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AL-MAHKUM ALAILI- “MAN” AS THE SUBJECT OF THE LAW, AND HIS LEGAL CAPACITIES (RECEPTIVE AND ACTIVE CAPACITIES).

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Introduction

Right from the time when an embryo or a foetus is conceived in it's mother's womb, shari'ah stands to regulate and legislate on it's rights and privileges to the time it is born alive, it reaches the age of Tamyiz (the age of differentiating between good and bad which is stated to be seven years according to the jurists), it reaches maturity stage and up to the time when it will be fully grown-up and ready to take any responsibility or duties as the case may be.

Therefore, Shari'ah as a complete way of life touches on all acts of human beings right from the time of creation to the time of death. Allah, the omnipotent God who created man sent down the rules through his messenger as a guide who explains to the human beings what Allah has ordered them to do and as well what

Abstract

The main forecast of this write up in to examine the legal capacity of a man (woman included) right from birth up to maturity until death. Therefore, the discussion will forecast on who is Al-Hakim, man as the subject of the law, man's legal capacity, divisions of legal capacity or Ahliyyah, receptive capacity (Ahliyyah al-wujub) and Active capacity (Ahliyyah al-ada). After perusing the above, it will be understood that in all the stages of man, right from conception to death, there are situations when one will not be criminally liable for any act he committed, but may be asked to pay compensation or damages in will civil aspect where he is tortuously liable. It can equally be seen that there is a stage when his acts are categorized in to three viz.

acts that perfectly beneficial to him are granted legal approval even without the permission of his guardian e.g. receiving gift, acts that are disadvantageous will not be approved like giving charities and acts that are fluctuating between profit and loss are subject to the approval of his guardian like marriage.

Keywords: Subject, Legal, Capacities, Receptive, Active

He ordered them to abstain from. Abu-Hurairah was reported to have said whenever you heard Allah (S.W.T) saying in the Holy Qur'an "YA AYYUHAL-LADHINA AMANU (o you who believe!)" you should open your ears and hear the command of your Lord, because He will either order you to do or abstain from doing something.

In this write-up, I will Insha- Allah try and explain the topic under discussion as;

- WHO IS AL-HAKIM
- MAN AS THE SUBJECT OF THE LAW
- MAN'S LEGAL CAPACITY
- DIVISIONS OF LEGAL CAPACITY OR AHLIYYAH
- RECEPTIVE CAPACITY (Ahliyyah-al-wujub)
- ACTIVE CAPACITY (Ahliyyah-al-ada)

Who is AL-HAKIM the lawgiver?

There is no controversy among the Muslim jurists as to the fact that Allah is the lawgiver (AL-HAKIM). Jurists therefore postulate that: -

There is no law but that of Allah. The Holy Qur'an itself stated in Surah- Al-An'am verse 57 Thus: -

"The law (decision) rests with non but God, He declares the truth, and He is the best of judges"¹

Muslims therefore are obliged to follow the Laws of Allah as the Laws are prescribed by the wise and just Lord, who grant them security from oppression and ensure justice and fair play in all their dealings.

MAN AS THE SUBJECT OF LAW

Man, as the subject of the law is the one whose act invokes a *hukm*, or a hokum requires him to act in a prescribed manner. In legal parlance he is known as

the *mukallaf* (subject) A mukallaf is a person who possesses legal capacity whether he acts directly or through delegated authority ²

The first requirement for legal capacity is the ability to understand the communication that creates the obligation.

This is to say that the subject should be able to understand the meaning of the *Hukm* communicated to him by the mujtahid or the faqih.

There are conditions to be observed before the law can operate against or for a person. They are all related to legal capacity or Ahliyyah in juristic terminology.

This topic, is important for understanding Islamic law generally, but it has special significance for criminal law and the law of contracts & Tort. For instance all the general defences under criminal law are covered under this topic. This is because for any person to enter in to a valid contract, he has to have contractual capacity which is one of the essential elements of a valid contract under Islamic law.

According to the general view of the jurists therefore the essentials of a valid contract under Islamic law are three:

1. Formular – Sigha (words uttered by the parties)
2. The object (the subject matter of the contract) and
3. The parties to the contract who are called the subject of the contract.

Since we are much concerned with the third element (the subject) we can add that he is the one who offers or accepts either for himself or for someone else if he conclude it for someone, then in addition to the capacity, he must also have the authority or guardianship to conclude the contract.

The Usulists, having exploited all sources, principle and provision of practical legal rule of law came out with two conditions which are to be fulfilled before a mukallaf could be under any legal obligation. They are as follows:

1. That the mukallaf is capable to understand the evidence of legal obligation;
2. That the mukallaf is fit for the application of the law to his action.³

It is important here, to take each condition and elaborate more on it.

1. **Mukallaf's capacity to understand the evidence of legal obligation.**

Here, it should be understand that lack of understanding of the evidence of law makes it to be inapplicable or no law at all. That obviously will signify that there can be no conviction on the subject of the law. Allah (S.W.T) said in the Qur'an:

“We never punish until we have sent a messenger”
Qur’an 17:15

The legal obligation therefore must be known to the mukallaf from the primary sources of the law, after this he can now determine to abide by the law. This is the reason why an insane person and an infant are immune from any legal liability or obligation because they cannot understand the law. This also applies to a sleeping person who is in the state of forgetfulness; they will not be answerable for their acts. They are free from any legal obligation as stated by the Hadith of the prophet (P.B.U.H)

“The Devine pen is raised up from three 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 sane or normal”⁴

Another Hadith on this issue is:

“The prophet (P.B.U.H.) said: “if anyone among you should sleep off the time of prayer or forget about it, he should pray it whenever he remembers of it, verily Allah has said; “perform the prayer for my remembrance”⁵

It is to be noted that infants and insane persons are liable for their monetary obligations and tortuous liabilities, and this liability is linked to their properties and natural persons or Dhimmah and not their actions. They are considered as liable for their act because they are humanbeings who have been endowed with capabilities.

2. **Mukallaf’s fitness for the application of the law to his action.** This means that the mukallaf should be fit for the obligations before the rules of law can be applied to him under the science of Usul-al-figh. This fitness is divided into two namely:
 - i. Ahliyyah al-wujub (fitness for the obligation of duties)
 - ii. Ahliyyah al-ada (fitness for the discharge of duties)

MAN’S LEGAL CAPACITY OR AHLIYYAH

“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 his 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 for liabilities and their fulfillment.

The word “Ahliyyah” according to the definition comprises of the capacity of obligation (Ahliyyah al-wujud) 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 executing these rights and fulfilling liabilities.⁷

Capacity for acquisition enables a person to acquire both rights and obligations while capacity for execution gives him the ability to exercise such rights and perform his duties.

According to some Jurists, Dhimmah equally means the ability to acquire rights and obligations, but the majority of the Jurists consider Dhimmah to be an imaginary container that holds both the capacity for acquisition and the capacity for execution. In other words, it is the location or place or residence for the two kinds of capacity. In short, Dhimmah is the balance-sheet of a person showing his assets and liabilities, in terms of his rights and obligations. According to Al-Sarakhsi, Dhimmah is the “trust” that was offered to the mountains, but they refused; man accepted it.⁸

Thus Dhimmah is an attribute conferred by the lawgiver. It is a trust resulting from a covenant between the lawgiver and the subject.

DIVISION OF LEGAL CAPACITY OR AHLIYYAH

Legal capacity is of two types: -

1. Ahliyyah-al-wujub (receptive legal capacity)
2. Ahliyyah al-ada (active legal capacity)

There are four stages of man in relation to his Ahliyyah. They are:

- a. Ahliyyah –al-wujub al-naqisa (incomplete receptive capacity).
- b. Ahliyyah al-wujub al-kamilah (complete receptive legal capacity)
- c. Ahliyyah al-ada al-naqisah (incomplete active legal capacity)
- d. Ahliyyah al-ada al-kamilah (complete active legal capacity)

Some Jurists, however limited Ahliyyah into three stages thus: The first stage is from the birth to three age of Tamyiz (i.e. partial discretion, which is considered to be the age of seven years). During this period, the child assumed

not to have intellect and ineligible for the assignment of a capacity for execution.

Secondly, from the age of Tamyiz (i.e. seven) and continued up to the actual puberty, or legal age of puberty whichever is earlier. Deficient capacity for execution is normally assigned during this stage, as the individual possess a certain amount of Aql and discretion.

The third and final stage commences from actual physical puberty or the legal age determined for it, whichever is earlier. On reaching this age, the individual is assigned complete capacity for execution and become eligible for each kind of Kitab i.e. he reached Ahliyyah al-ada al-kamilah or complete legal capacity. This is said to be the final stage of man in the relation to his Ahliyyah.

RECEPTIVE CAPACITY (AHLIYAH AL-WUJUB)

This is the first stage of man's life. It started from the period it is conceived in it's mother's womb, to the time it is born.

- (a) The foetus in the womb can claim right from others. The origin of this fitness is a right which Allah gave to a man as he distinguished him among creatures. The speciality is known among the Muslim Jurists as Al-Dhimmah, which is a natural attribute of a man. When a person is liable to another person his Dhimmah is considered to be indebted and will not be free until he meets his obligation.⁹

Every mankind has been endowed with this Ahliyyah al-wujub al-Naqisah, be he a man, woman, human foetus, sane or insane, healthy or sick in so far as he is a human being.

The unborn child on 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 a part of her. (In the case of *Ummul-walad*) an independent personality is therefore not assigned to it.¹⁰

The personality of the foetus or *Janin* is therefore considered as deficient or incomplete. By virtue of this deficiency he acquires certain rights as:

- a. Freedom from slavery
- b. Inheritance
- c. Parentage

d. Bequest (Wasiyyah)

However, a 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 separated from his mother alive, he will acquire the capacity of liability along with the capacity of obligation.

All the above situation of the foetus throughout it's stay in its mother's womb is therefore called Ahliyyatul wujub al-naqisah. We can now see the second, stage which is Ahliyya-al-wujub al-kamilah.

(b) Ahliyyah al-wujub al-kamila or complete receptive legal capacity starts from the time a child is born alive to the time when it reaches the age of Tamyiz (the age of differentiating) between what is good and what is bad) some jurists took it to be seven years. He will by then be competent to lay claims to any of his rights and be answerable as well to any liability or obligation due to other people. In the stage of Ahliyyah, a child who is born alive has acquired only those obligations and liabilities for the effect of which he has the capability, which is their performance.

1. A child acquires the purely financial liabilities, because his acquisition of these liabilities makes 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 his capacity of execution, it is possible for his representative who is legal guardian to fulfill them. That is to say, representation is allowed in pure financial rights, fulfillments by the guardian is therefore, like the fulfillment by the child himself in this case.

A child at this stage can equally be liable for payment of compensation for the damage of goods and for the payment of Zakat according to the generality of the jurists.

2. A child is not liable to punishment because he lack the capacity. His guardian cannot therefore, stand on his behalf and take the punishment to serve as a deterrent, a reform and to purify the soul. Therefore, is not applicable to the guardian.

ACTIVE CAPACITY (AHLIYYAH AL-ADA)

This means the fitness of a man to discharge duties and obligations by action or by statement in a way that legal competence will be awarded to that action and that statement.¹¹

Ahliyyah –al-ada is further classified into two viz: Ahliyyah al-ada al-naqisah and Ahliyyah al-ada al-kamilah. Meaning incomplete active legal capacity and complete active legal capacity.

- a. Ahliyyah Al-ada Al-naqisah, this means, incomplete active legal capacity. It starts from the time a man reaches the age of Tamyiz or he becomes Mumayyiz up to the time when he reaches the age of puberty or maturity. His acts at this stage of life are categorized in to three.
 - i. Acts that are perfectly beneficial to him. They are granted legal approval even without the permission of his guardian e.g. receiving of gift 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 void ¹²

It is to be noted that the person who possess deficient capacity is not subject to the *kitab-jina*, he cannot therefore, be held criminally liable. He is only subject to a *ta'adib* (displine) the reason being that the *kitabal-jina'* is only applicable to that person alone who comprehends the Kitab fully. Criminal liability does not exist in the case of a person who has not attained puberty, because he is not a mukallaf and the waliy cannot stand in his place for criminal offences.

- b. Ahliyyah al-ada al-kamilah:- it means complete active legal capacity or a perfect capacity of execution which makes a person competent for receiving the divine communication relating to legal obligation with all it's kinds. An adult and sane person competent for receiving divine communication relating to offence. He will have to do or abstain from what is prescribed by this communication, and will be punished for violating it. He is also competent for receiving divine communication relating to acts of worship, in the sense that he is reliable to perform

acts of worship and their performance is obligatory on him. This performance will be valid by which he will deserve a reward as abandoning the acts of worship is disobedience by which he will deserve punishment.¹³

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 omissions he makes in them. With this he is legally competent.¹⁴

CONCLUSION AND OBSERVATION

In the course of this write up it is observed that the life circle of a human being is in all divided in to four stages under Islamic law. The first stage starts right from the time an embryo is conceived in its mother's womb to the time when it is born alive or it comes to this world. In this vein, it is noticed that during this period, the embryo is having rights, but no obligations. Some of these rights include right to inheritance, gift or bequest.

The second stage of man's life is from the period it is born alive to the time when it reaches the age of distinguishing which was said to be seven years according to some jurists. At this stage also the child has the right to claim the afore-mentioned rights he might have when he was in his mother's womb and he can be said to have endowed with Dhimmah. He as well can enter into a contract that is beneficial to him with his guardian's consent.

The third stage is from the period of Tamyiz (seven years) to the time of puberty. At this stage also his acts of entering in to a contract is subjected to three conditions as stated under Ahliyyah Al-ada al-Naqisah. It is also agreed by the jurists that at this stage, a child cannot be criminally responsible for any crime he might have committed. He can only be tortuously liable to pay for any damage or Diyyah from his properties.

The fourth stage of man's life and the last stage is from maturity until death. This is the complete stage of man's life. At this stage, he is both contractually and or criminally responsible for all what he has done. Apart from that, he is bound to follow all the commandment of Allah (S.W.T) be they the acts of faith, rituals contractual etc.

Alhamdu lillah! Wabillahit-tawfiq.

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