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CONTRACTUAL LEGAL CAPACITY AND ITS IMPEDIMENTSUNDER ISLAMIC LAW [AHLIYATUL-'AQDI WA 'AWĀRIḌUHU FIL-FIQH]

*Dr. **ELESIN**, Abdul Wahab Muhammad Jamiu**

Abstract

Contract law can be viewed as the main instrument of facilitating social interactions and distributing legal entitlements. Under the Islamic law, contract is "an expression of the matching between a positive proposal made by one of the contractors and the acceptance of the contract by the other contractor in a way which has an impact on the subject of the contract". It well established that, for any contract/transaction to be validly concluded, there must be tarāḍīl-muta'āqidayn; (mutual consent or free consensus of the parties to the contract). Also, at-tarāḍī is only legally valid when the parties to the contract possess ahliyatul-'aqd (contractual legal capacity). Consent is when one does something voluntarily without being forced or coerced to do the act. In other words, contractual legal capacity of the party to a contract must be free from any invalidating factors. It is therefore pertinent to discuss contractual legal capacity and various factors that affect a person's legal power from disposing his property and concluding the contract on the ground of lacking valid consent. This research is descriptive and doctrinal aiming at providing legal material for legal practitioners especially those who do not comprehend original language of the law. The research consulted Qur'ān, Sunnah, fiqhmanuals, tafsīr books and academic literature. Our findings reveal that lack of proper understanding of the contractual legal capacity and its impediments may lead to miscarriage of justice. The paper therefore recommends that al-quḍāt (judges), muḥāmūm (lawyers), students of law as well researchers be well informed and be guided accordingly.

Keywords: Islamic Law of Contract, Contractual Legal Capacity, Impediments of Contractual Legal Capacity, Interdiction of Contractual Legal Capacity;

1. BACKGROUND TO THE STUDY

Fiqhul-Mu'āmalāt Al-Māluiyah (Law of MonetaryTransaction/Contract) is the part of the Fiqh dealing with relations between people, such as the Islamic commercial law. It is the area of Fiqh which governs/reviews the process of financial products from the perspective of Sharī'ah-compliance. This review requires explicitly Islamic legal systems that cover commercial transactions. Generally this part deals with the principles of contracts, the elements of contracts, conditions of subject matter,

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qualifications of contracting parties, classification of contracts with regard to validity among others.[1] This paper discussed contractual legal capacity and its impediment under Islamic Law of contract.

The paper is divided into six parts, with this background as the first followed by conceptual framework in the part two in which the concept of 'aqd (contract) was given. Part three described formation of contract while part four discussed ahliyatul-'aqd (contractual legal capacity). Part five explained 'awariḍu ahliyyatil-'aqd (impediment to contractual legal capacity) and part six round-off the paper by providing summary, conclusion, major recommendations and area of further research. Doctrinal method of research was adopted. The papery consulted the primary and secondary sources of Sharī'ah in their original forms (Arabic language). References were made to Tafsīr, Fiqh and Usūlul-Fiqh among others. Relevant articles on internet were also consulted.

2. AL-ITĀR AL-MAFHŪMI [CONCEPTUAL FRAMEWORK]

In the classical manuals of Islamic law, the term 'aqd (contract) is most frequently used for two-party transactions, concluded by ījāb (offer) on one side and qabūl (acceptance) on the other. However, it is also used for transactions concluded by ījāb (an offer) only such as: guarantees, gifts, bequest and the likes. Again, 'aqd is used for acts merely juristic in nature such as divorce, release, manumission of debts and the likes. In fact, the term covers obligation in every field: one's religious obligation to Allah, the interpersonal obligations of marriage, the political obligations expressed in treaties, and the commercial obligation involved parties in a range of particular contract.[2] It would seem that 'aqd'is used in its etymological sense (tying up), reflected, as it happens, also in the root of (obligation) rather than as a technical term.

(a) Ta'rīful-'Aqd [Definition of Contract]

Al-'Aqdwith 'uqūd (عُقُودٌ) asplural lexically means conjunction or to tie, is akinto the word "contract" of modern law. The Qur'an says about the "'aqd'" in different verses.[3] Some of them are: (2:40, 83, & 177), (3:81),

1 Liman S. H. & Elesin A. M. J. (2019), Introduction to Basic Principles of Sharī'ah (Islamic Law), TETFund sponsored, ABU Press, Zaria, p. 19.

2 Mohammed N. 'Principles of Islamic Contract Law', Journal of Law and Religious 6, (1988), 115-116, Hussein H. Contracts in Islamic Law: The Principles of Commutative Justice and Liberality, Journal of Islamic Studies (2002) pp. 257-297).

3 The other related terms to 'Aqd' are: (a) Mīthāq [see verses: (3:81, 187), (4:21, 90, 92), (5:12, 70), (7:169), (8:72), (13:20)] (b) 'Ahd or Wa'dah [see: (2:40, 83, 177),

(5:1, 87-88). According to Majallatul-Aḥkām al-'Adliyyah, 'aqd takes place when two parties undertake obligations in respect of any matter. It is effected by the combination of ījāb (offer) and qabūl (acceptance). Interpretation of Qur'ān says: "O you who believe! Fulfill your obligations" [sūratul (chapter) Māidah (5) verse: 1].

Linguistically, "aqdu" in Arabic language means "to tie" or "to fasten hard objects with rope", e.g. tying iron etc. It is an act of "putting a tie to a bargain". When two parties or more enter into a contract, it is called "in'iqād" (الْعِقَادُ), that is joining or tying up the ījāb (offer) and qabūl (the acceptance) together. The obligations thus arising out of contract are called "al-'Aqd" (العَقْدُ). Other relevant terms include: "al-Iltizām"الالتِزَامُ (commitment/engagement), "al-'Ahduawal-Wa'dُ العَهْدُ أو الوَعْدُ" (covenant/promise).[4]

'Aqd was later used for legal transactions, contracts or agreement, e.g. marriage contract ('aqdun-nikāh), sales contract ('aqdul-bay'i), accord contract ('aqdul-hudnah) etc.

Legally, there is an abstract definition that indicates a contract compromises a legal "ījāb" (offer) and "qabūl" (acceptance) in a way that affect the contract subject. In other words, 'aqd (contract) is "an expression of the matching between a positive proposal made by one of the contractors and the acceptance of the contract by the other contractor in a way which has an impact on the subject of the contract".

Therefore, Muslim scholars have not distinguished between bilateral and unilateral agreements or pact and promise obligations. They are all called contracts. That tells that the term 'aqd (contract) has a much wider and broader connotation as compared to the term "contract" in the common law. 'Uqūd (contracts) in Islamic law covers Ḥuqūqu-Allah; (the Rights of Almighty Allah), by observing ṣalat (Prayers), ṣawm (fasting), zakat (poor-due) and ḥajj (pilgrimage). It also covers ḥuqūqul-'ibād; the rights of human beings and even animals.[5] Allah (SWT) instructed Muslims to

(17:40)]. See: Qurtubīy M. A. (d. 671 AH), al-Jāmi'u li Ahkāmil-Qurān; TafsīruQurtubīy, ed. Ahmad B. and Ibrahim A. dārul-Kutubil-Misriyyah, Cairo, 2nd edition, 1384 AH / 1964, vol. 1, p. 9247, vol. 12, p. 9.

4 Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), Al-MawsuatulFiqhiyyah, vol. 30, p. 199.

5 Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), Al-MawsuatulFiqhiyyah, vol. 30, p. 198.

obey and fulfill all contractual obligations in the above quoted Qur'ān 5: 1 and the following interpretation of Qur'ān:

> And to those whom you have made a pledge (brotherhood) give them their portion (by Waṣiyyah, i.e. legal wills)". (Sūratun (chapter) Nisā' (4) verse: 33).

The most common forms of the contracts of exchange are either al-bay'u (buying) or ash-shirā'u (selling). Al-bay'u which involves al-bay'u (the sale of goods), or al-ijārah (leasing/hiring) which involves the saleof the usufruct (manfa'ah) or ijāratul-'amal aw khidmah (rendering of service). In both, the subject matter is the central focus of the legal effects accruing from the valid conclusion of the contracts. In Islamic jurisprudence, exchange contracts require more stringent fulfilment of the conditions of the object; i.e. subject-matter (shurūtumaḥallil-'aqd), particularly on the conditions of certainty, ascertain, ability and proprietary value. This is because exchange contracts involve the exchange of counter values, as opposed to the unilateral contracts of gratuity (at-tabarru'āt), which give one-sided benefit to the recipient.[6]

3. INSHĀ'UL-'AQDإِنْشَاءُ العَقْدِ [FORMATION OF CONTRACT]

Under Islamic law, a contract is formed and recognised as valid if the elements of the contract are fulfilled. A valid contract can be formed if there are the elements laid down in Islamic law, and which must exist in order for the contract to be considered lawful. However, opinions of Muslim jurists differ on what constitute essential elements of 'aqd otherwise known as arkānul-'aqd (the basic pillars of contract). Arkānul-'aqd (the basic pillars of contract) refers to the necessary legal conditions in the absence of which any contract would be considered null and void. These elements have been derived from the primary and secondary sources of Sharī'ah.

The jumhūr (majority) schools of law; Mālikis, Shāfi'is and Hanabilis[7] hold that arkānu are what to be necessary for a thing to exist whether part or relate to it. Hence, essential elements of contract are one; ṣīghah

6 Khaled B., (2012) Islamic Contract Law, IALS, University of London, Available at SSRN: https://ssrn.com/abstract=2019550 or http://dx.doi.org/10.2139/ssrn.2019550, accessed Wednesday 10/9/2020.

7 Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), Al-MawsuatulFiqhiyyah, vol. 30, p. 200.

(expression) i.e. ijāb (offer) and qabūl (acceptance), two; 'āqidan (two contracting parties) and three; maḥallul-'aqd (subject matter of contract).

For a valid contract in Sharī'ah, certain conditions are to be met such as: the existence of contracting parties who must be capable of entering into contracts, i.e. they must be mature and sane. The parties are otherwise known as: mūjib (offeror) and qābil (offeree). The second element is ṣīghah (expression) which consisted of ījāb (offer) and qabūl (acceptance), while maḥallul-'aqd (the subject matter) and thaman (the consideration) constitutes the third essential element. As for the parties to a contract, they must be legally capable to conclude the contract independent of themselves to the exclusion of others. This is otherwise known as "ahliyyatul-'aqd"; i.e. contractual capacity. The capacity to transact in Islamic law is measured by two aspects, namely prudence and puberty. Muslim jurists in general hold that, intrinsically, the essential elements of a contract are threefold and if these elements are not found properly, the contract is invalid:

i) Al-'āqidan (the contracting parties);
ii) Aṣ-ṣīghah (the form/expression), i.e. ijāb (offer) and qabūl (acceptance);
iii) Maḥallul-'aqd aw ma'qūd 'alayh (the subject matter: both goods and consideration).

The relevant element to the purpose of this paper is the first element, it is here by explained and discussed in the following paragraphs.

(a) Element One: al-Muta'āqidānالمُتَعَاقِدَان [Contracting Parties]

A person in law is either "shakhṣun tabī'iyun" "شَخْصٌ طَبِيْعِيٌّ"; i.e. natural person or "shakhṣunma'nawiyun aw i'tibāriyun" "شَخْصٌ مَعْنَوِيٌّ أَوْ اعْتِبَارِيٌّ"; i.e. artificial, juridical, juristic person or body corporate. Both the two categories can constitute contracting parties. The contracting parties are the pivot of the existence of the contract. The first element of valid contract in Sharī'ah is al-Muta'āqidān (the contracting parties) otherwise known as: mūjib "offeror"and qābil "offeree". There are also conditions for each pillar of a contract, for instance, conditions related to the parties are to have the requisite ahliyyah (legal capacity), conditions related to the object of the contract are to be well defined and known, also conditions related

to ṣīghatul-'aqd (the language of ijāb (offer) and qabūl (acceptance) are to be clear.[8]

(i) Shurūtul-Muta'āqidayn شُرُوطُ المُتَعَاقِدَيْنِ [Validity Conditions of the Parties]

To have a valid contract, it must be concluded by the following parties:

(a) Direct parties who have ahliyyatul-'aqd (legal capacity);
(b) Guardians, those who have wilāyah (authority i.e. guardianship) over the contracting parties, or;
(c) Agents, executors or personal representatives, those who are given wakālah; i.e. authority or power of attorney, by the contracting parties under contract of agency. However, this does not include unauthorised agents.

It should be noted that ahliyyatul-'aqd (legal capacity) is most sacrosanct condition of the contracting parties whether by one-self, by guardian, by executor, by personal representative, by agent or power of attorney. It is therefore pertinent to discuss ahliyyatul-'aqd (legal capacity) in the following passages.

4. AHLIYATUL-'AQD أَهْلِيَةُ العَقْدِ [CONTRACTUAL LEGAL CAPACITY]

Ahliyyah refers to a quality by which a person becomes fit to obtain what he is entitled to, or for the discharge of legal obligation to which he is liable to in the eye of the Law. Ahliyyah (legal capacity) is one of the elements of a contract for the purpose of acquiring legal rights and mutual benefits and to facilitate the imposition of the obligations on the parties. Capacity is the ability or fitness to acquire a right and exercise it, or to resume/acquire a duty and perform it. In other words, capacity is the ability to make a contract under a fully sane physical condition with a healthy mental awareness. Another most important part of each party is the possession of capacity according to Sharī'ah. Therefore, Muslim jurists defined the capacity as "a quality, which makes a person qualified for

8 Majallatul-Ahkami Al-Adliyyah, Committee of Scholars and Jurists, Khilāfatul-'Uthmaniyah, ed. Najib H. article: 101, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), Al-MawsuatulFiqhiyyah, vol. 30, p. 221, Al-'Uthaimin, M. S. (1433 AH), Ash-SharhulMumti'u, darulIbnJawzi, KSA, 3rd edition, vol. 8, p. 106-112, Az-ZuhayliWahbah (nd); Al-Fiqhul-IslamiwaAdillatuhu, Dimasq, vol. 4, p. 457-463, 471.

acquiring rights and undertaking duties and responsibilities and liabilities".

The needed qualifications for a contract to be valid are bulūgh (maturity) and rushd (rationality) of the parties concerned. In other words, a contract conducted by a minor who cannot distinguish between right and wrong, a lunatic/mad or an insane person lacking discretion and reasonability are null and void.

(a) Main categories of Contractual Legal Capacity:[9]

Ahliyyatul-'aqd (contractual legal capacity) is of two types viz. ahliyyatul-wujūb (legal capacity to own/possess), in other words, legal capacity for acquisition of rights and ahliyyatul-ādā' (legal capacity to dispose), in other words, legal capacity execution or performance of duties. Ahliyyatul-wujūb is legal capacity to acquire or own property. The only condition for being legally capable of owing property, interest or right is "insāniyyah" i.e. "being a human". Bulūgh (maturity), tamyīz (discretion) and 'aql (intellect) are not conditions for ahliyyatul-wujūb (legal capacity to own/possess).

On the contrary, ahliyyatul-ādā' i.e. (the legal capacity to dispose or exercise a right); e.g. for X to validly dispose his property, he must be legally capable. For X to be considered legally capable, he must fulfill certain conditions. Apart from being human, he must attain bulūgh (maturity) tamyīz (discretion) and 'aql (intellect). This is evident in (Sūratun (chapter) Nisā'i (4) verse: 6) quoted above.[10]

Illustration:

Ahliyyatul-wujūb (receptive legal capacity) is the legal capacity to own/possess. It refers to the capacity for inherent rights and obligation. Its criterion is based on the life itself. The moment an embryo is successfully delivered; he/she acquires ahliyyatul-wujūb because he is a human being. He/she has dhimmatunṣaḥīḥatun "valid personality" to own gift, inheritance, price of his goods sold by his guardian or legal representative. Ahliyyatul-Wujūb (receptive legal capacity); it is also sub-divided into: a)

9 Majallatul-Ahkami Al-Adliyyah, Committee of Scholars and Jurists, Khilāfatul-'Uthmaniyah, ed. Najib H. article: 101, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), Al-MawsuatulFiqhiyyah, vol. 30, p. 219, Az-ZuhayliWahbah (nd); Al-Fiqhul-IslamiwaAdillatuhu, Dimasq, vol. 4, p. 457-463, 471-475.

10 Qurtubīy M. A. (d. 671 AH), al-Jāmi'u li Ahkāmil-Qurān; TafsīruQurtubīy, ed. Ahmad B. and Ibrahim A. dārul-Kutubil-Misriyyah, Cairo, 2nd edition, 1384 AH / 1964, vol. 12, p. 9.

ahliyyatul-wujūbi an-nāqiṣah (deficient or inchoate receptive legal capacity) and b) ahliyyatul-wujūbi al-kāmilah (complete receptive legal capacity). Deficient receptive legal capacity arises due to the rights that are attached to a person such as a fetus in mother's womb who forms part of a mother. He is capable of holding rights for his own interest such as in inheritance, wills, legitimacy, gift, endowment etc.

On the other hand, complete receptive legal capacity comes about due to the imposition of rights on the person and of obligation against him. This exists from the birth till death of person. A minor starting from his birth until the age of seven has this legal capacity. He has the capacity to have rights and to bear certain obligations that could be managed by the guardian in respect, for example, of maintenance and payment of zakat.

Ahliyyatul-ādā'; i.e. active legal capacity to dispose and exercise rights and obligation. Its criterion is based on maturity or intellect. It is acquired upon attaining a certain level of intellectual maturity and competency. Therefore, the same human being cannot legally dispose his property; because, even though, he has valid personality "dhimmah" but he is deficient of bulūq (maturity), tamyīz (discretion) and'aql (intellect) which are conditions. Also, Ahliyyatul- Ādā' (active legal capacity); is also sub-divided into: a) ahliyyatul-āda' an-nāqiṣah (deficient or inchoate active legal capacity) and b) ahliyyatul-ādā' al-kāmilah; (complete active legal capacity).

Ahliyyatul-ādā' al-kāmilah (complete active legal capacity) refers to the competency of person to do certain dispositions with and subject to the authorisation of another person. This legal capacity is given to a minor who reaches the age of seven until he reaches the age of puberty. He is known as mumayyiz (a child who is capable of distinguishing between good and bad, profit and loss and knows the general meaning of the conditions of the contract). However, opinions of the jurists differ about the validity of contract concluded by mumayyiz based on their disagreement on the nature of his contractual capacity. Summary of opinions of the jurists on this matter was captured as follows:

(b) Taṣarufātul-Mumayyiz تَصَرُّفُ المُمَيِّز [Disposition of Reasonable Child]

Disposition of mumayyiz and its effects according to the majority of Hanafis can be divided into three categories.[11]

i) Dispositions which are purely for one's own benefit such as acceptance of gift or present. Such dispositions are valid even without permission from the guardian;
ii) Disposition which are purely detrimental to him such as giving his property to another by way of gift. These dispositions are invalid even with the permission of guardian;
iii) Dispositions which may either be beneficial or detrimental to him such as contracts of sale, hire and mortgage. Such dispositions are valid but subject to the ratification by the guardian.

However, minor does not have ahliyyatul-ādā'. All his sayings are non-binding and his contracts are void. This is because he does not understand the nature and effects of contract. In the opposite, complete active legal capacity (ahliyyatul-adā' al-kāmilah) refers to the competency of person to do whatever acts and dispositions he wishes without any need to get permission from other. The person who attained puberty and prudent has this legal capacity. He/she is legally competent to conclude and perfect contract, deal and transaction.[12]

Put summarily, complete legal capacity for acquisition of all kinds of rights and obligation is found in a human being after his birth, while complete legal capacity for execution and disposal of rights or performance of duties or obligations is established for a human being when he/she attains bulūgh (puberty or legal majority) and in the possession of rush (maturity of discretion). However, there are certain impediments which the fuqahā'u (jurists) considered to be capable of destroying a person's legal capacity. These factors affect complete legal capacity preventing capacity for acquisition and capacity for execution or performance of duties from taking full effect. The existence of these factors may result in the total absence of capacity or in deficient or imperfect capacity. In other words, all financial contracts (sale, hire, gift,

11 Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), Al-MawsuatulFiqhiyyah, vol. 30, p. 219.
12 Y. Y. Bambale, (2007), Islamic Law of Commerce and Industrial Transactions, Malthouse Law Books, p. 20-21.

etc.) would be null, void and of no effect as if there was no any. These are known as "'awariḍul-Ahliyyah" "عَوَارِضُ الأَهْلِيَّة" i.e. impediments to legal capacity, which the following paragraph discussed.

5. 'AWĀRIḌUL-AHLIYYAH عَوَارِضُ الأَهْلِيَّة [IMPEDIMENTS TO CONTRACTUAL LEGAL CAPACITIES]

Consent is when one does something voluntarily without being forced or coerced to do the act. There are various factors which lead to impediments of the legal capacity of a person that prevent him from disposing his property and concluding the contract on the ground of lacking valid consent. According to jumhūrul-fuqahā' (majority of Muslim jurists), the impediments are: i) minority, ii) insanity, iii) idiocy/imbecility, iv) prodigality, v) death sickness, vi) bankruptcy and viii) intoxication/drunkenness, while Maliki School includes femininity.[13] A person of these qualities cannot legally conclude financial transactions that involve alienation, conveyance and transfer of interest in property. Underneath were the discussions of the above mentioned legal incapacities.

(a) Aṣ-Ṣighar الصِّغَر [Minority]

A person who falls under this category of impediment is known aṣ-ṣabiyy الصَّبِيُّ (minor). He is a child who does not exhibit signs of puberty/maturity or reach the age of puberty/majority. The restriction on the minor is lifted upon exhibiting signs of maturity or reaching majority. This takes its authority from ḥadīth:

> From Aishah (RA) said: the Messenger of Allah (SAW) said: "The dictum or pen is lifted from three persons; from a sleeping person until he wakes up, from an insane till he recovers and from a minor until he reaches age of puberty."[14]

13 Ibn'Abidin Muhammad A. (d. 1252 AH), Raddul-Muhtarala Ad-Durr Al-Mukhtar, Beirut, darul-Fikr, 2nd edition, 1412/1992, vol. 3, p. 527, Ibn'Abdul-Barr Abu 'Umar Y. A., (d. 463 AH), Al-Istidhkār, ed. Salim M. A & Muhammad A. M., dārul-Kutubil-'Ilmiyyah, Beirut, 1st edition 1421/2000, vol. 6, p. 540, Al-Baji, Abu Al-Walid S. K (d. 474 HA), al-MuntaqaSharhul-Muwattai, Cairo, 1st edition 1332, vol. 4, p. 157-158, Ash-Shirazi Abu Ishaq A. A. (d. 476 HA), Al-Muhadhab fi Fiqhl-Imam Ash-Shafi'i, ed. Adil A. & Ali M., darul-Ma'rifah, 1st edition (1424/2003), vol. 2, p. 3, Al-Bahuti M. Y. (d. 1051) (1414/1993), Al-Bahuti Mansur Y. (d. 1051 AH), SharhuMuntahal-Iradat, alamul-Kutubi, 1st edition, 1414/1993, vol. 2, p. 8.

14 Abu DāudSulaiman S. (d. 275 AH), (nd), SunanuAbīDāud, ed. Muhammad M. A. al-Maktabatul-'Asriyah, Beirut (nd); vol. 4, p. 139, no. 4398, an-Nasai A. S. (d. 303), Sunanun-Nisai, ed. Abdulfattah A. Halab, 2nd edition, (1406/1986), vol. 6, p. 3432,

The ḥadīth centers on the mental faculty which could be affected by age, lunacy or sleep. Puberty as agreed upon by the Muslim jurists is proven by emission of semen in a dream for a boy and by menstrual discharge for a girl. Exhibit of pubic hair and armpit hair are other manifestations of puberty and maturity. Where these signs did not manifest, the jurists use age factor to determine bulūgh (puberty). However, opinions of the jurists differ about the age of puberty. The minimum age of puberty for a boy is twelve and the girl nine. Hanafis opine that the maximum age of puberty for male is eighteen year old and for female seventeen years.[15] Article 986 says:

> beginning of puberty age for man is twelve years and nine years for woman why maximum age for both man and woman is fifteen years. When a man ages twelve and a woman ages nine but without being bāligh (pubescent) they are "adolescents", and the period is called "adolescence age".

Malikis put maximum age of puberty for both male and female at eighteen years old.[16] Jumhūrul-fuqahā' (majority of Muslim jurists) hold that maximum age of puberty for both boys and girls is fifteen years on the authority of a report by Abdullahiibn Umar (RA):

> From Abdullahiibn'Umar (RA) said: "I went to see the Prophet (SAW) and offered myself to participate in the Battle of Uhud (3rd AH) when I was the fourteen years old but the Prophet (SAW) rejected. Later when I was fifteen years old and came to the Prophet

no. 3432, at-TirmidhiyAbū'Isa, (1395/1975), Suanaut-Tirmidhiy, ed. Ahmad M. Shakir et al, Cairo, 2nd edition, vol. 4, p. 32, no. 1423, IbnMājah, M. Y. (d. 273 AH), SunanuIbnMājah, ed. Muhammad Fuad A. dārulhyāiKutubil-Arabiyyah, (nd), vol. 1, p. 658, no. 2041. Imam Tirmidhy authenticated the ḥadīth, also did Al-Bani M. N., (d. 1420AH) in his Irwaul-Ghalili fi TakhrijiAḥadīthManaris-Sabil", ed. Zuhair S. al-Maktaul-Islami, Beirut, 2nd edition (1405/1985), vol. 2, p. 4, no. 297.

15 IbnNujaimZainud-Din I. (d. 970 HA), Al-BahruAr-RaiqSharhuKanzud-Daqaiq, together with Takmilatul-BahriAr-Raiqi by Muhammad H. A. (d. 1138 HA) and Munhatul-Khaliqi by IbnAbidin, darul-Kitabi Al-Islami, 2nd edition (nd), vol. 3, 106.

16 Al-Baji, Abu Al-Walid S. K (d. 474 HA), al-MuntaqaSharhul-Muwattai, Cairo, 1st edition 1332, vol. 6, p. 185, Ibn Al-Arabi Al-Qadi Muhammad A. (d. 543 AH), Ahkamul-Quran, ed. Muhammad A., Beirut, Lebanon, darul-Kutubi Al-'Ilmiyah, 3rd edition, 1424/2003, vol. 1, p. 320, Qurtubīy M. A. (d. 671 AH), al-Jāmi'u li Ahkāmil-Qurān; TafsīruQurtubīy, ed. Ahmad B. and Ibrahim A. dārul-Kutubil-Misriyyah, Cairo, 2nd edition, 1384 AH / 1964, vol. 5, p. 9.

(SAW) and requested to participate in the Battle of Khandak (Drain) (4th AH), the Prophet (SAW) accepted".[17]

The ḥadīth put age of puberty for a boy to fifteen years while Jumhūr extend the context to a girl.[18]On the other hand, Hanafis opine that the maximum age of puberty for male is eighteen year old and for female seventeen years.[19] Malikis view maximum age of puberty for both male and female is fifteen, seventeen or eighteen years old.[20]

Imam Ibn Arabi; a prominent Maliki jurist, commented with concern that: if ḥadīth Ibn 'Umar (RA) is not considered determining proof for age of fifteen, then all other opinions should be considered merely uncorroborated claims. The age approved by the Prophet (SAW) prevails. The Prophet (SAW) also considered الإنبَات (pubic hair) in the case of Banu Qurayzah.[21]

It would not be wrong if it is suggested that recourse should be made to 'urfwal-'ādah (custom and practice) in determining age of puberty. The mufti and qāḍi should be responsible for that. The point made here is that, صِغَرٌ (minority) is an impediment to legal capacity. And that any contract concluded by صَغِيْرٌ (a minor) is invalid. His parent or guardian should represent or supervise him or her.

17 Bukhāri M. I., (1422), Sahīhu Bukhāri, ed. Muhammad Zuhair, dāru Taoqu Najāt, 1st edition, vol. 3 p. 177, no. 2664 and Muslim ibn Hajaj, (nd), Sahīhu Muslim, ed. Muhammad Fuda Abdulbaqi, dāruIhyāit-Turāthi al-Arabiy, Beirut, vol. 3 p. 1490 no. 1868.

18 An-Nawawi, Abu Zakariya M. Y. (d. 676 AH), Al-Minhajsharhu Sahihu Muslim ibn Al-Hajjaj, Beirut, daruIhyait-Turath Al-Arabi, 2nd edition (1392AH), vol. 13, p. 12, IbnHajar Al-'Asqalani A. (d. 852 HA), Fathul-Bāri Sharhu Sahīhul-Bukhāri, dārul-Ma'rifah, Beirut, 1379, ed. Muhammad Fuad A. et al. vol. 5, p. 277.

19 Ibn Nujaim Zainud-Din I. (d. 970 HA), Al-Bahru Ar-Raiq Sharhu Kanzud-Daqaiq, together with Takmilatul-BahriAr-Raiqi by Muhammad H. A. (d. 1138 HA) and Munhatul-Khaliqi by IbnAbidin, darul-Kitabi Al-Islami, 2nd edition (nd), vol. 3, 106.

20 Al-Baji, Abu Al-Walid S. K (d. 474 HA), al-MuntaqaSharhul-Muwattai, Cairo, 1st edition 1332, vol. 6, p. 185, Ibn Al-Arabi Al-Qadi Muhammad A. (d. 543 AH), Ahkamul-Quran, ed. Muhammad A., Beirut, Lebanon, darul-Kutubi Al-'Ilmiyah, 3rd edition, 1424/2003, vol. 1, p. 320, Qurtubīy M. A. (d. 671 AH), al-Jāmi'u li Ahkāmil-Qurān; TafsīruQurtubīy, ed. Ahmad B. and Ibrahim A. dārul-Kutubil-Misriyyah, Cairo, 2nd edition, 1384 AH / 1964, vol. 5, p. 9.

21 Ibn Al-Arabi Al-Qadi Muhammad A. (d. 543 AH), Ahkamul-Quran, ed. Muhammad A., Beirut, Lebanon, darul-Kutubi Al-'Ilmiyah, 3rd edition, 1424/2003, vol. 1, p. 320, Qurtubīy M. A. (d. 671 AH), al-Jāmi'u li Ahkāmil-Qurān; TafsīruQurtubīy, ed. Ahmad B. and Ibrahim A. dārul-Kutubil-Misriyyah, Cairo, 2nd edition, 1384 AH / 1964, vol. 5, p. 34-36.

Maturity of the contracting parties is of paramount important. Not every person can make a legal contract, such as, a minor, an insane person and any person incapable of making a decision due to physical and mental defects. The right to contract and discharge obligations can only exist where there is capacity to contract. Contracting parties must be legally competent to conduct contract. Any contractual agreement of incompetent person is null and void and of no effect. A minor cannot validly enter into a contract. Minor is one who has not reached the age of puberty; that is a person who is still legally a child. His contact is void. No person can validly conclude a legal transaction without first having attained physical, mental and intellectual maturity that being the equivalent of maturity to enjoy full capacity, a person, should attain physical puberty and enjoy sound judgment known also as prudence in his or her judgment.[22]

Equivalent to ahliyyatul-'aqd (legal capacity) is ar-rushd; i.e. discretion. The physical or virtual presence of the contracting parties is necessary at the occasion. Both parties to the contract must be capable of doing so. The competence to transact in Islamic law is measured largely by two aspects, namely prudence and puberty as revealed in the Qur'ān thus:

> Observe the orphans through testing their abilities until they reach the age of marriage; then if you find them capable of sound judgment, hand over to them their property/fortune. But consume it not wastefully, nor in haste against their growing up. If the guardian is well-off, let him claim no remuneration, but if he is poor, let him have for himself what is just and reasonable. When ye release their property to them, take witness in their presence, but all-sufficient is Allah in taking account" (Sūratun (chapter) Nisā'i (4) verse: 6).

Ar-rashīd (intelligent or prudent) in the verse means: "Someone who is prudent in managing and disposing his/her property; either through selling, buying, renting, leasing, pawning and the likes". It does necessarily means somebody who does not spending his money on ḥarām.[23]

(b) Zawālul-'Aql زَوَالُ العَقْل [Insanity/lunacy]

Another impediment to capacity is insanity or lunacy. A person who is in the state of insanity is known as an insane. He is a person whose actions

22 Majallatul-Ahkami Al-Adliyyah, Committee of Scholars and Jurists, Khilāfatul-'Uthmaniyah, ed. Najib H. article: 101, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), Al-MawsuatulFiqhiyyah, vol. 30, p. 219, Az-ZuhayliWahbah (nd); Al-Fiqhul-IslamiwaAdillatuhu, Dimasq, vol. 4, p. 457-463, 471.

23 Al-'Uthaimin, M. S. (1433 AH), Ash-SharhulMumti'u, daruIbnJawzi, KSA, 3rd edition, vol. 8, p. 184-185.

cannot be said to be his own and are humanly abnormal and irrational. He is prohibited from dealing with his property and entering into a contractual relationship. His guardian must act on behalf of him. His dispositions are similar to the disposition of a minor below the age of seven. Article 979 of Majallatul-Ahkami Al-'Adliyyah says: "An insane, who is continuously mad is considered to be a minor of imperfect understanding". The restriction on the insane is lifted upon his mental recovery. On the authority of ḥadīth:

> From Aishah (RA) said: the Messenger of Allah (SAW) said: "The dictum or pen is lifted from three persons; from a sleeping person until he wakes up, from an insane till he recovers and from a minor until he reaches age of puberty."[24]

Under Islamic law, any financial contract entered into by an insane person is null and void (bātil). Evenly balanced with minors without prudence, such a person is devoid of all aptitude. The reason for this is that he cannot have the intention to produce legal associations, which forms the source for the legality of all contracts in Islamic law.

(c) As-Safah/Al-Junūnالسَّفَهُ/الجُنُونُ[Idiocy/Imbecility]

Idiocy is another impediment of legal capacity.A person who is in the state of"idiocy" is known as"safīhسَّفِيْهٌ" or"ma'tūhمَعْتُوْهٌ" (idiot). He is a person being so deranged in mind because his understanding is limited, his speech is confused and his plan of action is bad. However, his action is similar to the action of mumayyiz; i.e. "a reasonable person".Article 978 of Majallatul-Ahkami Al-'Adliyyah says: "An idiot is considered to be a minor of perfect understanding". Except Imam Abu Hanifah (RA) who held that idiocy is not a cause for ḥajr (interdiction), and that it is not permitted to interdict an idiot. Jumuhūrul-fuqahā'u (majority of jurists) including Imam Abu Yusuf and Muhammad ibn Al-Hasan Ash-Shaybani, the two principal students and jurists of Hanafi School held that idiocy is

24 Abu DāudSulaiman S. (d. 275 AH), (nd), SunanuAbīDāud, ed. Muhammad M. A. al-Maktabatul-'Asriyah, Beirut (nd); vol. 4, p. 139, no. 4398, an-Nasai A. S. (d. 303), Sunanun-Nisai, ed. Abdulfattah A. Halab, 2nd edition, (1406/1986), vol. 6, p. 3432, no. 3432, at-TirmidhiyAbū'Isa, (1395/1975), Suanaut-Tirmidhiy, ed. Ahmad M. Shakir et al, Cairo, 2nd edition, vol. 4, p. 32, no. 1423, IbnMājah, M. Y. (d. 273 AH), SunanuIbnMājah, ed. Muhammad Fuad A. dāruIhyāiKutubil-Arabiyyah, (nd), vol. 1, p. 658, no. 2041. Imam Tirmidhy authenticated the ḥadīth, also did Al-Bani M. N., (d. 1420AH) in his Irwaul-Ghalili fi TakhrijiAḥadīthManaris-Sabil", ed. Zuhair S. al-Maktaul-Isiami, Beirut, 2nd edition (1405/1985), vol. 2, p. 4, no. 297.

a curse and that it is permitted to interdict an idiot for his/her interest.[25] The reliance of jumhūr include the above quoted Q4: 5 and another passage of the Qur'ān:

> But if the debtor is of poor understanding, or weak, or is unable himself to dictate, then let his guardian dictate in justice." (suratul (chapter) al-Baqarah (2) :282).

According to Imam Sarkhaṣi, a great Hanafī jurist, this verse is explicitly subjecting an idiot to guardianship through interdiction. His/her disposal of property can only be valid and enforceable if it is concluded under the supervision and approval of the guardian.[26]

From the Sunnah, the jumhūr invoked decision of the Messenger of Allah (SAW) who put ḥajr (interdiction) on Hibban ibn Munqidh,[27] a companion, from concluding financial transaction which creates obligation of conveyance. However, when Hibban complained that he cannot stop trading, then, the Prophet (SAW) advised him: "When you buy something, say (to the seller): "No deception"; i.e. (Lākhalābah). Then, in every goods you bought you have option of three days. If you satisfied, you hold the commodity, but if you dissatisfied you return it to its owner; i.e. the seller".[28]Although, Imam Abu Hanifah also relied on the same ḥadīṯ of Hibban to disallow ḥajr on safīh (an idiot), the interpretation of jumhūr to the ḥadīṯ seems more acceptable.

25 As-Sarkhaṣy, Muhammad ibn Ahmad (d. 483HA), Al-Mabsut, dārul-Ma'rifah, Beirut, 1414/1993, vol. 24, p. 156-157.

26 As-Sarkhaṣy, Muhammad ibn Ahmad (d. 483HA), Al-Mabsut, dārul-Ma'rifah, Beirut, 1414/1993, vol. 24, p. 156-163.

27 He is Habbanu ibn Mukqdh ibn'Amru Al-Ansariy, father of Yahya and Was'iu; teachers of Imam Malik. He lived one hundred and thiry (130) years. He has earlier sustained wound on his head in one of his battles with the Messenger of Allah (SAW) which affected his tongue and mental faculty. See: As-Sarkhaṣy, Muhammad ibn Ahmad (d. 483HA), Al-Mabsut, dārul-Ma'rifah, Beirut, 1414/1993, vol. 24, p. 157-158, Qurtubīy M. A. (d. 671 AH), al-Jāmi'u li Ahkāmil-Qurān; TafsīruQurtubīy, ed. Ahmad B. and Ibrahim A. dārul-Kutubil-Misriyyah, Cairo, 2nd edition, 1384 AH / 1964, vol. 3, p. 386-387, vol. 5, p. 37, vol. 18, p. 138.

28 Ibn Mājah, M. Y. (d. 273 AH), SunanuIbnMājah, ed. Muhammad Fuad A. dāruIhyāiKutubil-Arabiyyah, (nd), vol. 2, p. 789, no. 2355, Ibn'Abdul-Barr Abu 'Umar Y. A., (d. 463 AH), Al-Istidhkār, ed. Salim M. A & Muhammad A. M., dārul-Kutubil-'Ilmiyyah, Beirut, 1st edition 1421/2000, vol. 6, p. 485. Al-Bani M. N., (d. 1420AH) authenticated the ḥadīth in his Silisilatul-Aadith As-Sahihah, Riyadh, 1st edition, 1415 AH/1995, vol. 6, p. 881, no. 2875.

(d) Al-Isrāf/At-Tabdhīr الإِسْرَافُ وَالتَّبْذِيرُ [Prodigality/Profligacy]

Also, prodigality constitutes another impediment of contractual capacity. A person who falls under this impediment is called "al-mubadhr المُبَذِّرُ"or al-musrif المُسْرِفُ (prodigal). He is referred to as either:

i) a person who wastes and destroys his property uselessly by throwing it away and squandering it in his expenditure or;
ii) a person who is deceived in business owing to his being stupid or simple minded.

Article 946 of Majallatul-Ahkami Al-'Adliyah defines al-mubadhr as: "one who is wasteful, who behaves in a prodigal way, he spends a lot of money carelessly without thinking about what will happen when they have none left". Reason for his restriction is wasting and destroying of property. The interpretation of Qur'ān says:

> To those weak of understanding give not your property which Allah has assigned to you to manage. But feed and clothe them therewith, and speak to them words of kindness and justice". [Sūratun (chapter) Nisā'i (4): 5].

The verse instructs that: "Do not give to those who are weak of judgment your property which Allah has placed your charge for their support; but let them have their sustenance therefrom, and clothe them, and speak unto them in a kindly way".

Yusuf Ali comments on the verse thus:

> This applies to orphans, but the wording is perfectly general and defines principle. Property has not only its rights but also its responsibilities. The owner may not do just what he likes absolutely; his right is limited by the good of his family of which he is a member, and if he is incapable of understanding it, his control should be removed. This does not mean that he is harshly dealt with. On the contrary his interest must be protected, and he must be treated with special kindness because of his incapacity.[29]

29 Yusuf Ali, (1440), The Holy Qur'ān English Translation of the Meaning and Commentary, King Fahd Holy Qur'ān Printing Complex, Al-Madinah Al-Munawarah, comments 510.

Another proof for subjecting prodigal to guardianship is:

> But if the debtor is of poor understanding, or weak, or is unable himself to dictate, then let his guardian dictate in justice." (sūratul (chapter) al-Baqarah (2) :282).

Therefore, a prodigal, a mentally week person and an incapable person are put under guardianship. A case was also reported that one 'Abdullah ibnJa'far (RA), a companion, used to spend his money recklessly. When his information reached 'Ali ibnAbiTalib (RA), he intended to advice 'Uthman ibn'Affan (RA) the then Khalifah, to interdict 'Abdullah ibnJa'far. But he (Abdullah ibn Ja'far) quickly approached Az-Zubayr (RA) who agreed to partner with him (Abdullah ibn Ja'far) before 'Ali (RA) would approach 'Uthman. 'Uthman (RA) declined to interdict 'Abdullah ibn Ja'far and said: "How would I interdict a man whose partner is Az-Zubayr?" This is so because Az-Zubayr (RA) was known with his prudent and intelligent in trade, and Abdullah used the partnership as a trick to escape the looming ḥajr (interdiction).[30]

The above cited narration supports validity of interdiction on the basis of at-tabdhir (extravagance); i.e. reckless in spending one's money, because all of them; 'Uthman, 'Ali, Az-Zubayr and 'Abdullah ibnJa'far (RA) agreed that al-ḥajr (interdiction) can be invoked at instance of at-tabdhīr.

The opinions of the jurists differ whether al-ḥajr'alal-safīh requires declaration by the qāḍi, this is the opinion of Abu Yusuf, a Hanafi jurist, or as-safīh becomes maḥjūr 'alayhi (interdicted) by merely being safīh, as held by Muhammad ibn Al-Hasan Ash-Shaybani, another Hanafi jurist.[31]

Minor or prodigal's right of dispositions of property is similar, to certain extent, to disposition of mumayyiz. i.e. "reasonable person"[32]Article 990 of Majallatul-Ahkami Al-'Adliyyah says:

> An interdicted prodigal is, as regards his civil transactions, like a minor of perfectunderstanding. The judge alone is his guardian and

30 As-Sarkhaṣy, Muhammad ibn Ahmad (d. 483HA), Al-Mabsut, dārul-Ma'rifah, Beirut, 1414/1993, vol. 24, p. 156-158.

31 Al-Kāsāni, 'Ala'ud-Din, Abu Bakar M. (d. 587HA), Badā'iuṣ-ṣanā'iu fi Tartībish-Sharā'i, dārul-Kutubil'Ilimiyyah, 2nd edition, 1406/1986, vol. 7, p. 169-173.

32 Ibn Al-Arabi Al-Qadi Muhammad A. (d. 543 AH), Ahkamul-Quran, ed. Muhammad A., Beirut, Lebanon, darul-Kutubi Al-'Ilmiyah, 3rd edition, 1424/2003, vol. 1, p. 415-421, Qurtubīy M. A. (d. 671 AH), al-Jāmi'u li Ahkāmil-Qurān; TafsīruQurtubīy, ed. Ahmad B. and Ibrahim A. dārul-Kutubil-Misriyyah, Cairo, 2nd edition, 1384 AH / 1964, vol. 5, p. 27-39.

the father, forefather and the guardians appointed by them has no right of guardianship on prodigal.

(e) Maraḍul-Mawtمَرَضُ المَوْتِ[Death Sickness]

Series of impediment to legal capacity include maraḍul-mawtwhich means "a situation when a person has a logical apprehension of imminent death". It is also referred to as "a situation whereby a sick person is unable to attend his business and dies before a year has passed on account of his condition, or when the illness of such a man is prolonged".[33] Maraḍul-mawt covers imminent and hazardous situations which normally lead to death such as fighting in war, drowning or an offender who is sentenced to death by the court. A person on death sickness is not allowed to dispose of his property that involves the interest of others such as his legal heirs and his creditors. Gift made by him to his legal heirs is invalid if other legal heirs disagree.[34]

(f) Ad-Dayn aw Al-Iflāsالدَّيْنُ أو الإفلاس[Debt or Bankruptcy]

Debt or bankruptcy is another impediment to valid contractual capacity. A person falls under this impediment is called "madīn مَدِيْنٌ" (debtor or indebted) and "muflisمُفْلِسٌ" (bankrupt) respectively. He is a person or corporate who has no property or one whose debts are equal or greater than his property. Debt may be as a result of bay'u (sale on credit), qarḍ (loan), ḍamān (liability) among others.

Bankruptcy forms the basis for interdiction consistent with all schools of Islamic law. It has been considered as a 'special' rather than a 'general' type of interdiction. It is a prohibition offered for upholding the interests of others, rather than the welfare of the interdicted person himself. Consequently, bankruptcy only influences those contracts that can be potentially damaging to the benefits of others. The corollary to the Islamic rule that all contracts must be the product of autonomous parties freely

33 Ibn'Abdul-Barr Abu 'Umar Y. A., (d. 463 AH), Al-Istidhkar ed. Salim M. A &Muhmmad A. M., Darul-Kutubi Al-Ilmiyyah, Beirut, 1st edition (1421/2000), vol. 7, p. 326, Al-Baji, Abu Al-Walid S. K (d. 474 HA), Al-MuntaqaSharhu Al-Muwattah, Cairo, ed. Muhammad M. T. (1416/2004 HA), vol. 6, p. 95, Qurtubi M. A. (d. 671 AH), al-Jāmi'u li Ahkāmil-Qurān; TafsīruQurtubi, ed. Ahmad B. and Ibrahim A. dārul-Kutubil-Misriyyah, Cairo, 2nd edition, 1384 AH / 1964, vol. 15, p. 126, An-Nawawi, Abu Zakariya M. Y. (d. 676 AH), Al-MinhajsharhuSahihu Muslim ibn Al-Hajjaj, Beirut, daruIhyait-Turath Al-Arabi, 2nd edition (1392AH), vol. 11, p. 77.

34 Majallatul-Ahkami Al-Adliyyah, Committee of Scholars and Jurists, Khilāfatul-'Uthmaniyah, ed. Najib H. articles: 878, 1595, 1766.

agreeing to enter into a relationship on specific terms is that all contracts may be terminated on consent.[35]

Bankruptcy is universally accepted in all Islamic legal schools as a lawful impossibility basis for contract termination. There is a divergence of opinion concerning whether the bankrupt that subsequently purports to enter into contracts with third parties has created a void contract or whether, as with a minor as discussed above, the contract is voidable at the instance of the opposite party. It is noted that bankruptcy is a defined legal state under Islamic court, although its pronouncement confirmed by final order can determine that the person is bankrupt. The nature of personal debts, combined with the relationship between debt and available assets that may trigger a bankruptcy, may vary across jurisdictions; the order itself is determinative of status.[36]

In contrast, Islamic law separates bankrupt status from the concept of insolvency the inability of a party to meet their on-going financial obligations as they become due. Islamic law regards insolvency as determined with reference to individual circumstances; unlike bankruptcy, an insolvent person cannot rely on this circumstance as triggering an impossibility of performance finding. For this reason, contractual obligations continue for insolvent persons. This approach is consistent

35 Majallatul-Ahkami Al-Adliyyah, Committee of Scholars and Jurists, Khilāfatul-'Uthmaniyah, ed. Najib H. articles: 103, 104, 106, 110, 106, 181 387, 445, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), Al-Mawsuatul Fiqhiyyah, vol. 1, p. 178, 271, vol. 2, p. 392, vol. 6, p. 313, vol. 30, p. 239-, vol. 18, p. 230, vol. 32, p. 135, vol. 44, p. 184, Az-ZuhayliWahbah (nd); Al-Fiqhul-IslamiwaAdillatuhu, Dimasq, vol. 4, p. 656-670-735, vol. 5, p. 511, vol. 7, p. 47, vol. 10, p. 349, Ibrahim SaadAlhowaimil, Frustration of Performance of Contracts: A comparative and Analytic Study in Islamic Law and English Law. Thesis for the Degree of Doctor of Law, available at: https://bura.brunel.ac.uk/bitstream/2438/8532/1/FulltextThesis.pdf, accessed Friday, October 02, 2020.

36 Majallatul-Ahkami Al-Adliyyah, Committee of Scholars and Jurists, Khilāfatul-'Uthmaniyah, ed. Najib H. articles: 103, 104, 106, 110, 106, 181 387, 445, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), Al-MawsuatulFiqhiyyah, vol. 1, p. 178, 271, vol. 2, p. 392, vol. 6, p. 313, vol. 30, p. 239-, vol. 18, p. 230, vol. 32, p. 135, vol. 44, p. 184, Az-ZuhayliWahbah (nd); Al-Fiqhul-IslamiwaAdillatuhu, Dimasq, vol. 4, p. 656-670-735, vol. 5, p. 511, vol. 7, p. 47, vol. 10, p. 349, Ibrahim SaadAlhowaimil, Frustration of Performance of Contracts: A comparative and Analytic Study in Islamic Law and English Law. Thesis for the Degree of Doctor of Law, available at: https://bura.brunel.ac.uk/bitstream/2438/8532/1/FulltextThesis.pdf, accessed Friday, October 02, 2020.

with the Qur'ān passage (Q5: 1) that stress the importance of honouring one's obligation freely assumed by the contracting parties.[37]

Debtor or bankrupt is restricted from disposing of his property by the court adjudicating him bankrupt. The purpose of restriction is to protect his creditors. Jumhūrul-fuqahā' (majority of Muslim jurists) hold that it is allowed to restrict power of disposition of a bankrupt at the instance of request by the creditors. Once the court declared him/her bankrupt, any financial contract/agreement that transfers his/her existing property at the time of ḥajris null and void. However, his disposal of earned property after the ḥajr is valid, binding and enforceable.[38]The majority of jurists support their position with ḥadīth:

> From IbnKa'b inb Malik from Abihi (RA) that: "The Messenger of Allah (SAW) interdicted Mu'ādh and sold his property to fulfill the debts owed by Mu'ādh.[39]

37 Majallatul-Ahkami Al-Adliyyah, Committee of Scholars and Jurists, Khilāfatul-'Uthmaniyah, ed. Najib H. articles: 103, 104, 106, 110, 106, 181 387, 445, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), Al-MawsuatulFiqhiyyah, vol. 1, p. 178, 271, vol. 2, p. 392, vol. 6, p. 313, vol. 30, p. 239-, vol. 18, p. 230, vol. 32, p. 135, vol. 44, p. 184, Az-ZuhayliWahbah (nd); Al-Fiqhul-IslamiwaAdillatuhu, Dimasq, vol. 4, p. 656-670-735, vol. 5, p. 511, vol. 7, p. 47, vol. 10, p. 349, Ibrahim SaadAlhowaimil, Frustration of Performance of Contracts: A comparative and Analytic Study in Islamic Law and English Law. Thesis for the Degree of Doctor of Law, available at: https://bura.brunel.ac.uk/bitstream/2438/8532/1/FulltextThesis.pdf, accessed Friday, October 02, 2020.

38 As-Sarkhaṣy, Muhammad ibn Ahmad (d. 483HA), Al-Mabsut, dārul-Ma'rifah, Beirut, 1414/1993, vol. 24, p. 156-163-166, Al-Baji, Abu Al-Walid S. K (d. 474 HA), Al-MuntaqaSharhu Al-Muwattah, Cairo, ed. Muhammad M. T. (1416/2004 HA), vol. 5, p. 89, IbnRushdAbul-Walid Ahmad M., (d. 595 AH), Bidayatul-MujtahidwaNihayatul-Muqtasid, ed. Muhammad S. H., Cairo, vol. 4, p. 67, An-Nawawi, Abu Zakariya M. Y. (d. 676 AH), Al-MinhajsharhuSahihu Muslim ibn Al-Hajjaj, Beirut, daruIhyait-Turath Al-Arabi, 2nd edition (1392AH), vol. 10, p. 221-223, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), Al-MawsuatulFiqhiyyah, vol. 3, p. 287, vol. 5, p. 246, 300-, Az-Zuhayli W. (nd); Al-Fiqhul-IslamiwaAdillatuhu, Dimasq, vol. 6, p. 321-,

39 Ad-Daruqutuni Abu Al-Hasan Ali U. (d. 385 AH), Sunanud-Daruqutuni, ed. Shu'aib Al-Arnaut et al. Beirut, Lebanon, Muassasatur-Risalah, 1st edition 1424/2004, vol. 5, p. 413, no. 4551, Al-Hakim An-Naisaburi Abu Abdullahi, Muhammad A. (d. 405 AH), Al-Mustadrak alas-Sahihayni, ed. Mustafa A. Beirut, darul-Kutubi Al-Ilmiyah, 1st edtion, 1411/1990, vol. 2, p. 67, no. 2348, vol. 4, p. 113, no. 7060. Al-Hakim authenticated the ḥadīth on the grade of Sahihayn, Imam Dhahbi agreed with Al-Hakim in his Talkhis.

The Prophet (S.A.W) had prevented Mu'ādh whose debts outweigh his assets from disposing his property. The Prophet (S.A.W) also sold the property and paid the debt to the creditors.

This ḥadīth decrees that petition for a bankruptcy order is in accordance with the Islamic law. If this were not so, the Prophet (S.A.W) would not have prevented Mu'ādh from disposing his property. The ḥadīth also suggests that the court is ultimately responsible for selling all the bankrupts assets and distributing all the proceeds of sale amongst the creditors proportionally.[40] It was reported by 'Abdur Rahman ibn Dalf al-Muzanni that a man from the Juhaynah tribe went bankrupt and his matter was brought before 'Umar ibn al-Khattab (RA), the second caliph (634-644), who said; "O People! Al-'Usayfi; al-'Usayfi of the Juhaynah, was satisfied with his religion (din) and his trust because it was said of him that he arrived before the others on the Pilgrimage (hajj). He used to incur debts but he did not care to repay, so all of his property has been eaten up by it. Whosoever has a debt against him, let him come to us tomorrow and we will divide his property between his creditors. Beware of debts! Their beginning is a worry and their end is destitution.[41]Ibn Quddamah has argued in support of interdiction and sale of insolvent debtor.[42]

According to Imam As-Sarkhasi, a well vast Hanafi jurist, the above decision of 'Umar ibn al-Khattab (RA), in the case of al-'Usayfi of the Juhaynah tribe, is considered consensus of Sahabah (Companions) since there was no objection to it.[43]

(g) As-Sukruawil-Iskār السُّكْرُ أو الإسْكَارُ [Intoxication/Drunkenness]

Intoxication refers to "loss of mental capacity due to taking liquor or any intoxicated substance causing the intoxicant becomes unawares of his

However, Albani M.N. (d. 1420 AH) graded the ḥadīth weak (da'if). Irwail-Ghalil fi TaakhrijAḥadīthManaris-Sabiil, ed. Zuhair S. Beirut, 2nd edition 1405/1985, vol. 5, pp. 260, 264, nos. 1435, 1439.

40 As-Sarkhaṣy, Muhammad ibn Ahmad (d. 483HA), Al-Mabsut, dārul-Ma'rifah, Beirut, 1414/1993, vol. 24, p. 156-163-164-166, IbnQuddamah A. M. (d. 620 HA), Al-Mughni, Cairo, (1388/1968), vol. 4, p. 329.

41 As-Sarkhaṣy, Muhammad ibn Ahmad (d. 483HA), Al-Mabsut, dārul-Ma'rifah, Beirut, 1414/1993, vol. 24, p. 156-163-164-166, IbnQuddamah A. M. (d. 620 HA), Al-Mughni, Cairo, (1388/1968), vol. 4, p. 329.

42 IbnQuddamah A. M. (d. 620 HA), Al-Mughni, Cairo, (1388/1968), vol. 4, p. 329.

43 As-Sarkhaṣy, Muhammad ibn Ahmad (d. 483HA), Al-Mabsut, dārul-Ma'rifah, Beirut, 1414/1993, vol. 24, p. 156-163-164-166, IbnQuddamah A. M. (d. 620 HA), Al-Mughni, Cairo, (1388/1968), vol. 24, p. 164.

action that he made during his state of intoxication"[44] Effects of intoxicant's transaction/contract depend on whether his intoxication is due to legitimated or illegitimated reason. The court needs to notice that, if the intoxication is due to legitimate reasons such as taking liquor due to pressing necessity, duress, and mistake or taking medicine, his transaction becomes invalid according to Muslim jurists. But, if the intoxication is due to illegitimated reasons, his transaction becomes valid and effective according to majority of Muslim jurists including Hanafis, Malikis and Shafi'is. This is to punish the intoxicant. However, according to Zahiris and a view of Imam Ahmad, his transaction becomes invalid and ineffective.[45] This is based on:

> O you who believe! Do not go near to prayer when you are intoxicated ill you know what you say." (Sūratun (chapter) Nisā'i (4):43)

The Zahiri jurists argued that, a valid transaction is based on intention, intelligence, discrimination and understanding. Thus, his transaction becomes invalid as the intoxicant entered into such transaction with such reasons. The further argued that there is no different between legitimate and illegitimate reason as both are the same.

The jumhūr considered illegitimate of intoxication as an act of disobedience and the intoxicant should not be allowed to benefit from his

44 Ar-Raghib Al-Asfahani. H (d. 502 AH), Al-Mufradatu fi Gharibil-Quran, ed. Ad-Dadawi S. A, darul-Qalami, Demascus, Beirut, 1st edition, 1412 AH, p. 416.

45 Ibn'Abdul-Barr Abu 'Umar Y. A., (d. 463 AH), Al-Istidhkar ed. Salim M. A &Muhmmad A. M., Darul-Kutubi Al-Ilmiyyah, Beirut, 1st edition (1421/2000), vol. 6, p. 205-208, vol. 7, p. 326, Al-Baji, Abu Al-Walid S. K (d. 474 HA), Al-MuntaqaSharhu Al-Muwattah, Cairo, ed. Muhammad M. T. (1416/2004 HA), vol. 3, p. 111, 128, 272, vol. 4, p. 40, 99, 125, vol. 7, p. 71, 120, IbnRushdAbul-Walid Ahmad M., (d. 595 AH), Bidayatul-MujtahidwaNihayatul-Muqtasid, ed. Muhammad S. H., Cairo, vol. 3, p. 102, Qurtubi M. A. (d. 671 AH), al-Jāmi'u li Ahkāmil-Qurān; TafsīruQurtubi, ed. Ahmad B. and Ibrahim A. dārul-Kutubil-Misriyyah, Cairo, 2nd edition, 1384 AH / 1964, vol. 5, p. 202-204, vol. 6, p. 287-292, vol. 10, p. 128-133, An-Nawawi, Abu Zakariya M. Y. (d. 676 AH), Al-MinhajsharhuSahihu Muslim ibn Al-Hajjaj, Beirut, darulhyait-Turath Al-Arabi, 2nd edition (1392AH), vol. 11, p. 77, 200, vol. 13, p. 145, Al-'Uthaimin, M. S. (1433 AH), Ash-SharhulMumti'u, darulbnJawzi, 3rd edition, vol. 7, p. 147, vol. 13, p. 18, 52, 220, vol. 14, p. 22, 444, vol. 15, p. 127, 487, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), Al-MawsuatulFiqhiyyah, vol. 4, p. 258, vol. 5, p. 23, vol. 6, p. 50-59, vol. 7, p. 165, vol. 16, p. 100, vol. 24, p. 137, vol. 25, p. 92, vol. 28, p. 158, vol. 29, p. 16, 202, vol. 42, p. 124, vol. 43, p. 236, Az-Zuhayli W. (nd); Al-Fiqhul-IslamiwaAdillatuhu, Dimasq, vol. 4, p. 546, vol. 6, p. 262, vol. 7, p. 696, vol. 9, p. 343.

disobedience act. Although this argument of jumhūr is logical and reasonable, the position of Zahiri School seems to be consistent on the authority of the Quranic passage:

> On no soul Allah place a burden greater than it can bear. It gets every good that it earns, and it suffers every ill that it earns. [sūratul (chapter) Baqarah 2: 286].

The burden may be in terms of spiritual duty or material wealth; Allah assured that He will accept from each soul just such duty as it has the ability to offer. Man would be liable and responsible for his act of disobedience, but reason of being intoxicant takes its effect.

(h) Al-Wilāyah الولاية [Guardianship]

Another impediment to validity of contract is the state of being under guardianship (wilāyah). Wilayah refers to "a power or authority granted by the Sharī'ah to a person over another which makes his dispositions operative with respect to him without his consent". There are two types of guardianship, i.e.:[46]

i) wilāyatun-nafs (guardianship over a person) and
ii) wilāyatul-māl (guardianship over property).

Guardianship of a person refers to "a power and duty of a guardian to look after the minor and to take care of his education and teaching including to conclude the contract of marriage of his ward". Guardianship of property means "a power of a guardian to manage property dispositions for his ward that includes minor, insane and idiot".

Guardians of property according to Hanafis and Shafi'is are the father, the executor appointed by the father, the grandfather, the executor appointed by the grandfather, the judge and the executor appointed by the judge.

46 Ibn'Abdul-Barr Abu 'Umar Y. A., (d. 463 AH), Al-Istidhkar ed. Salim M. A &Muhmmad A. M., Darul-Kutubi Al-Ilmiyyah, Beirut, 1st edition (1421/2000), vol. 5, p. 389-, Al-Baji, Abu Al-Walid S. K (d. 474 HA), Al-MuntaqaSharhu Al-Muwattah, Cairo, ed. Muhammad M. T. (1416/2004 HA), vol. 3, p. 268, Ar-Raghib Al-Asfahani. H (d. 502 AH), Al-Mufradatu fi Gharibil-Quran, ed. Ad-Dadawi S. A, darul-Qalami, Demascus, Beirut, 1st edition, 1412 AH, p. 885, Qurtubi M. A. (d. 671 AH), al-Jāmi'u li Ahkāmil-Qurān; TafsīruQurtubi, ed. Ahmad B. and Ibrahim A. dārul-Kutubil-Misriyyah, Cairo, 2nd edition, 1384 AH / 1964, vol. 5, p. 30, vol. 8, p. 56, Majallatul-Ahkami Al-Adliyyah, Committee of Scholars and Jurists, Khilāfatul-'Uthmaniyah, ed. Najib H. articles: 59, 990, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), Al-MawsuatulFiqhiyyah, vol. 27, p.23, Az-Zuhayli W. (nd); Al-Fiqhul-IslamiwaAdillatuhu, Dimasq, vol. 10, p. 58.

However, Malikis and Hambalis exclude the grandfather and the executor appointed by him as guardians of property. In the absence of such guardians, according to Malikis and Hambalis, the guardianship passes to the judge on the basis of the ḥadīth:

> From Aishat (RA) said: the Messenger of Allah said: "The marriage of a woman who marries without the consent of her guardian is void. (He said this three times). If there was cohabitation, she entitles to her bridal-gift in lieu of the intercourse that has occurred. However, if there is a dispute, thesultan (ruler or man in authority) will be a guardian of one who has no guardian.[47]

(i) Al-Unūthawaz-Zawjiyyah الأنوثة وَالزَّوْجِيَّة [Femininity and Wedlock][48]

Another group of jurists in the Maliki School opined that ahliyatul-mar'atilil-'aqdahliyatun nāqiṣah/qāṣirah i.e. "female's contractual legal capacity is incomplete". In other words, contractual legal capacity of female is inchoate. Imam Malik was further asked whether her sale is valid if it involves muḥābāt (special affection). He replied: "Her selling involves muḥābāt is only valid in less than one-third of property". This narration from Imam Malik restricted capacity of a married lady to engage in charity-based contract to less than one-third of her property. Anything

47 Abu DāudSulaiman S. (d. 275 AH), (nd), *SunanuAbīDāud*, ed. Muhammad M. A. al-Maktabatul-'Asriyah, Beirut, vol. 2, p. 229, no. 2083, Abū'Isa at-Tirmidhiy, (1395/1975), *Suanaut-Tirmidhiy*, ed. Ahmad M. Shakir et al, Cairo, 2nd edition, vol. 3, p. 399, no. 1102, and IbnMājah, M. Y. (d. 273 AH), SunanuIbnMājah, ed. Muhammad Fuad A. dāruIhyāiKutubil-Arabiyyah, (nd), vol. 1, p. 605, no. 1879. Imam Tirmidhy authenticated the ḥadīth, also did Imam Al-Qurtubi in his Jāmi'u'Ulūmil-Qur'ān, vol. 3, p. 73, and Al-Bani M. N., (d. 1420AH) in his Irwaul-Ghalili fi TakhrijiAḥadīthManaris-Sabil, ed. Zuhair S. al-Maktaul-Islami, Beirut, 2nd edition (1405/1985), vol. 6, p. 243, 252, no. 1840, 1848, Al-Bani M. N., (d. 1420AH), ṣahīhuAbiDāud, MuassasatuGharas, Kuwait, 1st edition 1423 AH / 2002, vol. 6, p. 320, no. 1817, Al-Bani M. N., (d. 1420AH), ṣahīhul-Jām'iuṣ-ṣaghīrwaZiyādātuhu, Al-Maktabullslami (nd), vol. 1, p. 526, no. 2705, Al-Bani M. N., (d. 1420AH) in Mishkatul-Masabihi, ed. Al-Albani M. N. Al-Maktabatul-Islami, Beirut, 3rd edition, (1985), vol. 2, p. 938, no. 3131.

48 Khalil ibnIshaq Al-Masri (d. 776HA), Mukhtaṣaru Al-'Alāmah Khalil, ed. Ahmad Jad, dārul-ḥadīth, Cairo, 1st edition, 1426/2005, p. 172, Al-Mawaq, Abu Abdullahi, Muhammad ibn Yusuf Al-Maliki (d. 897 HA), At-Tajuwal-Iklil li Mukhtaṣaril-Khalil, dārul-Kutubi Al-'Ilmiyyah, 1st edition, 1416/1994, vol. 6, p. 631, Ad-Dirdīr, Ash-Sharḥu, published with Al-KabīrAd-Dasūqi, Muhammad ibn Ahmad (d. 1230HA), ḥāshiyatud-Dasūqi'ala Ash-Sharḥi Al-Kabīr, dārul-Fikr, (nd) vol. 3, p. 306-307, 344, Al-ḥattāb, Shamshud-Din Abu Abdullahi Muhammad M. (d. 954HA), Mawāhibul-Jalīl fi SharḥMukhtaṣariKhalīl, dārul-Fkir, 3rd edition, 1412/1992, vol. 5, p. 57.

above one-third is invalid without the consent of her husband, and the husband is empowered to cancel and annul the contract. Also, if she is a married lady, she can only guarantee within the one-third of her property, anything above one-third is invalid unless with the consent and approval of her husband. But guarantee of a spinster/maiden (*bikrṣaghīrah*) is absolutely invalid according to Imam Malik. Likewise, all her financial contracts are invalid without the consent and approval of her husband in what is above one-third of her wealth.[49] Imam Sahnun, one among the senior disciples of Imam Malik said:

> According to Imam Sahnun; the reason is that if she contracted above the allowed one-third for her, she became like al-maḥjūr'alayhi (interdicted person) and al-maḍrūb 'alayadihi (someone whose authority has been limited or restricted), she is therefore akin to someone who is put under the supervision of the guardian.[50]

Imam Ibn Rushd Al-Jadd, another great jurist of Maliki School, reported that no disagreement in the Maliki School that disposition of property by a married lady above one-third of her property is invalid, because her contractual capacity is inchoate.[51]

Imam Ad-Dirdir, a famous jurist of Maliki School, mentioned az-zawjiyyah (الزَّوْجِيَّة); i.e. wedlock as the sixth factor of ḥajr (interdiction). According to this opinion, the married woman is barred from conducting financial transaction above one-third of her property. This factor is akin to al-maraḍ (المَرَض) sickness, in the sense that it puts limit of contractual capacity to not more than one-third of married lady's property unless with

49 Malik ibn Anas, Imam, (1415/1994), *al-Mudawwanah*, dārul-Kutubil-Ilmiyah, vol. 2, p. 154, vol. 4, p. 117, 122-125.

50 Malik ibn Anas, Imam, (1415/1994), *al-Mudawwanah*, dārul-Kutubil-Ilmiyah, vol. 4, p. 124-125, IbnRushd Abu Al-Walid Muhammad Al-Jadd (d. 520HA), Al-Bayānuwat-Taḥṣīlwash-Sharḥwat-Tawjihwat-Ta'līllimasā'ilil-Mustakhrajah (therein referred to as IbnRushd, Al-Bayānuwat-Taḥṣīl), ed. Muhammad Hijji et al. darul-Gharb Al-Islami, Beirut, Lebanon, 2nd edition, 1408/1988, vol. 9, p. 209, vol. 14, p. 23-27.

51 Ibn Rushd Abu Al-Walid Muhammad Al-Jadd (d. 520 AH), Al-Bayānuwat-Taḥṣīl wash-Sharḥwat-Tawjihwat-a'līllimasā'ilil-Mustakhrajah (therein referred to as IbnRushd, Al-Bayānuwat-Taḥṣīl), ed. Muhammad Hijji et al.darul-Gharb Al-Islami, Beirut, Lebanon, 2nd edition, 1408/1988, vol. 9, p. 209, vol. 14, p. 23-27.

consent of the husband as the sick person cannot dispose more than one-third of his/her property unless with the approval of the legal heirs.[52]

6. SUMMARY, CONCLUSION AND RECOMMENDATIONS

All the above mentioned factors affect complete contractual legal capacity to deficient or incomplete legal capacity (ahliyatun nāqisah) or to imperfect legal capacity (ahliyatun qāṣirah) and therefore subject the affected individual to guardianship. The guardian should exercise his power accordingly for the interest and benefit of the ward. The paper therefore recommends that al-quḍāt (judges), muḥāmūm (lawyers), students of law as well researchers should be well informed and be guided accordingly.

52 Ad-Dirdīr, Ash-Sharḥu, published with Ash-SharḥiAl-Kabīr; Ad-Dasūqi, Muhammad ibn Ahmad (d. 1230 AH), ḥāshiyatud-Dasūqi'ala Ash-Sharḥi Al-Kabīr, dārul-Fikr, (nd) vol. 3, p. 306-307, 344, Y. Y. Bambale, (2007), Islamic Law of Commerce and Industrial Transactions, Malthouse Law Books, p. 24.