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The Epistemology and Ethics of Taklif: An Analysis of the Legal Subjectivity of the Majnūn

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Abstract

Legal subjectivity, particularly that of the majnūn (insane), is an understudied topic that is often only glossed over or nominally referenced in academic scholarship on Islamic jurisprudence. In attempting to fill this gap in scholarship, this article aims at examining the epistemological and ethical dimensions of legal subjectivity, particularly as it relates to the insane. The article takes the concept of taklīf in classical Ash'arite works of jurisprudence as the center of its analysis of legal subjectivity. Taklīf, its characteristics, the relationship between the law giver and the legal subject, and the host of epistemological and ethical assumptions embedded in assigning legal subjectivity to certain individuals and excluding others from it, were among the main issues that classical Muslim jurists grappled with. Understanding the concept of taklīf as a form of prescriptive speech, Ash'arite jurist-theologians went on to articulate a theory of legal subjectivity that emphasized the mental capability of the legal subject to comprehend the moral import of divine prescriptive address and to respond to it with cognizant and intentional obedience. In stressing the value of cognitive ability, Ash'arī jurists contended that the majnūn's comprehending capacity fell short of the level necessary to acquire legal subjectivity. Beyond the issue of the legal subjectivity of the insane, studying the concept of taklīf allows us to understand severe ways in which Ash'arī jurists conceived of reason/rationality, the relationship between intentionality, knowledge and action, and the nature of divine speech and its normative value.

Abstrak

Subjektivitas hukum, terutama terkait majnūn (orang gila), adalah topik yang jarang dikaji atau hanya mendapatkan perhatian sepintas di kesarjanaan hukum Islam. Untuk mengisi ruang kosong tersebut, artikel ini berupaya mengkaji dimensi epistemologis dan etis subjektifitas hukum, terutama terkait isu orang gila. Artikel ini mengambil konsep taklīf dalam karya-karya hukum klasik mazhab Asyʿari sebagai titik pusat kajian atas isu subjektifitas hukum. Taklīf, karakteristiknya, dan hubungan antara pembuat undang-undang dan subjek hukum, serta seperangkat asumsi-asumsi epistemologis dan etis yang dijadikan alasan untuk menetapkan seseorang dan melepaskan orang yang lain dari taklīf adalah isu utama yang diperdebatkan oleh para pakar hukum Muslim klasik. Berangkat dari pandangan bahwa konsep taklīf adalah satu bentuk prescriptive speech (bahasa yang mengikat/menentukan), pakar hukum dan teolog mazhab Asyʿari membangun teori subjektifitas hukum yang menitikberatkan pada kemampuan mental subjek hukum untuk memahami nilai moral dari ketentuan ilahiah yang diberikan dan meresponnya dengan kepatuhan yang sadar dan disengaja. Untuk menjelaskan arti penting dari kemampuan kognitif, pakar hukum mazhab Asyʿari berargumen bahwa kemampuan orang gila dalam memahami sesuatu tidak mencapai level yang dibutuhkan untuk memperoleh subjektifitas hukum. Di atas isu subjektifitas hukum orang gila, studi mengenai konsep taklif ini menjelaskan sejumlah cara yang digunakan oleh mazhab Asyʿari memahami akal/rasionalitas, hubungan antara kesengajaan, ilmu, dan tidakan, dan karakter dari kalam ilahiah serta nilai normatifnya.

Keywords: *Taklīf*; *Majnūn*; Legal subjectivity; Islamic jurisprudence; Ash'arites

Introduction

What is it about classical Muslim jurist's conception of legal subjectivity that left the *majnūn* (insane) outside the law's domain of address? It is often explained that the *majnūn*, being deprived of the faculty of reason and discernment, is not legally responsible for his actions both in this world—in front of judges and courts—and in the hereafter as his actions carry no negative consequential moral value in the eyes of the lawgiver. However, embedded in this emphasis on reason and discernment as grounds of legal subjectivity, is a range of epistemic and ethical assumptions that are often not readily or comprehensively articulated when addressing the legal subjectivity of the *majnūn*.

These assumptions, nonetheless, can be found scattered throughout various theoretical discussions within classical works of jurisprudence. The purpose of this paper is to examine these discussions as they are found in the works of Ash'arī jurist-theologians and to use this analysis to make intelligible the epistemological and ethical assumptions that played into the way Ash'arī jurists understood the legal subjectivity of the *majnūn*. In doing so, I hope to shed light on the way these jurist-theologians understood reason/rationality, the relationship between intentionality, knowledge and action, and the nature of divine prescriptive speech and the functions it serves.

The texts used in my inquiry are restricted to the works of five Ash'arī jurist-theologians[1] who are all—with the exception of the Malikī al-Bāqillanī (d.1013)— Shāfiʿī jurists from the early to the late classical period (10th-15th centuries). There are two main reasons for restricting my analysis to Ash'arī jurists. The first has to do with the type of jurists that I am choosing to focus on and on the role of theology in orienting many of their epistemological and ethical assumptions that grounds their conception of *taklīf.*

The set of texts of jurisprudence which I examine in this essay belong to a stream of Muslim jurists who are commonly classified as *al-fuqahāʾ al-mutakallimūn* (jurist-theologians). These jurists are unique in the way they rely on *kalām* postulates and the epistemological and ethical assumptions associated with them in developing a range of legal principles. The works of these jurists are particularly pertinent because they highlight the importance of *taklīf* as an idea that is conceptually situated at the intersection between theology and jurisprudence. The other reason behind choosing to examine Ash'arī jurist-theologians has to do with the fact that the only comprehensive work[2] that has been so far done on the legal subjectivity of the *majnūn* was accomplished through an analysis of Ḥanafī texts of jurisprudence. Therefore, focusing on Ash'arī jurists allows us to both extend that analysis to them and pose different questions about legal subjectivity that are particular to Ash'arī jurisprudence.

Mental Disability in Islamic law and the *Majnūn* as an Object of Definition

Within the larger corpus of Islamic legal texts, one often finds that mental disability is often categorized into four general levels of severity. The most sever is what is termed as *junūn* (insanity). In addition to insanity, Islamic legal text identified "at least three lesser mental conditions of varying severities, namely mental impairment (*ʿatah*), sudden disorientation (*dahsh*), and financial improvidence (*safah*)."[3] While each of these categories of mental disability and the legal discussions

[1] Al-Bāqillanī (d.1013), al-Juwaynī (d.1085), al-Ghazālī (d.1111), al-Āmidī (d.1233), and al-Zarkashī (d.1392).

[2] See: Mian, Ali Altaf. "Mental Disability in Medieval Hanafī Legalism." *Islamic Studies* 51, no. 3 (2012): 247-62. http://www.jstor.org/stable/43049909.

[3] Ali, Bilal and Hooman Keshavarzi. "Forensic Psychiatry." In *The Encyclopedia of Islamic Bioethics*. Oxford Islamic Studies Online, *http://www.oxfordislamicstudies.com.proxy.uchicago.edu/article/opr/t9002/e0250.*

associated with them warrants serious study, this paper is going to focus primarily on the category of insanity as personified by the *majnūn* (the insane). This, however, does not negate that there is legal, ethical, and epistemological overlap between the discussions about the legal subjectivity of the *majnūn* and that of the other categories of mental disability.

When examining the topic of insanity in classical works of Ash'arī jurisprudence, one of first challenges that is commonly faced is the absence of any explicit or elaborate definition of insanity. References to insanity often juxtapose the *majnūn* (insane) with the *'āql* (rational individual). However, beyond this juxtaposition it is hard to find any elaborate description of who the insane is and what the condition of insanity functionally means. In his study of Madness in medieval Muslim societies, Dols complains that "the jurists dealt with insanity in a brief, indirect, and often cursory manner; the legal notion of insanity is itself quite imprecise and ambiguous."[4] While this might generally be true in that, the definitions of insanity that the jurists formulated are often non-empirical and ambiguous, recent scholars have considered the ambiguity to be intentional on the part of jurists. By leaving the definition of insanity vague, Muslim jurists are thought to have allowed for "flexibility in judgment and to encompass a wide plethora of abnormal behaviors, including sleep disorders, mental retardation, dissociative rage, and perhaps even personality disorders."[5] In terms of the problem of brevity of treatment, recent studies point that the jurists dealt with the issue of mental disability and the legal subjectivity of the insane in a more elaborate manner than previously thought.

In his excellent study of mental disability in Hanafi jurisprudence, Mian points out that, relying on medical and popular understanding of mental illness, Hanafi jurists provided several definitions of *junūn* such as "the non-existence of intellect and discernment, or the opposite of intellect and reason, or the detraction of intellect, in which the consistent stream of rational action and speech is disrupted."[6] In addition, Hanafi jurists distinguished between two types of mental disability the first being *'atah* (mental impairment) and *junūn* (insanity). They further provided subcategories for both *junūn* and *'atah* such as their distinction between *junūn 'aradi* (temporal madness) and *junūn mustaw'ib* (perpetual madness).[7] Nonetheless, the case still remains that Ash'arī works of jurisprudence are lacking in explicit descriptions of *junūn* and its various types. Given the fact that these descriptions, as Mian mentions, rely on medical and popular understanding of mental disability, then one can safely assume that Ash'arī jurists were aware of these descriptions and, as will become clear within this essay, they implicitly adopted them into their understanding of the legal subjectivity of the *majnūn*.

On *Taklīf* and *Khiṭāb*

When thinking about legal subjectivity in Islamic jurisprudence, the most important concept that one must examine is the concept of *taklīf*. *Taklīf* is generally understood to denote "an imposition on the part of God of obligations on his creatures, of subjecting them to a law."[8] Drawing their definition of *takilf* from the lexicon, Ash'arī jurists articulated *taklīf* as an act of imposition that causes a certain hardship or difficulty on the part of the *mukallaf* (legal subject). For example, al-Bāqillanī defines *taklīf*

[4] Dols, Michael W. (Michael Walters), and Diana E. Immisch. Majnūn*: The Madman in Medieval Islamic Society*. Oxford : New York: Clarendon Press ; Oxford University Press, 1992. 451

[5] Ali, Bilal and Hooman Keshavarzi. "Forensic Psychiatry."

[6] Ali Altaf Mian. "Mental Disability in Medieval Hanafī Legalism." 253

[7] Ali Altaf Mian, 254

[8] Gimaret, D. 'Taklīf'. In *Encyclopedia of Islam*, Second Edition, edited by Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W. Heinrichs, J. Bearman (Volumes X, XI, XII), Th. Bianquis (Volumes X, XI, XII), et al. Accessed December 10, 2019. doi:http://dx.doi.org/10.1163/1573-3912_islam_SIM_7344.

as "imposing on [the servant] what the servant finds a burden and hardship in."[9]

Similarly, al-Juwaynī (d.1085) understands *taklīf* to be of the nature of an imposition that puts a burden on the legal subject but he adds the qualification that *takilf* carries with it the meaning of *taṭwiq* (boundedness), therefore, it excludes legal injunctions that fall under the meaning of recommendation (*nadb*) or discouragement (*karahiyyah*).[10] The notion of imposition that comes up in the way the jurists define *taklīf* is quite significant because it points to the moral/ethical status of Islamic law. The injunctions that are imposed through *taklīf*, whether they be commands or prohibitions, aren't understood by Ash'arī jurists to be reflective of any natural moral order or a natural human disposition. Al-Ghazali articulates this fact when he mentions, as part of his definition of *taklīf*, that the injunctions imposed by the process of *talkif* aren't based on what the individual is naturally inclined to or repulsed by.[11] Rather, they are a form of burden that one takes on in order to earn the pleasure of the law giver.

There is also another dimension to the idea of *taklīf* that is related to this previous discussion about imposition which is concerned with the question of the origin of subjectivity to the law. From the perspective of Ash'arī jurists-theologians, the relationship between the internal dispositions of the legal subject and the law as the divine address that induces legal subjectivity isn't necessarily one of compatibility. Classical Ash'arī jurist-theologians contended that ethical value judgments are "subjective and refer, not to any items of knowledge of real and objective attributes in the act itself, but to emotive impulses that arise within the agent in reaction to acts and occurrences."[12] In line with this anti-realist ethical subjectivism, classical Ash'arites resorted for a definition of legal subjectivity that situated revelation as the "sole legitimate source for norms that govern human action and behavior."[13] What this does to our perceptive of *taklīf* and its function, as understood by Ash'arī jurists, is that one is unable to arrive naturally or by virtue of reason alone at the idea that one is *obligated* to perform certain actions and refrain from others.

The jurists argued that the imperative to perform or refrain from certain actions is achieved through the process of *khiṭāb* (divine communicative/prescriptive speech.) Therefore, the notion of *khiṭāb* is theoretically inseparable from the notion of *taklīf*. In fact, *taklīf* is theorized by the jurists as a form of *khiṭāb*. However, before going into details about this relationship of synonymity between *taklīf* and *khiṭāb*, it is important to introduce the concept of *al-hukm al-shar'iī* (revelatory ruling). A revelatory ruling is commonly defined by the jurists as a divine prescriptive speech (*khiṭāb*) that is concerned with the actions of those who are legally responsible i.e. *mukallaf*.[14] Therefore, the range of normative actions which are expected of the legal subject fall under the notion of *aḥkām shar'iyya* (revelatory rulings). The reason why the notion of revelatory rulings is important in our context here is because it further clarifies the concept of *taklīf* and its relationship to divine communication.

[9] Bāqillānī, Muḥammad ibn al-Ṭayyib, and ʿAbd al-Ḥamīd ʿAlī Abū Zunayd. *Taqrīb Wa-al-Irshād "al-Ṣaghīr"*. al-Ṭabʿah 1. [Beirut?]: Muʾassasat al-Risālah, 1993. 1/239

[10] Imām al-Ḥaramayn al-Juwaynī, ʿAbd al-Malik ibn ʿAbd Allāh, and ʿAbd al-ʿAẓīm Dīb. *Al-Burhān Fī Uṣūl Al-fiqh*: Makhṭūṭ Yunshar Li-awwal Marrah. al-Ṭabʿah 2. al-Qāhirah: tawzīʿ Dār al-Anṣār, 1980. 101

[11] Ghazālī, and ʿAbd al-Malik ibn ʿAbd Allāh Imām al-Ḥaramayn al-Juwaynī. *Al-Mankhūl Min Taʿlīqāt Al-Uṣūl*. معناه: الحمل على ما فيه مشقه-ويندرج تحته الايجاب و الحضر- لا وفق ما) 21 يتشوف اليه الطبع او ينبو عنه)

[12] Shihadeh, Aymen."Theories of Ethical Value in Kalām: A New Interpretation," in Sabine Schmidtke --, et al. *The Oxford Handbook of Islamic Theology*. Oxford, United Kingdom: Oxford University Press, 2016, 400

[13] Shihadeh, Aymen."Theories of Ethical Value in Kalām: A New Interpretation," in Sabine Schmidtke --, et al. *The Oxford Handbook of Islamic Theology*. 402

[14] See: Ghazālī, and ʿAbd al-Malik ibn ʿAbd Allāh Imām al-Ḥaramayn al-Juwaynī. *Al-Mankhūl Min Taʿlīqāt Al-Uṣūl*. [Dimashq?,] 1970. 21

The revelatory rulings of Islamic law function as "a meeting point—for jurists, the meeting point—between the divine and the human, a meeting that takes place in the realm of language."[15] This idea of a meeting point between the Divine and Human that prescriptive speech makes possible, points to the kind of relationship between God and humans that is embedded in the concept of *taklīf*. In this relationship, God is the law giver and human as legal subjects are the recipients of the law. *Khiṭāb*, as prescriptive speech carrying revelatory rulings, constitutes the relationship as one of *taklīf*. A relationship of the imposition of certain moral injunctions from the law giver onto the legal subject. Thus, putting these elements in context with each other helps one gain a holistic image of *taklīf*, how it relates to the idea of *khiṭāb* and how it defines the relationship between the law giver and the legally responsible. Yet, the idea of *khiṭāb* and its relation to *taklīf* still requires more elaboration in order to unearth some of its nuances.

Khiṭāb as a term denoting divine prescriptive speech presupposes the existence of two sides of communication; an addressor and addressee.[16] For the jurists, the fact that in this communicative act God is the addressor and humans are the addressees doesn't alter the nature and character of communication. In so far as it is a form of communication, Divine prescriptive speech is not understood by the jurists to poses any special characteristics that differentiate it from normal human communicative acts. Just as any human communicative act, *khiṭāb* is understood to have certain characteristics that makes it an intelligible communication and which gives it a performative value. There is one main characteristic that is at the root of what *khiṭāb* is and what it is supposed to achieve. As a communicative/prescriptive speech between God and the legally responsible individual, *khiṭāb* is understood to perform one main function which is to create understanding (*ifham*) in the mind of the addressee. In other words, this entails that both the speech of the addressor should be intelligible and that the addressee should be able to understand it. This is articulated most clearly in al-Āmidī's (d. 1233) definition of *khiṭāb*. He mentions that *khiṭāb* is "the utterance, on which there is a common convention as to its coinage (*al-mutawaḍa'a 'alih*), which is intended by it the creation of understanding on whom is equipped to understand."[17] Similarly, al-Ghazali emphasizes the intelligibility factor in speech by arguing that "the condition of *khiṭāb* is that it should be understood."[18] The centrality of this condition can't be overstated because, as it will be clear later in the essay, it is upon it that the functionality of *taklīf* depends. For now, it is important to describe the types of *khiṭāb* discussed by the jurists and how each type relates to its addressee.

Khiṭāb is divided by the jurists into two types: *khiṭāb al-taklīf* and *khiṭāb al-waḍ'h*. This division is based on several distinctions between those two types of *khiṭāb* but the main ones are the fact that *khiṭāb al-taklīf* is directly concerned with the *acquired actions* of the legally responsible whereas *khiṭāb al-waḍ'h* is generally

[15] Powers, Paul. "Finding God and Humanity in Language: Islamic Legal Assessments as the Meeting Point of the Divine and Human," in Sluglett, Peter, Bernard G. Weiss, A. Kevin Reinhart, and R. Gleave. 2014. *Islamic Law in Theory : Studies on Jurisprudence in Honor of Bernard Weiss*. Studies in Islamic Law and Society. Leiden: Brill. 200 http://search.ebscohost.com.proxy.uchicago.edu/login.aspx?direct=true&db=e000xna&AN=782414&site=ehost-live&scope=site.

[16] There is a difference of opinion between Ash'arī jurist-theologians as to whether or not its accurate to call God's speech a *khiṭāb* given that for Ash'ariets God's speech is eternal and a *khiṭāb* presupposes the existence of an addressee. However, in our context the term *khiṭāb* is applicable because it takes into the consideration the existence of the addressee. For the view that finds the term *khiṭāb* problematic see: Bāqillānī, *Taqrīb Wa-al-irshād "al-ṣaghīr"*. 235-236; For the view that takes it be appropriate see: Zarkashī, *Al-Bahr Al-muḥīṭ Fī Uṣūl Al-Fiqh*. 126

[17] Āmidī, 'Alī ibn Abī 'Alī, and al-Sayyid Jumaylī. *Al-Iḥkām Fī Uṣūl Al-Aḥkām*. al-Ṭab'ah 1. Bayrūt, Lubnān: Dār al-Kitāb al-'Arabī, 1984. 136

[18] Ghazālī, *Al-Mankhul Min Ta'līqāt Al-Uṣūl*. 28

concerned with the host of conditions and casual relations that are necessary for the enacting or suspense of actions required by *khiṭāb al-taklīf*.[19]Another way of describing the difference between these two types of *khiṭāb* is to point out that while the former is prescriptive and evaluative, the latter is correlative and designative. *Khiṭāb al-taklīf* is prescriptive because it relates to actions by prescribing them as one of these categories; *wajib* (obligatory), *mandub* (recommended), *mubaḥ* (neutral), *makruh* (discouraged), *ḥaram* (prohibited).[20] Whereas, *khiṭāb al-waḍ'h* relates indirectly to actions by designating certain aspects related to actions as *sabab* (cause), *shart* (condition), *mān'i* (inhibition) and by categorizing certain contracts as *ṣaḥīḥ* (valid) and *bāṭil* (null). It is important to note, that even though *khiṭāb al-waḍ'h* is not concerned with acquired actions directly, it *does* relate to the actions of certain individuals such as the insane.

In the case of non-legally responsible individuals such as children or the insane, their actions fall under *khiṭāb al-waḍ'h*. However, under *khiṭāb al-waḍ'h*, the actions of the insane are not addressed in terms of their normative value, but it is primarily dealt with in terms of the material consequences of the actions. In the context of enumerating the differences between the types of *khiṭāb*, al-Zarkashī (d. 1392) mentions that *khiṭāb al-takilf* "relates only to the actions of the legally responsible (*mukallaf*), and the *waḍ'i* relates to the actions of the non-legally responsible, for if a beast or a child destroyed something then the owner of the beast or the custodian of child insures [the replacement of that which was destroyed]."[21] In this case, *khiṭāb al-waḍ'h* functions as a protective measure for both the non-legally responsible, in that they aren't subject to punishment for any destructive actions that they might commit, and for the party who might be affected by that destructive actions.

Up to this point, the discussion has centered on the nature of *taklīf* as well as the nature of the Divine prescriptive speech, but the *addressee* of this speech has only been rudimentarily described as the legal subject (*mukallaf*). However, understanding the legal subject, her characteristics, and the conditions under which her actions carry normative value, is important if we are to adequately understand the nature of *taklīf*. In fact, understanding what type of legal subject the jurists had in mind when they spoke about *taklīf* will ultimately help us understand their views on the legal subjectivity of the insane.

The Characteristics of *Mukallaf* (Legal Subject)

There are several conditions that the jurists described as being integral in making one legally responsible. Among the most important ones are maturity, reason, and understanding /comprehension.[22] Legal maturity (*bulūġ*) is understood to be the point at which one's rational capacity becomes fully developed. The development of one's rational capacity is often understood by the jurists to occur on the occasion of puberty. However, this is not to say that the jurists saw any natural or necessary connection between the advent of puberty and rationality. In fact, they recognized that a child may possess the degree of rational capacity necessary for *taklīf* prior to reaching puberty. For the jurists, though, puberty functioned as a practical and concrete sign that marks the perfection of one's faculty of discernment. Al-Āmidī mentions that " because reason and understanding is hidden in him [the child], and its appearance in him is gradual, and that it does not have a criterion by which to know it, the law giver designated for it a criterion, and it's puberty, and he exempted him from *taklīf* prior to it out of easiness."[23] As a condition for

19. For more details see: Zarkashī, Muḥammad ibn Bahādur, 'Abd al-Qādir 'Abd Allāh 'Ānī, and 'Umar Sulaymān Ashqar. *Al-Baḥr Al-Muḥīṭ Fī Uṣūl*. 127-132

20. Zarkashī, Al-Baḥr Al-muḥīṭ Fī Uṣūl Al-fiqh. 127; Āmidī, *Al-Iḥkām Fī Uṣūl Al-Aḥkām*. 96

21. Zarkashī, *Al-Baḥr Al-Muḥīṭ Fī Uṣūl Al-Fiqh*. 128

22. See: Āmidī, *Al-Iḥkām Fī Uṣūl Al-Aḥkām*. 199-200; For an extended treatment see: Zarkashī, *Baḥr*. 344-384.

23. Āmidī, *Iḥkam*, 151

taklīf, maturity is inseparable from the second condition which is reason/rationality. If maturity is the occasion of rationality, what exactly do Ash'arī jurists understand rationality to be?

The definition of reason in the Islamic intellectual tradition is articulated differently depending on the scholarly literature that it occurs in and even within the same kind of literature there exists certain variances on what reason is understood to be. For example, in the works of jurisprudence— which we are primarily dealing with— reason has been defined in many variant ways. Al-Bāqillanī defines *'aql* (reason) as "some of the necessary types of knowledge that is particular to those who are rational, such as; knowing that opposites don't concur[simultaneously], and that what is known can either be existent or non-existent,… and that two is more than one, …. So whoever has these types of knowledge is *'āqil* (rational) and *mukallaf* (legally responsible)."[24]

Following al-Bāqillanī, al-Juwaynī defines reason as those types of knowledge that "are never absent from a rational person, and which he doesn't share with non-rational persons…" and they are " knowing the possibility of what is [rationally] possible, and the impossibility of what is [rationally] impossible…"[25] However, in another context he provides a different and rather broader definition which considers reason to be a human disposition which functions as condition for knowledge and not a type of knowledge.[26] What is interesting about al-Juwaynī's former definition of reason is that it allows us to understand some of the discrepancies that one finds in the definitions of *'aql* that are provided by the jurists-theologians.

Al-Juwaynī reminds us that when providing a particular definition of reason, in his case defining reason as a type of necessary knowledge, he doesn't negate the idea that reason (*'aql*) is a word used for different meanings, rather, the "purpose is to describe the *'aql* that is a condition for *taklīf* and which if a person is devoid of she wouldn't be able to know what she is held accountable for."[27] In other words, when defining reason the jurists didn't necessarily have a universal category in mind, but that their definition of reason is often qualified by the context and subject that they are addressing. Keeping the previous definitions in mind, what does it mean to consider reason to be a type of necessary knowledge?

When one examines the types of necessary knowledge that are designated to be constitutive of reason, one finds that, unlike the epistemologically orientated understanding of reason articulated in works of Ash'arī theology[28], the root of what reason meant in the context of Ash'arī jurisprudence is a capacity for discernment and of distinguishing benefit from harm. In fact, within the discussions of *taklīf*, the jurists often follow the term *'aql* (reason) with the term *tamyīz* (discernment). Those two terms are almost always mentioned together when the jurists describe the conditions of *taklīf*. It is as if the jurists are trying to point out that the condition of rationality is a condition of discernment by which an agent is able to generally distinguish between what is real and what is not and of what is beneficial and what is harmful. Reason as a capacity of discernment is related to and is complemented by the third condition of *taklīf*; that is *fahm*.

Fahm (comprehension) is one of the most emphasized conditions of *taklīf*. It appears in definitions of *taklīf*, in discussions about various issues (*masa'il*) related to *taklīf* such as the issue

24. Bāqillanī, *Taqrīb*, 197

25. Imām al-Ḥaramayn al-Juwaynī, ʿAbd al-Malik ibn ʿAbd Allāh, Muḥammad Yūsuf Mūsá, and ʿAlī ʿAbd al-Munʿim ʿAbd al-Ḥamīd Kabīr. *Kitāb Al-Irshād Ilá Qawāṭ'i Al-Adillah Fī Uṣūl Al-I'tiqād*. Miṣr: Maktabat al-Khānjī, 1950. 22

26. Juwaynī, *Burhān*, 112-113

27. Imām al-Ḥaramayn al-Juwaynī, *Kitāb Al-Irshād Ilá Qawāṭ'i Al-Adillah Fī Uṣūl Al-I'tiqād*. 21

28. See: Abrahamov, Binyamin. "Necessary Knowledge in Islamic Theology." *British Journal of Middle Eastern Studies* 20, no. 1 (1993): 20-32. http://www.jstor.org/stable/196077.

taklīf bil muhal (making one responsible of what is impossible to fulfill), and in discussions about conditions of *taklīf*. In a sense, *fahm* expresses all the conditions of *taklīf* at once because one can easily subsume the idea of maturity, rationality, and other conditions under it. There are, however, two important and interconnected ideas that are subsumed under the notion of comprehension and which has not been addressed yet. These ideas are knowledge (*'ilm*) and intentionality/will (*qaṣd*). The jurists argue time and again that for one to respond to the divine address, one must first *comprehend* the address and then respond to it with a particular form of action that requires both knowledge and intentionality. Al-Ghazali mentions that "*taklīf* requires obedience and compliance, and this cannot occur except with an intention/will (*qaṣd*) to comply, and the condition of an intention/will is knowledge of what is intended/willed, and a comprehension (*fahm*) of *talkif*."[29] Of particular importance is the emphasis that the jurists put on the relationship between knowledge and intended action. Al-Zarkashī argues that the "performance of an action as a form of an intended obedience presupposes knowledge of that action."[30] Not only that they emphasized the necessity of knowledge to intended actions, the jurists also describe the types of knowledge that have to be in the mind of the legal subject when performing a certain act.

For actions to be considered as legitimate forms of carrying out obligations or refraining from prohibitions, these actions must be done by the legally responsible with an intention that is both defined i.e. intending to perform a particular action as opposed to another and an intention of obedience. Al-Bāqillanī mentions that for actions to fall under *taklīf* they must be performed by individuals who are characterized by "reason (*'aql*), discernment (*tamyīz*), ability to receive (*talaqqi*) matters of worship, to know them, and to intend [to perform] the imposed actions specifically (*qaṣd ma yukallafunahu bi 'aynihi*).[31] Therefore, a moral agent must not just have a general awareness of the actions she is performing, rather, an action that falls under *taklīf*, necessitates that the moral agent is intimately aware of how, why, and for whom the action is performed.

Al-Āmidī elaborates on the knowledge-action relation by explaining that the addressee of divine prescriptive speech requires a particular level of comprehension of details. He mentions that in comprehending the *khiṭāb* of God, the moral agent must understand that this speech is of the nature of " a command and a prohibition, that it entails reward and punishment, that the one commanding it is God Almighty; that it's obligatory to obey him, and that what is commanded is of the character of such and such…"[32] Within the framework of *taklīf*, knowledge is therefore an integral element of the performance of intentional acts because it imbues actions with moral value. It is knowledge of the type that al-Āmidī mentioned that makes sure that acts are not just heedlessly preformed but that they are specifically carried out as a form of compliance (*imtiṯāl*). Thus, one can see that for the jurists, the notions of maturity, reason, and comprehension complemented each other and together formed the prerequisites of what it means to be a *mukallaf* (legal subject). There is, however, an additional common thread that passes along these conditions of *taklīf* that is worth noting.

The fact that the conditions of *taklīf* which the jurists emphasize the most are mainly of a *cognitive* nature is particularly significant. Ash'arī jurists are not concerned with the notion of ability (*qudrah*) of the legal subject to translate what is imposed on her into concrete actions as much as they are concerned about the legal subject's cognizance of divine speech and the intentional and obedient response to that speech. Of course, this is not to argue that the

[29] Ghazālī, and ʿAbd al-ʿAlī ibn Muḥammad Ansāṛī. Kitāb *Al-Mustasfá Min 'Ilm Al-Usul*. Būlāq, Miṣr: Muṭbaʿah al-Amīrīyah, 1904. 277

[30] Zarkashī, *Baḥr*, 350-351

[31] Bāqillanī, *Taqrīb*, 236

[32] Āmidī, *Iḥkam*, 150

jurists do not address the issue of physical impediments and their inhibiting effect on the performance of obligated acts. In fact, in both their works of jurisprudence and law, the jurists never fail to discuss the ability of the individual to perform the obligations that are imposed on her and they painstakingly enumerate the various *rukhaṣ* (facilitations/alleviations) that are granted to the individual in response to a justifiable inhibiting circumstance (*'uḏur*).[33] However, it still intriguing that in the context of *khiṭāb al-taklīf* the conditions that the jurists emphasize are of a cognitive nature.

The jurist's deep investment in the Ash'arī theological tradition is particularly relevant to their cognitivist understanding of *taklīf*. Their focus on the cognitive nature of *taklīf* as opposed to the element of enacting power and its role in translating intentions into concrete actions is a direct result of their Ash'arī theological leanings on Divine omnipotence and its implication on human's ontology of action. Ashʿarites "emphasized God's monopoly on creative agency in the universe, " in that God for them was "the creator of all things and events, including volitional human action. For this reason, the Ashʿarites did not consider the absence of compulsion or coercion to be a condition of moral responsibility."[34] In other words, within an Ash'arī theological framework, man does not create his actions but acquires or performs them (*kasb*).

Despite the importance of the theory of *kasb* and its theological underpinnings, giving a detailed discussion of it would push us beyond the scope of this paper. What we are concerned with here is how the idea of acquiring one's actions as opposed to freely creating them affect Ash'arī jurist's understanding of the nature of *taklīf*. There is no better example to explain this than the issue of coercion in Ash'arī jurisprudence. Drawing on the idea of *kasb* and its underlying assumptions about physical human agency, "Ash'arites considering the problem of coercion (*'ikrah*) and moral agency arrived at the conclusion that there is nothing inherent in coercion itself that would make its absence a necessary condition for moral agency."[35] We find al-Bāqillanī arguing that:[36]

> a coerced individual isn't coerced except upon what he acquires and what he is enabled of, such as the one coerced to divorce [his wife] or sell [his property] or pronounce disbelief, and all of these actions if they happen they are his acquired actions (*kasbun lah*), and they occur with him being cognizant of them and particularly intending them (*qaṣdihi ilayhi bi 'aynih*) therefore it is valid to hold him legally responsible just as a person who is not coerced is held responsible.

This statement by al-Bāqillanī is particularly revealing because, on the one hand, it highlights the elements of *qaṣd* (intention/will) and *'ilm* (knowledge) as foundations for *taklīf* and, on the other hand, it asserts that both of those elements remain active even if an individual is coerced to perform or refrain from a certain action. Furthermore, the notion that a coerced agent still had the capability of willing an act and being cognizant of it means that coercion does not inhibit an agent's reason. A sound reason was, for the Ash'arites, the ultimate grounds for moral agency and given that "coercion does not compromise an agent's reason, it does not undermine moral agency."[37]

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33. Katz, Marion H. ''Azīma and Rukhṣa'. In *Encyclopedia of Islam*, THREE, edited by Kate Fleet, Gudrun Krämer, Denis Matringe, John Nawas, and Everett Rowson. Accessed December 21, 2019. doi:http://dx.doi.org/10.1163/1573-3912_ei3_SIM_0261.

34. Syed, Mairaj. *Coercion and Responsibility in Islam: A Study in Ethics and Law*. First edition. Oxford, United Kingdom: Oxford University Press, 2017. 28

35. Syed, Mairaj. *Coercion and Responsibility in Islam: A Study in Ethics and Law*. 69

36. Bāqillanī, *Taqrīb*, 250

37. Ibid. 28. Syed mentions that this was the Ash'arites' initial position but that they "subsequently changed this criterion to the capacity to understand speech (*fahm*)." While it is true the Ash'arties came to emphasize the notion of *fahm* as a criterion of moral agency, this shouldn't necessarily mean that the criterion of reason was replaced by that of *fahm* because *fahm* necessitates reason.

A coerced individual is legally responsible not only because she still possesses intention/will and knowledge while performing an action, but that, for al-Bāqillanī as well as for the majority of Ash'arites, the freedom to "act otherwise" isn't an option at the time of the action. This has to do with another dimension of Ash'arite ontology of human actions. In line with their theory of *kasb* and their occasionalist ontology, Ash'arites argued that the performative power to act is only granted at the occasion of action. Thus, al-Bāqillanī mentions that "a person who is enabled to act, in our view, cannot abandon an act at the occasion of empowerment (*ḥāl qudratihi ʿalyih*).[38] This inability to refrain from an action at the time of its enactment, then, doesn't suspend the legal responsibility of a coerced individual because, for al-Bāqillanī, this is a quality that both coerced and non-coerced individuals share. There is, however, an important qualification that al-Bāqillanī provides which further supports the value that jurists placed on the cognitive nature of *taklīf*. For al-Bāqillanī, coercion is only conceivable to occur within the sphere of external actions. He argues that:[39]

coercion cannot occur except upon the visible actions of the limbs which are known to occur when they occur and known not occur when they are abandoned. As for coercion upon what is absent and conjectured from the actions of the mind, it is not possible that a servant is coerced to know something or be ignorant of it or love it or hate it or to believe in it or to will it, for this is impossible.

Therefore, al-Bāqillanī's discussion of the issue of coercion and its relation to *takilf* allows us to understand the extent to which *taklīf* is fundamentally concerned with acts of the mind such as intentions/wills, knowledge, and understanding.

The discussion so far has been solely on the nature of the concept of *taklīf* and its various epistemic and ethical dimensions. It was intentional to avoid directly addressing the legal subjectivity of the insane, because without a proper and holistic understanding of *taklīf*, any attempt to address the status of the insane in Islamic jurisprudence would render it unintelligible. However, now that we have a more nuanced image of Ash'arī jurist's understanding of *taklīf* and the way that their conception of it shapes their view of what a legal subject should be like, it's appropriate to address the question of how does the insane as a legal subject fit into, or rather do not fit, this image?

The *Majnūn* as a Legal Subject

As described in the beginning of the essay, Ash'arite works of jurisprudence contain no direct or elaborate definition of insanity and its different variations. There is, however, a consistent juxtaposition between a *majnūn* (insane person) and a *ʿāqil* (rational/discerning person). We have seen that the jurists understand reason to be a type of necessary knowledge. They designate some types of necessary knowledge to be the distinguishing standard between a rational and non-rational individual. They also emphasize the element of discernment as sign of rationality. Therefore, considered as a non-rational individual, an insane person can be understood to have a disturbed command of the types of necessary knowledge that constitute reason. In addition, an insane person lacks a particular *tamyīz* (discernment) between benefit and harm. The consequences of this is that an insane person is not considered to be legally responsible (*mukallaf*). For, as al-Āmidī mentions, the condition of full legal subjectivity is that the legal subject "rational (*ʿāqil*) and comprehending of *taklīf*, because *taklīf* is a *khiṭāb* (prescriptive speech) and to engage in a prescriptive speech with a non-rational and non-comprehending individual is impossible, such as if it were an inanimate object or a beast."[40] However, as al-Āmidī indicates above,

38. Bāqillanī, *Taqrīb*, 251
39. Bāqillanī, *Taqrīb*, 256
40. Āmidī, *Iḥkam*, 150

it isn't just the lack of the condition of rationality that diminishes the legal subjectivity of the insane, but it is also the implication of the absence of reason on the ability of the insane to comprehend God's prescriptive speech that additionally inhibits his legal subjectivity.

We have pointed out above that *fahm* (comprehension) is one of the main conditions of *taklīf*. Ash'arī jurists consistently point out that *taklīf* is a form of prescriptive speech that necessitates both an understanding and an appropriate response on the part of the addressee. In the case of an insane individual, Ash'arī jurists claim that there is an element of understanding that can be accounted for her when addressed by a prescriptive speech. Al-Āmidī mentions that a *majnūn* and a non-discerning child exhibit a "basic understanding of the foundation of prescriptive speech (*aṣl al-fihmi li aṣl al-khiṭāb*) without its details."[41]

However, as mentioned above, the type of understanding that is necessary for *taklīf* is one that requires a possession of certain types of knowledge which enables the addressee to comprehend the moral thrust of the speech. For an addressee of prescriptive speech to be legally responsible, she must know that this speech is of the nature of "a command and a prohibition, that it entails reward and punishment, that the one commanding it is God Almighty; that it's obligatory to obey him, and that what is commanded is of the character of such and such…"[42]

The jurists stress that these types of knowledge that underlay the concept of *fahm* are inaccessible to an insane individual. In fact, al-Āmidī thinks that this kind of comprehension lay way beyond the ability of an insane individual that he argues that, with respect to understand the detailed import of prescriptive speech, an insane individual and a non-discerning child are like an inanimate object or a beast in their understanding of the basic import of speech.[43] The idea of receptive comprehension of the moral thrust of speech that the jurists saw as lacking in an insane individual was only one part of the larger concept of *fahm* which comprises both receptive and active dimensions of understanding.

Ash'arī jurists contend that for an addressee of prescriptive speech to actively respond to its demands, she must possess a degree of awareness that includes within it an element of knowledge and an element of intentionality/will (*qaṣd*). Al-Ghazali mentions that one of the conditions of an action that qualifies it as falling under *taklīf* is that the act must be "known to the one commanded by it, a knowledge that distinguishes (*tamyīz*) it from its others, so that it will be possible for her to intend/will it."[44] Not only that an action has to be particularly known, but that it also has to be particularly intended/willed. One has to know that the action that one is about to embark upon is commanded by God so that it will be performed with the particular intention of *imtiṯāl* (compliance) and *ṭa'ah* (obedience).[45]

The jurists often address this issue of intentionality and obedience when they discuss the question of the legal responsibility of the mentally disoriented (*al-sahy* or *al- ġafil*) and the drunken (*al-sakran*). Ash'arī jurists consider the mentally disoriented and the drunken to be non-legally responsible because they lack knowledge of their actions and an intentional obedience. Al-Bāqillanī mentions that the mentally disoriented and the drunken are not legally responsible because their actions are performed while they are not aware of them and not intending/willing them, "for it is not possible while they are unaware of their action, to be knowledgeable of them and particularly intend them, let alone intend them for the sake of drawing near to God as opposed to others…"[46] Just as the mentally disoriented and

[41] Āmidī, *Iḥkam*, 150
[42] Āmidī, *Iḥkam*, 150
[43] Āmidī, *Iḥkam*, 150
[44] Ghazālī, *Mustasfa*, 286
[45] Ghazālī, *Mustasfa*, 286
[46] Bāqillanī, *Taqrīb*, 242-243

the drunken, the insane is exempt from legal responsibility because of the lack of ability to perform actions while being aware of their moral value i.e. that they are particularly performed with the intention of compliance and obedience to God. Interestingly, the jurists considered the mental state of the insane to be far better than that of the mentally disoriented or the drunken in that their scope of knowledge and intentions/wills are larger with respect to many actions.[47] However, the degree of knowledge and intentionality that the insane possessed wasn't enough to qualify them as legally responsible.

Conclusion

As illustrated by this study, the question of legal subjectivity is one that preoccupied classical Ash'arī jurists. As jurist-theologians, their understanding of legal subjectivity was formulated along theological and juristic lines and was crystallized in their adoption of concept of *taklīf*. Their particular use of *taklīf* in articulating the nature of legal subjectivity and the range of epistemological and ethical assumptions embedded in it, created a framework of legal subjectivity that left the *majnūn* outside the law's domain of address. Understanding the concept of *taklīf* as arising from divine prescriptive address, Ash'arī jurists went on to articulate a theory of legal subjectivity centered on the mental capacity of the legal subject to comprehend the moral import of that address and to respond to it with cognizant and intentional obedience. In stressing the value of cognitive ability, Ash'arī jurists contended that the *majnūn*'s comprehension fell short of the level necessary to acquire legal subjectivity. Beyond the issue of the legal subjectivity of the *majnūn*, this analysis of *taklīf* allows us to understand some of the ways in which Ash'arī jurists conceived of reason/ rationality, the relationship between intentionality, knowledge and action, and the nature of divine speech and its normative value.

[47] Bāqillanī, *Taqrīb*, 243

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