DESPITE THE EXISTENCE OF AL-DHIMMAH IN EVERY HUMAN BEING, ABILITY OF CERTAIN PEOPLE TO ENGAGE IN CONTRACTUAL RELATIONSHIP IS CURTAILED.

SABO KARABI GIADE
A.D.Rufa’i College for Legal and Islamic Studies, P.M.B. 004 Misau, Bauchi State, Nigeria.

Abstract
The paper clearly spelled out the meaning of the word “Dhimmah,” which is an Arabic word to mean the ability to acquire rights and obligations by a mukallaf (the subject of law) which is not just left without conditions or hindrance it also stated the life circle of any human being is categorized in to four. From the time an embryo is conceived in it’s mother’s womb to it’s delivery, from delivery to Tamyiz (which is seven years according to Islamic Jurists), from Tamyiz to maturity and from maturity until death. Therefore after attaining legal capacity,
sometimes ability of certain people to engage in contractual relationship is curtailed. The factors include but not limited to natural circumstances and man affected or acquired causes like sleeping, infancy, in coercion/duress, mistake and ignorance on the other side.

Key Words:
- The life circles of human beings are divided into four (4) stages.
- In the first three (3) stages one is not criminally liable, but liable in tort.
- Upon reaching the fourth stage, one is both criminally responsible and the liable in tort.
- There are two (2) factors that affect the legal capacity even after maturity.
- Natural circumstances and man acquired are two (2) factors that affect the legal capacity.

Research Methodology:
The methodology followed in this research work is through having research in many Islamic books and manuscripts.

man in relation to his Ahliyyah is from the period of maturity till death. When a person attains maturity, it indicates that he will be responsible for all his acts be they criminal, civil or religious. At this stage, he will be considered as a complete human being capable of acquiring as well as exercising or executing all his rights.

However, after the attainment of maturity a human being can go into all action as allowed by the shari’ah such as contractual activities and so on. Despite the attainment of maturity, one may become incapacitated as a result of which some of his rights may be curtailed.

This is what the scholars called Awarid Al-Ahliyyah, or vitiating elements of Ahliyyah. Awarid or vitiating elements of Ahliyyah. Awarid or vitiating elements are subdivided into two;

1. Awarid As-Samawiyyah (Natural Circumstances)
2. Awarid Al-maktasabah (man-circumstance)

The first is referring to the natural circumstance that makes man incapacitate to go into some kinds of transactions as a result of deficiency that affect him naturally against his will. He will not be liable for the criminal acts he committed, but he can be liable in committing civil wrongs.

The prophet (P.B.U.H.) is reported to have said:
“The divine pen is raised up from three groups of people (i.e. they are free from liability) the sleeping man until he wakes up, the infant until he reaches maturity, the Insane man until he become sane or normal.”

WHAT IS AL-DHIMMAH?
Al-Dhimmah is defined in a book titled: ‘Sadr Al-Shari’ah’ as follows: The term Dhimmah is regarded as the ability to acquire rights and obligations. The majority of the jurists consider Dhimmah as an imaginary container or receptacle that holds both types of Ahliyyah – i.e the capacity for acquisition and the capacity for execution. It is regarded as the location or place of residence for the two types of Ahliyyah. In short, it is the balance sheet of a person showing his assets and liabilities in terms of his rights and obligation.
In Islamic law, Dhimmah is a requisite condition for the existence of Ahliyyah. It is an attribute conferred by the law and trust resulting from a covenant (Ahd). This means that Dhimmah can only be assigned to natural persons.
According to Al-shakarasi, Dhimmah is a trust that was offered to the mountains but they refused, man accepted it. Thus, attribute compared by the law giver is a trust resulting from a covenant between the lawgiver and the subject.
This concept of Dhimmah is equated with the concept of personality in western law. Which is an attribute conferred on a natural person, as well as artificial person.
In this book, titled; “The rules of law in the Shariah”, while discussing on the Ahliyyah al-wujub, professor Abdulqadeer Zubair said:

“The fitness under this division, is the suitability of a person to claim rights from other or institutions and to be liable for others or institutions. The origin of this fitness is a specialty upon which Allah has molded man and with which he has distinguish him among other creatures. The specialty is known among the Muslim jurists as “al-Dhimmah” which is a natural attribute of man. When a person is liable to another

1 see Muhammad Isma’il A. A subul AS-salam Bulq al-maram Dar-Ilya al-turath Al-Arabi Barut (1960) vol. III p 180
2 See Yahaya Y.B Islamic law of commercial and industrial transaction, malt house press ltd surulere Lagos (2007) p 24
4 see Imran Ak Nyze. Islamic Jurisprudence, international institutes of Islamic thought, Islamabad (200) p.109
5 Yahaya Y.B an outline of Islamic Jurisprudence
AHLIYYAH (Legal Capacity)
Ahliyyah literally means absolute fitness or ability to acquire rights and exercise them, and to accept duties and perform them. It is said “so and so is competent for this act” when he is competent for it’s performance, demand or entitlement. Some jurists interpreted Ahliyyah to mean competence of a person for acquiring rights and exercising them and for liabilities and their fulfillments.
The word Ahliyyah according to some definitions, comprises of the capacity of obligation (Ahliyyah al-wujub) and capacity of execution (Ahliyyah al-ada). Thus the capacity of obligation is a man’s competence for acquiring rights and liabilities. The capacity of execution is a man’s competence for exercising these right and fulfillment of liabilities.
Capacity for acquisition enables a person to acquire both rights and obligations while capacity for obligation gives him the ability to exercise such rights and perform his duties.
Some jurists divided Ahliyyah in to tree (3):
(1). Ahliyyah al-wujub (receptive legal capacity)
(2). Ahliyyah al-ada (active legal capacity) and
(3). Ahliyyah al-qasirah (imperfect legal capacity).
Other jurists divided Ahliyyah in to two. Each sub-divided in to two. Thus;
   a. Ahliyyah al-wujub i. Al-Naqisah
   b. Ahliyyah al-ada i. Al-Naqisah
   ii. Al-Kamilah
For the first one, (Ahliyyah al-wujub) it is divided in to two i.e incomplete receptive legal capacity. The second one, (Ahliyyah al-ada) is also divided in to incomplete active legal capacity and complete active legal capacity.

Ahliyyah al-wujub al-Naqisah.
This Ahliyyah is translated as incomplete legal capacity.
This is the first stage of man’s life. It started from the period of conception in the mother’s womb to the time it is born. The foetus in the womb can claim rights

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6 Zubair AQ the rule law in the shari’ah HC publication Lagos, (1994) pp. 142-142
7 Hassan HH an Introduction to the study of Islamic law, Adam publishers 1542 patendi House Darya ganj new Delhi (2007) p 344
from others, but cannot be liable to others. The specially is known among the Muslim jurists as al-Dhimmah, which is the natural attribute of a man. When a person is liable to another person, his Dhimmah is considered to be indebted. Every mankind is endowed with this Ahliyyah al-wujub al-Naqisah be he a man, woman, human foetus, sane, insane, healthy or sick, so far he is a human being. The unborn or janin is deficient. This implies that only some rights are established for him and no obligations are imposed on him. This is because it is considered as part of the mother in some respects. Thus it is set free with the mother and is also sold as part of her (in the case of Ummul-walad) an independent personality is therefore not assigned to it. The personality of the foetus or janin is therefore considered as deficient or incomplete. By virtue of this deficiency he acquires certain rights as:

i. Freedom from slavery
ii. Inheritance
iii. Parentage
iv. Bequest

However, purchase made by the would-be waliy ( Guardian) on behalf of the janin cannot make him liable for the payment of the price. He will also not be liable for spending money on his near relatives for accidental murder, but when he is separated from the mother alive, he will acquire the capacity of liability along with the capacity of obligation.

Ahliyyah al-wujub al-kamilah.
This is translated as complete legal capacity. It is the second stage of human beings in relation to their Ahliyyah. It started from the period of Tamyiz (the age of distinguishing between what is good and what is bad). Some jurists took it to be seven years. He will be by then competent to lay claims to any of his rights and to be answerable as well to any liability or obligation due to other people. A child acquires the purely financial liabilities, because his acquisition of these liabilities make the accrual of their effects possible in relation to him. The reason is that although it is not possible for a child to fulfill the liabilities and obligations for want of capacity of execution, it is possible for his guardian to fulfill them. That is to say, representation is allowed in pure financial rights. Fulfillment by the guardian is therefore like the fulfillment by the child himself.

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8 Op cit nyazee at p 115
A child at this stage can equally be liable for the payment of compensation for the
damage of good and for the payment of zakat, according to the generality of the
jurists. On the other hand, a child at this stage is not liable to punishment
(criminal) because he lacks the capacity as the Hadith of the Holly prophet says:
The devine pen is raise up from three groups of people ...... the infant until he
reach maturity ......”

**Ahliyyah al-ada al-naqisah**

This Ahliyyah is translated as incomplete active legal capacity. It started from the
period of Tamyiz (which is defined to mean the period of distinguishing between
good and bad) to the period of maturity.

* At this stage his acts are classified in to three
  
  i. Acts what are perfectly beneficial to him. They are granted legal
     approval even without the permission of his guardian. Example,
     receiving gifts and charities.
  
  ii. Acts that are perfectly disadvantageous to his wealth, such as giving
      charities. This acts will not be approved. Even when the guardian
     permits him, the permission will be null and void.
  
  iii. Acts that are fluctuating between profit and loss. These acts are subject
      to the approval of his guardian. If the guardian sanctioned them, they
      will be accorded legality. But if he does not, they become null and avoid

It is to be noted that criminal liability does not exist in the case of a person who
has not attained puberty because he is not a *Mukallaf* and his guardian cannot
stand in his palace for criminal offence.

**Ahliyyah al Adah al-kamilah.**

It is translated as complete active legal capacity. This is a perfect capacity of
execution which makes a person competent for receiving the divine
communicatiion relating to legal obligation with all it’s kinds.

This legal capacity started from the time of maturity until death. When a Mukallaf
(subject of law) therefore reaches this stage of Ahliyyah, all shari’ah obligations
like acts of faith, rituals, contracts, commitments etc. are duty bound on him and
he is accountable for all commissions or omission he makes. With this he is legally
competent

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9 Opcit A.Q Zubair at p 147
10 Opcit A.Q Zubair at p 148
11 Opcit A.Q Zubair at p 148
Ahliyyah Al-qasirah
This is defined as imperfect legal capacity. It is assigned in cases where the base of capacity is being a human and in possession of discretion, but an external attribute or factor has been introduced that does not permit the recognition of the legal validity of certain acts. The following are examples of imperfect capacity.

i. Woman
A woman is said to possess imperfect legal capacity. It is because of this, that she is denied the right to be the head of state or a Qadhi, to divorce her husband etc.

ii. Slave
A slave is also said to possess imperfect legal capacity because of it’s weak and low social status, and does not possess the right of ownership.

iii. Artificial or fictitious person
Islamic law does not acknowledge the concept of artificial or fictitious person. The reason is that, the Dhimmah (trust) which is Ahad (covenant) with lawgiver is lacking in fictitious person, because it cannot perform religious duties. Hence it is assigned deficient legal capacity.

Factors Affecting Complete Legal Capacity
It is to be observed that after attaining and passing through all the Ahliyyah, and after the complete active legal capacity was established for human being, he will still not be compatible of performing some duties.
Therefore, despite the existence of Al-dhimmah in every human being, ability of certain people to engage in contractual relationship in curtailed. The factors are classified into two, namely:

i. Awarid As-samawiyyah (natural circumstances) and

ii. Awarid Al-muktasabah (man affected or acquired causes)

Awarid as-samawiyyah (natural circumstances.) The natural circumstances are factors that are naturally in-build to a Mukallaf. They are factors that affect the Mukallaf against his will and without his consent. These factors can lead a mukallaf to commit certain acts unknowingly, as such he will not be accounted for whatever he does criminally. He can only be liable tortuously to pay compensation where applicable.

Examples of this factors are, sleeping, infancy, insanity, forgetfulness etc.

i. Sleeping
Sleeping is one of the factors that curtailed the contractual relationship of any act performed by the sleeping person. Thus, whatever act a
sleeping person commits it cannot be counted and act upon. This is based on the Hadith of the Holy prophet (PBUH) where he was reported to have said:

"The divine pen is raised up from tree group of people (i.e they are free from liability the sleeping man until he wakes up,) the infant until he reaches maturity; the insane man until he becomes same or normal." 

It is to be note that sleeping man can only be pardoned for the criminal act he committed, but for the civil act, he will be held liable to give Diyyah or compensation. However, if a person happens to be asleep during or at the time of a particular worship, he is pardoned, but he is to bring back the duty or act at the time he wakes up.

ii. **Infancy**

An infant, who has not attained maturity, is equally curtailed from engaging in certain contractual relationship. First, we can see the Hadith cited under items (i) that is sleeping. The divine pen is equally lifted or raised up from an infant until he reaches maturity.

Secondly, among the contracts that infant are not allowed to go in to, are those that are perfectly disadvantageous to his wealth, such as giving charities. This cannot be approved even if it has been done with the consent of his guardian.

Thirdly, contracts that are fluctuating between profit and loss, this acts are subject to the approval of his guardian. If the guardian approves it, it will be accorded legality, but if he does not, they will be termed null and avoid.

iii. **Insanity**

Insanity is also among the factors that curtail certain people to engage in contractual act as was seen in the above quoted Hadith under “sleeping”. Insanity is a disease which afflicts a man motivating him to do acts that are incompatible with the requirement of intelligence. An insane, or a lunatic is not capable of receiving the communication relating to legal obligation. The acts of worship are not obligatory on a lunatic, nor are they liable to punishment, nor is any disposition made

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12 Opct Muhammad Isma’il A.A
by him valid, as mentioned under the discussion of a child are not possessed of understanding. 13

iv. Forgetfulness
Forgetfulness is also another deficiency that occurs to a man subjecting him to failure to remember his responsibilities. Forgetfulness is classified into two by the jurists
  a. Forgetfulness resulting to committing sin
  b. Forgetfulness resulting to destruction of other’s property.
  c. Forgetfulness resulting to committing sin is overlooked by the shari’ah as the Hadith of the Holy prophet (PBUH):

“Allah has pardon on my community for the mistakes, forgetfulness and what resulted from coercion” 14

Awarid al maktasabah (effected or acquired causes)
i). Intoxication
Drunkenness is a state caused in a human being due to the use of an intoxicant, which temporarily suspends the proper functioning of the mental faculty. Intoxication does not cause a change in the capacity for acquisition, as it’s bases is the attribute of being a human. Thus a drunken person possess a Dhimmah (legal personality) with a complete capacity for acquisition, and he is held liable for destruction of life and property, and also for all obligations, for maintenance, and even for Zakat. All these duties and obligation require the existence of the capacity for acquisition alone, and intoxication does not negate it.
The basis for the capacity to execution, on the other hand, is Aql (reason) and Rushd (discretion); these are negated in the case of the drunken person by the state of drunkenness. The Kitab (BOOK) is not addressed to the drunken person, because he does not comprehend it. The state of such a person is worse than that of an idiot, who may understand parts of the speech addressed to him.
The jurists agree unanimously that the Kitab is not directed towards the intoxicated person if such intoxication has been caused by the legal use of intoxicants 15
E.g. through ignorance, coercion or duress.
Muslim jurists disagree about the person who is intoxicated when such intoxication is caused by prohibited means. The Hanafis and some other jurists

13 Opcit Hassan H.H at p. 365
14 Ibn Majah Hadith 2045
15 Nyazee I.A. Islamic Jurisprudence, the international institute of Islamic thought Islamabad (200)
do not consider such a cause to have any effect on the capacity for execution and on the understanding of the Kitab. Any transaction or acknowledgment he makes is valid and enforceable against him. He acquires criminal liability for acts committed in such a state, though he can retract his confession made in this state regarding case of Hudud as these are pure rights of Allah.

Some jurists are of the opinion that an intoxicated person has no capacity for execution because his Aql (reason) is completely impaired by the state of intoxication. They maintained that the lawgiver has already provided a penalty for the offence of intoxication and holding him liable for his transaction as well, would amount to punishing him twice for the same offence, a kind of double jeopardy.

They argued that the verse about avoiding prayers in an intoxication stated is actually addressed to a sober person telling him to avoid becoming intoxicated before the time of prayer, an act over which he has control, as compared to the person subject to fits of madness over which he has no control.

Modern jurists try to prefer the second opinion as it may be close to some forms of western law.

ii). Jest
When a person uses words without intending to convey either primary or their secondary meanings, that is, their connotation, he is said to speak in jest. Such a person may for instance use words employed for the contract of marriage but does not intend the hukm (effect) of such contract. Jest cannot negate the capacity for execution. A contract on the other hand, requires constant and willingness to give rise to legal effects. The person speaking in jest does bring the apparent from (Sigha) of the contract, but has not given his consent in reality. The Hanafis therefore, consider the transaction of such a person as invalid, except transactions like marriage, divorce, manumission, Ruju (to return a divorced wife) and the like. This is based on the tradition that says: “three things intended seriously are taking seriously, and if intended in jest are also taken seriously: marriage, divorce and the freeing of slave.” Shafi’i, maintained that statements made in jest are to be considered valid at all times.

iii) Coercion And Duress
Ikhrah is a situation in which one is force to do something without his willingness.

It has no effect either in capacity for acquisition or capacity for execution, because this state does effect life or reason and discretion.

16 See- sadr al-shari’ah, Al-Tawdih vol.2,820
The jurists disagree about the extent to which coercion can effect freewill. The views of this jurists may be classified in to two opinions:

1. The first opinion maintains that coercion is an obstacle in the way of Takhlif (creation of an obligation). Thus the Kitab is not directed toward a person under coercion or duress. Among those who hold this opinion are Shafi’I jurist who maintain that freewill is a condition of Takhlif. Ikhrah, according to the Shafi’i arises under a threat of death, hurt and like. It does not arise for causes of lesser gravity, like a threat to property.

2. The second opinion is held by the Hanafis who divided Ikhrah in to three types:
   a. Coercion that negates freewill or choice, this is coercion under threat of death or loss off limb.
   b. Coercion that negates consent, but makes free will irregular fasid (to vitiate). This is brought about by confinement for a long period or by beating or coercion that does not lead to life or limb.
   c. Coercion that does not negate constant or it doesn’t make free will facid e.g is confinement of close relatives. Some Hanafi jurist do not accept this third category, and link it with one of the categories above, depending upon the nature of the threat to dear ones.

(iv). Mistake and Ignorance

The most important evidence in this respect is the tradition of the prophet (PBUH) in which it has been said that the Hudud penalties are to be waved in case of Shubha (uncertainty). This is usually taken to mean "benefit of doubt given to the accused"

While this meaning may be covered by the tradition, it is not it’s primary concern. The rule of giving benefit of doubt to be the accused is generally accepted as a rule of evidence in Islamic Law. The tradition according to the jurists, deals with doubts in the mind of the subject at the time of commission or omission of an act. These are of several types:

- Shubha fi al-dalil (mistake of law)
- Shubha fi al-milk (mistake as to ownership)
- Shubha fi al-fi'il (mistake in the commission of the act); and
- Shubha fi al-aqd (mistake as to governing law in the contract).

For example, assuming that in the early days there was a person who was under the impression that temporary marriage is permitted, that is, he may not be aware of the abrogating evidence. If he entered in to a temporary marriage under this impression the marriage contract was declared void, but the law would
waive the Hadd penalty in such a case (this does not mean that Ta’azir was also waived) there could have been a possibility of the occurrence of such a case in early days when people were not aware of the law. Today, it is unlikely to happen. In any case, it is an example of Shubh fi-dalil as well as shubh fil al-aqd. Ignorance may be that of law or fact. In general, ignorance of law is no excuse for a subject present within the Dar Al-Islam (i.e. Islamic state). This however, should not be confused with the acts of a Muslim residing in Dar Al-Harb (i.e. non Islamic state). The Hanafis make an exemption for some of the unlawful acts of such an individual, because he is not enjoying the protection of the Islamic state during his stay abroad. Submission to the Islamic and being subject to it’s jurisdiction is also stated as a condition of Taklif by some jurists. The issue of jurisdiction of the Muslim state is expressed as a principle by the Hanafi jurists Al-Dabusi:

“the principle according to our jurists is that the world is divided in to two dars. Dar al-Islam and dar-al Harb. According to Imam al Shafi’i the entire world is a single dar”

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17 Al-Dabusi. Tasis Al-Nazar (Cairo, 1320AH/1902 CE). 58