individuals. On the other hand, some others have given intrinsic value to *dhimma*. Fakhr al-Islam, a Sunni scholar, writes: “Every human being who is born has *dhimma* and that is the *dhimma* of authority which has the right and duty (Ministry of Endowments and Islamic Affairs, 1404 AH, 21: 274). As seen, in the first interpretation, the *dhimma* is a single description, but in the second, it is something/someone to that the qualification of right and duty is added. It is clear that in the intrinsic sense, the object is capable of a description. In the common sense, *dhimma* is a vessel of credit that is assumed in a person and in which a person's rights and duties are accumulated. In this application, there are many similarities between the property and the concept of “Patrimoine” (property), which is mentioned in French classical law. According to common view, *dhimma* is only a container of generalities, not a container of personal and concrete standing properties. In other words, the rights related to the property itself do not belong to individuals’ *dhimma*, but debts that are general matters, belong to *dhimma* (Jafari Langaroudi, 2003: 120). According to this view that is sometimes erroneously attributed

<sup>1</sup>. See Q, 9: 8-10.

<sup>2</sup>. دِمَّتِي بِمَا أَقُولُ رَهِينَةٌ وَأَنَا بِهِ رَعِيمٌ.

to all jurists, the debt is supposed for a person's liability when a place for its existence in man is imagined, and this hypothetical place is the very *dhimma*. However, it should be noted that in Islamic law, *dhimma* is never assigned to property, rather it belongs to all announced rights and duties. Contrary to common view that *dhimma* is considered exclusively by the general properties or general affairs, both among the Hanbalis and the Imami jurists, some believe that sometimes the place of *dhimma* or commitment to *dhimma* is the general standing property and sometimes the personal and concrete standing property. They divide the personal standing properties that may be belonged to *dhimma*, into two:

A) In the case of guaranteed standing properties, such as the usurped property that the usurper is obliged to give back, the usurper is said to be in *dhimma* (*mashqhoul al-dhimma*) as well.

B) As for non-guaranteed properties, like commitment of the trustee to give back the trust properties to bailee, tenant, and borrower, all three are considered trustworthy in a particular concrete property and are obliged to return it to the object's owner. This type of commitment, despite belonging to a concrete object, is sometimes called *ma fih al-dhamma* (something in which *dhimma* is) (Hosseini Ameli, nd: 133).

## 2-2- The difference between *dhimma* and similar concepts

Since *dhimma* is one of the important sub-categories of the issue of obligations in jurisprudence, it has a close relationship with terms such as covenant, obligation, capacity (*ahlīyat*), debt, etc., both in words and in terms; but they do not have the same application, and the premise of the existence of *dhimma* is preceded on them, especially some have considered the two terms of capacity and liability as the same *dhimma*. So in order to better understand the *dhimma*, a brief difference between *dhimma* and other similar concepts are intended here.

## 2-3-The difference between *dhimma* and capacity

In jurisprudential texts, especially Sunni jurisprudential books, sometimes capacity is mistaken with *dhimma*. They consider *dhimma* as the same as capacity (Faraqi, nd, 3: 226). Capacity terminologically means competence and qualification (Ibn Manzūr, 2004, 1: 327), and technically, it is the competence to have rights and duties (Safayi and Qasemzadeh, 2005: 153). Capacity is different from *dhimma*, which should not be taken as the same meaning of *dhimma*. The capacities of acquire rights and obtain rights are the person's competence in rights or enduring duties (Emami, 2003, 1: 203 and Katouzian, 1992, 2: 2)<sup>3</sup>. That is why the common term in the law of the Arab countries, "the capacity of acquire rights or capacity of enjoying," is superior and better to the capacity of obtain rights, which is common in Iranian law (Al-Sanhouri, nd, 1: 266). The capacity to enforce or perform rights, or the capacity to possessing in Arab rights, commonly referred to as the capacity of exercise rights, means the competence and ability of a person to enforce the rights granted to him or her by law (Katouzian, 1992: 107 and Abdolmajid Bakr, 1989: 15). Thus, it becomes clear that capacity is a sign and effect of the existence of *dhimma* in a person. Capacity however is conceptually different from *dhimma*. If capacity means legal competence and qualification, *dhimma* refers to the place of establishment (Ministry of Endowments and Islamic Affairs, 1404 AH, 21: 276). Therefore, capacity, especially the capacity of obtain rights, is due to the existence of *dhimma*, that is, *dhimma* is necessary for the capacity of acquire rights and not its same meaning. This capacity is not proved except after the obligation of *dhimma*, so that it is said: "this is proven in someone's *dhimma*" and it is not said: "in someone's capacity" (Zarqa, 1418 AH, 2: 1977). According to the author, first and foremost, the tasks required place of implementation. It

<sup>3</sup>. Article 956 of Civil Law.

makes sense to assume a valid place for the human's security and full observing his character. Secondly and broadly, and because of the apparent similarities, *dhimma* is also considered in the next place to establish rights, as it is now possible to consider *dhimma* as the gathering place of duties and rights. The common mistake that must be avoided is the confusion of the container and the object. Sometimes, instead of owner of *ma fi al-dhamma*, it is said owner of the *dhimma*, while no one can become the owner of his *dhimma* or anyone else's. For *dhimma*, unlike *ma fi al-dhamma*, cannot be possessed.<sup>4</sup> As mentioned, the difference between *dhimma* and *ma fi al-dhamma* is the difference between a container and an object. Anyone who wants to drink water or contents in the container never eat the bowl. In the same way, the phrase "fulfilling *dhimma*" is not correct, rather it should be said: "fulfilling what belongs to *dhimma*." It worth saying that sometimes, the *dhimma* can be used virtually instead of *ma fi al-dhamma*. In the case of "*tasarum al-dhimam*", instead of "*tasarum ma fi-dhimam*", it is said "*tasarum al-dhimam*", that this is the basis of virtual use, and of course the legal sound sense does not prefer the virtual to the truth.

#### 2-4-The difference between *dhimma* and liability

In cases where there is no material and objective basis for the financial effects of the contract, jurists have invented the concept of liability as a container for a person's property and a manifestation of the effects of the contract (Shahidi, 2001: 114). Liability is a kind of obligation and it has been used in the meaning of fidelity, trust, guarantee, covenant, etc. (Ibn Athīr, 1364 AH: 375). The search in the jurisprudential books shows that the majority of scholars have the same meaning and application of these two terms, so that they have set these two for conventional matters. Considering *dhimma* and liability, some jurists say that *dhimma* and liability of each person are the conventions of the Sharia'h or the wise towards them. They hence have considered the meaning of the *dhimma* and liability as the world of convention which is the very conventions (Mousavi Bojnordi, 1419 AH, 5: 58). Also, a group of great jurists with the same definition of *dhimma* and liability (i.e. *dhimma* and liability are a reservoir and a warehouse for valid affairs), believe that there is no obstacle to placing one's convention on the covenant, which is the case in *dhimma* (Imam Khomeini, 1421, 1: 379). Therefore, in the view of this great scholar, the equality between *dhimma* and liability is taken into account. This belief also exists among jurists, as some professors believe that the literal and technical meaning of liability is commitment and obligation, that this can be carried out for *dhimma* as well (Jafari Langaroudi, 2014: 218-220). Therefore, it has been stated that there is no doubt that *dhimma* terminologically is synonymous with commitment and covenant, and it does not matter whether it is general or partial. Or some have interpreted Article 291 of the Civil Code (as death is not of the abortive of liability, so after the death, the deceased's debts or the actions assigned to them as liability are done from the estate of the deceased). The jurists are divided into two groups regarding to *dhimma*; a group who used the same literal meaning without interfering with jurisprudence, and another group who, without any study or source, implicitly assigned the *dhimma* to the obligations in which promisee is general. But what is inferred from the words of the jurists is, firstly, that the *dhimma* and liability do not mean mere commitment, but they are used as a container. Secondly, the difference between *dhimma* and the covenant is not only in the general or partial nature of the contained, i.e. the promisee, but the promisee of *dhimma* and liability is different in nature. Hence, *dhimma* is the container of religion, which is a conditional ruling, but the liability is a container for the obligatory ruling (Nematollahi, 2012: 166). Therefore, it can be said that the words *dhimma* and liability in the religious usages, are not the religious truth.

<sup>4</sup> For instance, in a place, instead of "أثار اتحاد مافی الذمه و طلب" it is said "أثار اتحاد ذمه و طلب". See: Katouzian, 1374 HS, n. 276: p. 406.

## 2-5. Characteristics of *Dhimma*

Through studying the jurisprudential rules and considering the various uses that have been applied to *dhimma*, the following characteristics can be considered for *dhimma*:

A) *Dhimma* is a conventional container that is assumed for individuals. Therefore, the fetus has no *dhimma* before the birth (Mirzay-e Qomi, 1992, 4: 356). Similarly, the existence of *dhimma* for animals is not acceptable. Therefore, if a person makes a will for the benefit of an animal, if his intention is to possess something, that is, to conclude a proprietary will, in the same way that the bequest enters the ownership of the animal, the will would be void. For the animal has no *dhimma* to possess something. But if his intention is to advise others to donate to the animal, it is okay. Of course, today in law, because legal entities are also considered for commercial institutions and companies, such personalities are also having *dhimma* according to the validity of the law as real persons.

B) Each person has a *dhimma* and it is not possible to consider several *dhimma* for a person, just as several people cannot share in a single *dhimma* (Bojnordi and Moqtadai, 2013: 2). Since the *dhimma* has a conventional place in the person, it has the capacity of positive and negative components without limitation. That is why a person can have extraordinary debts with positive components and extraordinary assets, without any problem in his *dhimma*.

C) Every person has a *dhimma* after birth, even if he has no debt, for the *dhimma* is attached to the person himself. Every human being has the ability to *tamannu'*. Therefore, a person cannot be considered without the ability to have or commit. Therefore, even a child who has just been born and has no property, and no one has made a will or inherited for him, still has a *dhimma* (Khansari, 1999, 1: 145). However, some have considered puberty as a condition for *dhimma* (Shahid Thani, 1409 AH: 225). It seems that *dhimma*, albeit weakly, arises only for possession and use incompletely from the time of pregnancy, but it is a shaky existence that is established with the birth. In the case of legal entities, it can be considered as *dhimma* after its formation and establishment.

D) *Dhimma* is a place for all debts and no debt is preferable to another one, unless the debtor has taken mortgage for his claim and has an objective right, in which case he is superior to the other creditors. Some personal rights have also taken precedence in Islamic jurisprudence, such as the cost of equipping and burying the deceased, as well as alimony for the wife and children of the person. Therefore, the precedence of some debts in terms of their *dhimma* is not the reason for preferring that debt over the next debt. On the other hand, the debts owed to individuals' *dhimma* do not bind a particular piece of their property. This is contrary to the objective rights of individuals over their property, which constitute a specific property. This constitutes the fundamental difference between objective and debt rights.

E) *Dhimma* belongs to the person and debt belongs to the *dhimma* after its creation and thus does not impose restrictions on the concrete objects and the components inside the person's *dhimma* (Zohayli, 1409 AH: 53). At the same time, it can be said that in Islamic law, as in French law, the property of individuals is the general collateral of creditors. It is not in the sense that they have found an objective right over the person's *dhimma* to a particular property. Rather, it means that the creditor can take his right from the debtor's property.

F) With the death of a person, his *dhimma* is also eliminated, for the *dhimma* is connected to his personality. However, there is disagreement on this regard:

1- Although in Imami jurisprudence, there is no clear and explicit discussion about the survival of *dhimma* after the death of individuals, from some Imami narrations and beliefs, even if only occasionally, one can see the traces of the survival of *dhimma*, even after the death of the deceased (Allama Hilli, 1420 AH: 557). There are some reliable narrations that advise the guarantee for the deceased. The Permission to guarantee the deceased's *dhimma* implicitly refers to the survival of his *dhimma*. As an example, in a

narration, Abi Saeed Khedri narrates that he said, “We were with the Messenger of Allah (PBUH) in front of a corpse. He said: ‘dose the deceased have debt?’ They replied: ‘yes, two dirhams are owed’, He said: ‘do yourself pray for the body.’ Ali (AS) said: ‘O Messenger of Allah (PBUH), I took over those two dirhams. I am his guarantor and I will pay the two dirhams.’ Then the Messenger of Allah (PBUH) stood up and prayed over the corpse. He then turned to Ali (AS) and said: ‘May God reward you with goodness and release your *dhimma*, just as you released your brother's *dhimma*.’”<sup>5</sup> This shows that in Islam, there is guarantee for the *dhimma* of a debtor deceased and it is correct and effective (Sheikh Tusi, nd: 1309 and Mohaghegh Hilli, 1413 AH, 13: 348).

2. The Sunnis generally (Maliki and Shafi'i and some Hanbalis) believe that after the death of a person, the *dhimma* will remain until the liquidation of the rights belonging to the estate, and after the liquidation, the *dhimma* of the deceased will end; Therefore, the dead can even find new rights after his death. Sunni jurists usually cite a narration from the Prophet (PBUH) according to which “the soul of a believer depends on his debt until it is payed” (Al-Abi Al-Azhari, 1421 AH: 317).<sup>6</sup>

3- According to some Hanafis, the death of the deceased does not cause the decline of *dhimma*, but weakens it. In this view, the *dhimma* remains only necessary to settle the creditors' rights (Malik Ibn 'Anas, 1323, 2: 148). On the contrary, Abu Yusuf believes that if a will is made for the living and the dead, the will is valid for the living and not for the dead, for the deceased does not have the power of making will (Al-Kasani Al-Hanafi, 1420 AH: 9). In short, according to Hanafi, with death, the *dhimma* is neither disappeared nor remains, rather, it is destroyed.

4. Maliki and some Hanbalis believe that a person's *dhimma* is destroyed by death. If the deceased has left property, the debt will belong to that property, otherwise the debt will be waived. For there is no place to settle the debt yet (Sanhoury, 1988: 18).

### 3- Assets

In Arabic law, following the French law, the title property is used instead of *dhimma*; jurists have used these two terms together shoulder to shoulder, as some professors have quote it in the definition of debt or *ma fi al-dhimma*: “...Claim and the like that belong to the container of property or *dhimma* of a person, whether real or legal (Jafari Langaroudi, 1998: 483).” In this section, the concept of asset (property) in law is first examined. Then we will compare the concept of asset with *dhimma*.

#### 3-1. The concept of asset

Property, in the sense of possessing and having, is the term against “Patrimoine”, referring to the sum of property, claims, and debts. Therefore, in legal terminology, asset includes the dual sum of the positive and negative components of human property (Langaroudi, 2012: 280). The French word “Patrimoine” is derived from the Latin principle “Patrimonium”. The word is structurally similar to words such as “Matrimonium” derived from “Regime Matrimonial” in modern French. The concept of principle meaning the origin and also the concept of authority<sup>7</sup> in this type of vocabulary are intended here. That's why the heritage of father is called “Patrimoine.” Because the legacy left by the father or grandfather is based on their authority. Similarly, “Patrimoine moral” or moral asset, which includes a set of rules left

<sup>5</sup>. Under the narration is mentioned: جزاك الله عن الاسلام خيرا وفك رهانك كما فككت رهان اخيك, in which the word رهان is used for *dhimma*. (see: Hurr 'Amili, Muhammad bin Al-Hassan, Ibid, 18: 424).

<sup>6</sup>. «نفس المومن معلقة بدينه حتى تقضي عنه». (see: Al-Albani, 1408 AH: 313, h. 860-861).

<sup>7</sup>. Auctoritas.

by ancestors and has a moral strategy, is used as well<sup>8</sup> (Robert, 1971: 178). The term “Patrimoine” in legal usage usually refers to the elements of wealth and individual’s richness. In this application, the property includes the property of persons, whether living or non-living, movable and immovable, material or immaterial. The term “Biens patrimoniaux” stands against “Biens extrapatrimoniaux”. The latter is related to the things that the human person possesses, whether in the physical realm of man, such as life, material health, etc., or the spiritual, such as honor, fame, peace, and... (Flour (J), 2002: 55).

Therefore, the boundary between non-financial assets and financial assets is separate. However, it is sometimes seen in the statements of the French courts that the concept of “Patrimoine” has gone beyond its own meaning. As an example, the criminal branch of the Supreme Court of France on May 24, 1860, considered the memory of the deceased to be part of his family's property. But in a special sense, the legal doctrine today deals with the above-mentioned word exclusively in terms of economic components, and in contrast, matters concerning the human body or the human soul are non-financial matters, and the term “extrapatrimoniaux” is used to describe them (Nerson, 1939: 1). Therefore, it can be said that every person has a conventional vessel called asset/property. The set of rights and duties of the persons constitute the asset. The positive and negative components, i.e. the assets of the individuals, are assumed within this conventional container. They are interacting with each other, and neither is independent of the other.

### 3-2. Features of Asset

A. According to law, property is necessary for human personality. Therefore, every person necessarily has an asset, even if the positive component of the asset is very small. Also, each person can have only one asset, which means that just as a person's personality cannot be decomposed, his asset is also independent, although a person can leave a portion of his or her assets to the bank for the purchase of real properties.

B. The set of assets of a person provides him with a respectable and necessary realm of territory, which, both in terms of reduction and addition to that component, in the authorized cases, requires his acceptance or at least his consent.

C. Assets are the manifestation of a person's personality and legal authority, and in this regard, the followings are mentioned:

1. We can never imagine a character without possessions, even a newborn baby and an old man whose death has not been confirmed by forensic medicine.
- 2- From the beginning of the baby's life, he has assets because the child has the ability to enjoy it by achieving the ability to resign.
3. Each person has an asset (the principle of unity and the indivisibility of the asset). Otherwise, creditors cannot have collateral right for the debtor's property, which is contrary to the principle of unity.
- 4- Assets are not separated from the personality in any way except by the death of the personality after when his assets are transferred to the heirs.

<sup>8</sup>. Terme le plus général par lequel l'on désigne tout ce qui existe et qui est concevable comme un objet unique (concret, abstrait), V.Rey (A) et Rey-Debove(J) et cottez(H), (Sous la direction de Paul Robert).

### 3-3. Applications of Asset

According to what has been said, the asset in one of its applications includes valuable foreign elements that people have in their possession. This economic view of the concept of asset is also seen in the various regulations. That's often the case when it comes to people's assets.

For example, Article 1844-4 of the French Civil Code stipulate that: "a company may transfer its assets." Either Article 1844-5 of the Civil Code speaks of the transfer of property, or Article 878 of the French Civil Code discusses the transfer of an individual's property. The article states that "estate's creditors may apply for the division of the deceased's property by inheritance." The word "Patrimoine" is used in the same sense in Article 272 of the Civil Code. As seen, in this application, it refers to the components of the asset. Beside economic and exchangeable components, jurists have coined other uses, such as "the property of the nation" or "the general property of humanity," which includes many elements, real and artistic. Through its full connection to the wealth of a nation or human beings, they may be considered the owner of that wealth (Weill, 1979: 57). As for the other use of the word, the asset is sometimes used to mean all property. In this application, numerical items and asset's components are not regarded. An asset can have an infinite quantity and only contain one item of property. The question is, may it be imagined that there is no element in the asset, in the sense that the asset has no component? The answer is that there is no limitation. In a situation where the asset is the person's current or future asset set, it may be assumed that the person has that set, but no element is found inside it.<sup>9</sup> In the classic French theory, explained and clarified by Aubry et Rau in their famous work "Cours de droit civil", there is an inseparable link between character and wealth. In this theory, an asset refers to the sum of one's rights and obligations, not to its components. This theory has three main conclusions:

- (A) Only persons, whether legal or real, may have assets. Neither property exists independently, nor may a person be found without it, for in this theory, asset means the ability to create rights and financial obligations.
- B) Each person has only one asset. Asset is also divided to unitary and indivisible, based on the personality. No one can divide his asset into several parts. Rather, the person with all his assets is placed in front of the creditors.
- C) Asset during the lifetime of a person, whether legal or real, is non-transferable to others. What is passed on to others is only the components of the asset. Because no one can transfer power and authority to another. According to French writers, with death, the property is transferred to the heirs (Colin et Capitan, 1953: 61).

As for the principle of unity of asset, it should be added that some laws such as German, British and American laws have considered the desired unity in certain activities, according to which the asset of individuals in those special activities is allocated and separated from their general assets. This theory is called asset allocation theory. French law has not denied this either (Weill, 1979: 57).

In some French views, endowments are described as "the collective allocation of property for a specific purpose."<sup>10</sup> In some French regulations, the endowment is described as "the irreversible allocation of property or rights to the performance of a public benefit activity without the intention of making a profit."<sup>11</sup> One partner limited liability companies are, in fact, formed by a real or legal person through the collective allocation of property to a specific economic or agricultural activity. In the same cases, which follow the theory of asset allocation theory, it is seen that by creating another legal entity, individuals have given a part of their assets to that entity, and thus we are dealing with two or more individuals with separate assets. In this sense, there is no critique of classical theory. In other words, the

<sup>9</sup>. Seriaux, op. cit. n°4, p. 2.

<sup>10</sup>. 2.Cass I civ. 15fev. 1983. bull. Civ.I, n61, cité par seriaux, op. cit. n°4, p.2.

<sup>11</sup>. L.n87- 571 du 23 juill. 1987 art.18 al.1



legislature's purpose of authorizing one partner companies was that traders or farmers allocate a part of their property to professional activities.

In order to separate a part of the property from other properties and also in order to keep other assets away from the pursuit of creditors who claimed the debtor through his professional activities, there are two solutions; The first: traders and farmers can divide their assets into several separate assets. The second: recourse is to the concept of legal personality, such that these persons can establish a company and be the only partner of that company. The second solution has the advantage of maintaining its affinity with public law. Moreover, it is in line with the principle of the unity of one's property (Colin, 1928: 63). Although this solution has preserved the rules related to property, it has created an amazing phenomenon;

As a company is formed with only a single partner and has only one member. That is why the chosen solution requires a change in the concept of the company. The first paragraph of Article 1832 of the French Civil Code provides for the establishment of a company with two or more partners. However, the second paragraph of Article 1833 of the same law states that in some cases, it is possible to establish a company with a single member. This authorization is also prescribed in the second paragraph of Article 1832. It is proved then that in French law, the establishment of a sole proprietorship company is an exception to the rule and is not permitted, save in cases permitted by law.

As for the unity of property and as a violation it may be said that how can it be accepted that a poor person has property? The fact is that this poor person is at least the owner of his own clothes, otherwise his assumption of ownership of the property will not be ruled out. Asset components should not be confused with asset. Assets are created for individuals as a result of the ability to enjoy (*tamattu*).

In our day, the general ability to enjoy, which is the possession of property unlimitedly and the utilization of it, has been known to human beings from the time of sperm fertilization until their death.

Today, there are no longer slavery companies or conditions in which a woman was deprived of her rights through marriage. Civil death has been also stopped since 1854 (Mazeaud, 1985: 27). As for the fetus whose sperm has been coagulated, although not born, an old legal presumption that is now in the ranks of the general rules of law for the fetus, according to the rulings of the courts, has also considered the ability to enjoy inheritance even for fetus.<sup>12</sup>

Article 906 of the French Civil Code stipulates: "... In order to have gratuitous possession between lives, the coagulation of sperm at the time of donation is sufficient, and also for the possession through a will, the coagulation of the legatee is sufficient at the time of the legator's death. However, the gift and the will would not be effective unless the child is born alive." Legal entities, in general, have the capacity to enjoy based on their expertise. Only in exceptional and special cases do these people lose their ability. For example, incompetence due to criminal convictions or legal restrictions due to uncertainty about the activities of a legal entity are such, and except in these cases, legal competence as a result of the existence of assets for legal entities is also in accordance with the rule. In French law, the authors provide other examples of criticism of classical theory. The reference to inheritance rules includes in such cases (Sanhoury, 1988, 1: 217). The reason for this criticism is the acceptance of the optional inheritance from 1804 by the French regulations. The most obvious result of these regulations is that the heir, on the one hand, is the owner of his own personal property and, on the other, the owner of the property left from the deceased as his estate. These two assets are separate from each other until the payment is made to all the creditors of the estate by the property that previously belonged to the deceased and henceforth belongs to the heir. Similarly, creditors of inheritance can separate the estate from the pursuit of the heirs' personal creditors by segregating or dividing the property (Terré, 2002: 158). Article 878 of the Civil Code provides: "Creditors in any circumstances and against any claim may sue for the division of the deceased's property from the heir's property." In this article, "each creditor" means the personal creditors

<sup>12</sup>. Cass.1 civ, 10 dec. 1985, Bull. civ.I. n°339, cité par seriaux, op. cit. n°5, p.3.

of the heir.<sup>13</sup> The non-transferability of a part of a person's property in accordance with the legal and authorized conditions accepted by the French judicial procedure<sup>14</sup>, or the non-seizure of property that is to remain in the holder's possession, or a case arising from the right of return provided by law, all may impair the integrity of the entity's assets. For example, in the latter case one may refer to Articles 368-1 of the French Civil Code, in which stipulates about the inheritance of an adopted child that if he has no descending relatives, the property received from the guardian must be returned to the guardian or heirs of the guardian.

As it is clear from the above examples, sometimes dichotomy in asset is complete and sometimes imperfect. In the first hypothesis for the accumulation of the heir's assets alongside the deceased's property before the settlement of the estate, the dichotomy is complete. But in other assumptions, dichotomy is observed, albeit incompletely. For in all these cases, the property or a set of property is subject to regulations that more or less create an independent set inside the assets. This dichotomy is referred to in French legal literature as "dichotomy while a single mass."<sup>15 16</sup>

### 3-4- Comparison of *dhimma* in Islamic jurisprudence with assets in classical law

Although *dhimma* in Islamic law is very similar to the concept of property in French law, a comparison of the two concepts shows differences that are examined below.

A) In classical French theory, at the beginning of this theory, property included exclusively the financial rights of individuals over concrete objects. In other words, a person's asset was a set of assets on which a person had an objective right. Thus, the debt rights of individuals were not considered his property. Later, jurists, in order to create harmony between debt and objective rights in this regard, widely assumed debts that a person were obliged to perform as included in his property (Planiol, 1952: 15).<sup>17</sup> In one of his writings, Mazeaud states: "The debtor commits to a normal obligation with all his property, which simultaneously includes debt and obligation..." (Mazeaud, 1985: 73)<sup>18</sup>. While some classical French jurists with an analysis based on the text, in the Article 2092 of the French Civil Code does not infer that debt is to be an asset. The article stipulates that "anyone who is personally liable is required to fulfill his obligation through all his movable and immovable property as well as his present and future asset." As seen, this article is related to a person's positive asset. This doctrine was however disputed (Sériaux, 1992: 3). Some regulations also tend to summarize the concept of asset exclusively in a person's inventory, both in principle and in causerie. For example, Article 272 of the French Civil Code, after referring to the word "Patrimoine" and as an explanation, refers only to the principle and causeries and the positive elements of the asset. On the contrary, in Islamic law and according to popular opinion, it belongs to all general objectives. Therefore, as a rule, general claims and general debts are assigned to individuals' *dhimma*. That is why it is not correct to discharge the concrete objects. For it is the subject of *ma fi al-dhimma* (Shahidi Thani, 1398, 4: 357). Hence, if in the lease contract, the lessee has leased the property benefits for ten million Rials for a period of one year, the landlord can discharge the tenant's *dhimma* (lien) to it. However, the lessee cannot discharge the lessor's *dhimma* to the beneficiary. But, he can waive his objective right to property.

(B) In classical and ancient Roman law, the obligation was a personal relationship between a debtor and a creditor, and it was not possible to transfer it from both the debtor or the creditor. Because every creditor has a special manner, such as stubbornness or negligence. Just as each debtor has a certain morality, such as being loyal to his promises. Each of these attributes plays an important role in the value of debt

<sup>13</sup>. Civ. 15juill 1891. Cité par seriaux, op. cit. n°6, p.3.

<sup>14</sup>. Cass 1er civ. octobre.1985, Bull.civ.I.n°252. cité par seriaux op. cit. n°6, p.3.

<sup>15</sup>. To refer to this dichotomy in French legal texts, the phrase "Dualisme larve" is used. We preferred to use "dichotomy while a single mass" instead of its translation.

<sup>16</sup>. Seriaux, op. cit, n°6, p. 3.

<sup>17</sup>. Planiol et Ripert, Traité pratique de droit civil français, t.3, Les biens, 1952, LGDJ, n°15.

<sup>18</sup>. Le débiteur d'une obligation ordinaire est tenu sur tout son patrimoine qui supporte à la fois la schuld (dette) et la Haftung (contrainte) v. mazeaud, op. cit. n°9, p. 12.

(Tavakoli Kermani, 2001: 19). For this reason, in the traditional Roman view, instead of transferring debt or claim, it was to change it to a commitment, and then in this view, the main commitment with all its features would disappear and another commitment would be made instead. These ideas were later modified in France, but some of its effects remained. At the same time, classical French writers allowed also the forcible (legal) transfer of debt through inheritance. According to classical professors, the container of property in which the rights and financial obligations of the deceased are accumulated, remains after his death. But it is impossible to remain this vessel without connecting it to the person. Therefore, the property is inevitably attributed to the deceased's heir as his successor. That is why it is said in French law that the heir is the successor of the deceased's character. According to this theory, by the death, the dead's rights and debts are transferred to the heir immediately. Of course, the heir, especially if the deceased's debt is more than the positive rights and components of his property, can reject the estate, or, provided that they observe all estates and estimate their amount to debts, accept it. Article 774 of the French Civil Code stipulates: "Inheritance may be accepted unconditionally or simply, or provided that it is taken into account and its measurement is estimated in relation to debt."<sup>19</sup> In the latter case, the heir are responsible for the debt of the inheritance only for the amount of the positive components of the will. Thus, in French law, the death of a person will end his *dhimma* as well, though all his property and debts are transferred to the heir. However, in Islamic jurisprudence, there is no consensus on the time of the end of *dhimma*, as mentioned before. Although some have commented on the end of *dhimma*, many Sunni writers believe that *dhimma* will remain even after his death (Malik Ibn Anas, 1323 AH, 2: 148 and Mohaghegh Hilli, 1413 AH, 13: 348). There are some Imami authentic narrations such as Al-Za'im Gharim's in order to prove this theory. Thus in Islamic law, the acquittal of the debtor deceased's *dhimma* is allowed and accepted (Sheikh Tusi, nd: 309 and Ibn Idrīs, 1410 AH, 2: 53).

C) In classical French law, following Roman law, by the death, not only the dead's property and financial rights became the property of the heir, but also all his debts and obligations were transferred to the heir. The heir had to pay the deceased's debts from the estate and in case of lack of property or insufficiency of the estate, they were responsible to pay the dead's debts themselves. But in Islamic law, the heirs only own the deceased's property, for the deceased's character ends with his death. Thus, with the death of the deceased, the estate is recognized as the guarantor for the creditors' claims, without changing the debt right into the main objective right in the estate.

D) In classical French law, an asset consists only of a set of individual financial rights and obligations, as well as whatever has financial value. Thus, the political rights of individuals or the rights placed in the human rights framework, such as the right to life and liberty and the like, are not related to property. Lawsuits related to the civil status of individuals, such as marital or lineage claims and the like, though they may have financial effects, are not themselves considered as personal assets and are not included in a person's property. Therefore, all the concrete objective rights of individuals, whether original or subordinate such as ownership, right of easement, exploitation, mortgage, and the like, as well as debt rights, are within the property of individuals. Similarly, the financial aspects of the rights to literary and artistic property are within the property, in contrast to non-financial aspects. In other side, the content of *dhimma* in Islamic jurisprudence is different; Islamic jurisprudence is not limited to the financial rights of individuals, and other rights and duties, even non-financial, are established in their *dhimma*. Some Islamic duties and obligations that have no financial aspect, such as prayer, fasting, Hajj, and the like, are in the *dhimma* of individuals. That is why sometimes it is said that someone has few months or prayers on his *dhimma*. Similarly, some of the duties and acts of worship that have financial aspects, such as khums (one fifth of property), zakat (alms-giving), fitriyah or fitrah (alms-giving in the fitr feast), and the like, are also included in the *dhimma* (Montazari, 1415 AH, 1: 105). Therefore, the scope of the *dhimma* in Islamic law is more widely than Western law. Instead, the concept of asset in current French law includes all financial rights.

<sup>19</sup>. Art.774: Une succession peut être acceptée purement et simplement ou sous bénéfice d'inventaire.

E) Some writers of Islamic law discuss the destruction of *dhimma* or even the occurrence of defects on it. As mentioned above, according to Shafi'i, after the death, the deceased's *dhimma* neither disappears nor remains as he did during his lifetime. Rather, it is destroyed (Ibn Qudamah al-Maqdisi, 1424 AH: 311). Some have also said about the bill of exchange: Whenever the bill is established to the indebted (*mashqul al-dhimma*) and after the contract it becomes clear that he was insolvent, the creditor (*muhtal*) has the right to cancel it. Because the *dhimma* of the drawee (*mahalun alayh*) is defective due to his insolvency. This option is actually a redhibition.<sup>20</sup> Although the occurrence of a defect on *dhimma* or its destruction has been less specified and such interpretations have not been prevalent, it can indicate the jurists' different perception of the concept of *dhimma*. This statement, along with other views such as the continuance of *dhimma* even after the death of its owner, indicates bestowing a legal personality, even if incomplete, to the *dhimma*. In French law, on the other hand, property is generally considered to be a set of property whose elements and components have become an indivisible whole. That is why attributing features such as defect and destruction to property is impossible in French law (Sanhoury, 1998: 19).

## Conclusion

*Dhimma* is closely related to terms such as covenant, commitment, obligation, guarantee, debt, capacity, etc., and in the sense of jurisprudence and law, it is the very covenant, taking all the requirements and obligations. So some jurists and Islamic jurists considered the *dhimma* as synonymous to above terms, especially liability and capacity. However, liability and *dhimma* respectively are as the same as imperative and positive rules, in opposition to each other. The relation between them is generality and peculiarity in some respect. Also, the assumption of the existence of *dhimma* is prior to all other terms. Every person has an objective vessel called asset, so it requires the human personality and the set of rights and duties of the individuals constitutes the asset. The positive and negative components, i.e. the components of individuals' assets are assumed to be within this objective vessel. Comparing the concept of *dhimma* in Islamic law, which is often considered a container of generalities and religious law, with the concept of asset in French law, which is rooted in Roman law, shows significant differences. Among the differences is that in the asset theory and at the beginning of its advent, the asset exclusively included the financial rights of individuals over concrete objective properties. Lawyers later explicitly assumed that the obligations of a person were within the person's property, so they can establish harmony between objective and debt rights in this regard. However, according to popular opinion, save in exceptional cases, the *dhimma* is considered exclusively a general container.

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<sup>20</sup>. To study about this theory, see Jafari Langaroudi, 2003:120. To see about jurisprudential views on this issue, see: Najafi, nd, 26: 165.

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