



الجامعة الإسلامية العالمية ماليزيا  
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA  
بِوَسِيْلَةِ اِسْلَامِ اَنْبِيَا رِجْسًا مُلَدِّسِيَا

LEGAL CAPACITY (AL-AHLIYYAH) BETWEEN  
THE SHARĪ‘AH AND DEVELOPMENTAL  
PSYCHOLOGY

BY

MAHFUTH KHAMIS AMAFUA

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requirement for the degree of master of Islamic Revealed  
Knowledge and Heritage  
(Fiqh and Usūl al-Fiqh)

Kulliyyah of Islamic Revealed Knowledge and Human  
Sciences  
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## ABSTRACT

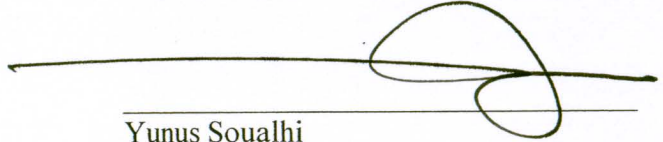
The topic discussed under this research is Legal Capacity between Shari'ah and Developmental Psychology. The motive behind this research has been to investigate whether there is a relationship between the Shari'ah concept of legal capacity and developmental psychology, and at the same time to find out areas of agreement and disagreement, as well as the field where the two disciplines can compromise, integrate and utilize each other's contribution, for prosperity and enhancement. The method applied in this research is the qualitative method where the researcher has collected the data and information pertaining to the topic, studied them thoroughly and evaluated them accordingly. It has been found out that this topic is of great interest. This is because it is not only the psychologists and Muslim jurists who have discussed it, but even the Positive Law has contributed to it. There are areas of commonalities and differences like the issues pertaining to the gradual development of a child with all the physical and cognitive changes from the prenatal stage to late adulthood about which both parties agreed and of course they disagreed on the determination of the age of maturity. Both parties, as it has been detected, can utilize each other's contribution. The Muslim jurists can benefit from the research tools and techniques offered by the psychologists, while the psychologists can integrate the spiritual dimension that they lack in their field.

## ملخص البحث

قام الباحث بدراسة موضوع الأهلية بين الشريعة وعلم النفس التنموي. ويهدف هذا البحث لدراسة العلاقة بين الشريعة وعلم النفس وكذلك البحث عن نقاط الإتفاق والإختلاف وإمكانية الدمج بينهما لاستفادة كلا الجانبين من الآخر. ولقد استخدم الباحث لإنجاز هذا الموضوع المنهج الكيفي للوصول إلي الغرض نفسه بحيث جمع كلّ المعلومات المتعلقة به من ثنايا الكتب القديمة والحديثة المدونة في كلا المجالين ، ثم تطرق إلي دراستها وتقويمها وفق المنهج الكيفي للوصول إلي النتائج المقصودة. وقد أظهرت الدراسة أهمية هذا الموضوع بحيث أنّ دراسته ومناقشته لم تقتصر على علماء علم النفس و الأصوليين فحسب بل ساهم فيها علماء القانون الوضعي . ومن النتائج التي توصل إليها الباحث في هذه الدراسة هي وجود نقاط إتفاق واختلاف فيما يتعلق بالتدرج النموي من الطفولة إلى الشيخوخة. غير أن هذا الاختلاف يتعلق بالجانب الرّوحي أو البعد الديني الذي لايلتفت إليه علماء علم النفس وكذلك في تحديد سن البلوغ. وهذا فإن الباحث إقترح إمكانية استفادة الأصوليين من الاستراتيجيات التي قدّمها علماء علم النفس التنموي، بينما على علماء علم النفس التنموي الإهتمام بالبعد الرّوحي الذي تفتقده دراساتهم.

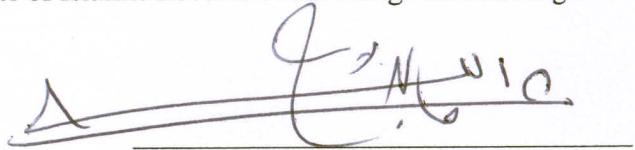
## APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Islamic Revealed Knowledge and Heritage (Fiqh and Usūl al-Fiqh).



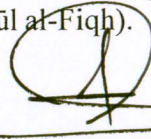
Yunus Soualhi  
Supervisor

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Islamic Revealed Knowledge and Heritage (Fiqh and Usūl al-Fiqh).



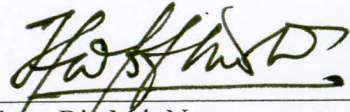
Malik Badri  
Co-Supervisor

This dissertation was submitted to the Department of Fiqh and Usūl al-Fiqh and is accepted as partial fulfilment of the requirements for the degree of Master of Islamic Revealed Knowledge and Heritage (Fiqh and Usūl al-Fiqh).



Mohamad Akram Laldin  
Head, Department of Fiqh and Usūl Fiqh

This dissertation was submitted to the Kuliyyah of Islamic Revealed Knowledge and Human Sciences and is accepted as partial fulfilment of the requirements for the degree Master of Islamic Revealed Knowledge and Heritage (Fiqh and Usūl al-Fiqh).




Hazizan Bin Md. Noon  
Dean, Kuliyyah of Islamic Revealed  
Knowledge and Human Sciences.

## DECLARATION

I hereby declare that this thesis is the result of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institution..

Name: Mahfuth Khamis Amafua.

Signature  ..... Date .....

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**LEGAL CAPACITY (AL-AHLIYYAH) BETWEEN THE SHARĪ‘AH AND**  
**DEVELOPMENTAL PSYCHOLOGY**

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Date

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I would like to express my gratitude to all those who have contributed positively in one way or another to the success of my completing this thesis. My special regard is due to the International Islamic University Malaysia, which has equipped me with both religious and secular knowledge so that I can play a balanced, positive and dynamic societal role.

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I dedicate this work to my family, namely, Mamaayi, Mama Ameri, Mama Sakari, Ajali, Buguda, Faita, Amina Ali, Mama Zainab, Zainab, Thuwiba, Tasneem, and all the rest who spiritually supported me in completing this task. They and the entire Muslim Ummah in my country (Uganda) have long awaited my return with this achievement. The immense perseverance and patience of theirs have provided me with the courage to withstand every hardship and finalize my work Allah bless us all.

## TRANSLITERATION TABLE

b = ب	z = ز	f = ف
t = ت	s = س	q = ق
th = ث	sh = ش	k = ك
j = ج	ṣ = ص	l = ل
h{ = ح	ḍ = ض	m = م
kh = خ	ṭ = ط	n = ن
d = د	ẓ = ظ	h = هـ
dh = ذ	‘ = ع	w = و
r = ر	gh = غ	y = ي

**Short:** a = اَ ; i = اِ ; u = اُ

**Long:** ā = آ ; ī = إ ; ū = أ

**Diphthong:** ay = آي ; aw = أَوْ



# TABLE OF CONTENTS

Abstract .....	ii
Abstract in Arabic .....	iii
Approval Page .....	iv
Declaration Page .....	v
Copyright Page .....	vi
Acknowledgement .....	vii
Transliteration Table.....	viii
<b>CHAPTER ONE: INTRODUCTION .....</b>	<b>1</b>
Research problem .....	2
Objectives of the study .....	2
Research methodology .....	3
Literature review .....	3
Research chapterization .....	10
<b>CHAPTER TWO: THE CONCEPT OF LEGAL CAPACITY IN THE SHARĪ‘AH AS DISCUSSED BY MUSLIM JURISTS (USŪLYYŪN) .....</b>	<b>11</b>
Definition of legal capacity .....	11
Capacity for acquisition ( <i>Ahliyyah al-wujūb</i> ) .....	13
Capacity for execution or ( <i>Ahliyyah al-ādā</i> ) .....	21
<b>CHAPTER THREE: THE CONCEPT OF LEGAL CAPACITY IN POSITIVE LAW AND DEVELOPMENTAL PSYCHOLOGY .....</b>	<b>29</b>
Legal capacity in positive law .....	29
Psychologists’ views and arguments about human development as an integrated study of lifespan and legal capacity .....	49
<b>CHAPTER FOUR: COMPARISON AND ANALYSIS BETWEEN THE PERSPECTIVES OF MUSLIM JURISTS AND PSYCHOLOGISTS .....</b>	<b>69</b>
<b>CHAPTER FIVE: CONCLUSION .....</b>	<b>88</b>
<b>BIBLIOGRAPHY .....</b>	<b>92</b>

# CHAPTER ONE

## INTRODUCTION

Legal capacity (*Al-Ahliyyah*) is, indeed, one of the most vital, important and significant issues as far as the Islamic *Shari'ah* is concerned. There are numerous and voluminous books, research works and articles which have been carried out on this very issue. It is beyond doubt that legal obligations or legally valid acts cannot be imposed at all on any person who does not possess legal capacity. It is clearly stated by Almighty Allah in the Holy *Qur'an* that "On no soul doth Allah place a burden greater than it can bear"<sup>1</sup> otherwise, we shall be doing injustice to the people if we bestow or impose on them burdens, duties and responsibilities beyond their abilities, and talent. Therefore, in order to address this significant point, human beings are classified in accordance to their possession of ability, which the *Fuqahā'* (Muslim Jurists), referred to as the capacity for the acquisition of rights and the execution of duties. Muslim jurists, at the same time, deem it unnecessary to specify and identify the age that determines legal capacity. Meanwhile, psychologists, on the other hand, and Western positive Law have taken the trouble to specify the age in this matter. These differing views of specifying and not specifying the age regarding this issue of legal capacity have remained vague and ambiguous up to this moment. This study, therefore, aims to find out the relationship between age and legal capacity as explained by psychologists and the different ages put forward by the *Fuqahā'* such as the age of discernment (*Sinn al-Tamyīz*), puberty (*Sinn al-Bulūgh*), and maturity (*Sin*

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<sup>1</sup> *Sūrat Al-Baqarah (2:286)*

*al-Rushd*) as to which of the two could determine with certainty the ability to incur legal liability or obligations and acquire legal rights, so that the *Sharī'ah* can utilize and benefit from the psychologists' arguments regarding the determination of legal capacity and vice versa.

#### **RESEARCH PROBLEM:**

- 1- What does the *Sharī'ah* mean by *Ahliyyah* (Legal capacity)?
- 2- What is the relationship between legal capacity and the cognitive abilities of a human being during his or her lifespan?
- 3- How is legal capacity determined in Western positive Law?
- 4- To what extent can the approaches of the Muslim jurists and developmental psychologists be integrated?

#### **OBJECTIVES OF THE STUDY:**

- 1- To explain what the *Sharī'ah* means by the concept of *Ahliyyah* (legal capacity).
- 2- To discover the relationship between legal capacity and the cognitive abilities of a human being during his or her lifespan.
- 3- To develop a new approach to the study of legal capacity from the perspectives of the *Sharī'ah* and Psychology.
- 4- To find out to what extent the approach of both the Muslim jurists and developmental psychologists can be integrated.

## RESEARCH METHODOLOGY:

Regarding the methodology applied in this study of legal capacity between the *Sharī'ah* and developmental psychology, the researcher deems it necessary to apply inductive and textual analysis methods with which he can analyze the views of the *Fuqahā'* and those of the psychologists pertaining to the topic and make comparison between them.

## LITERATURE REVIEW:

There is no doubt that the study of legal capacity is of great significance. Indeed, there are several books written on the subject. Moreover, according to my humble knowledge, despite all attempts made here and there, there is no single book or study which has been carried out in the light of the *Sharī'ah* and psychology, as such, in this field. I, therefore, deem it necessary to study the area and make a comparison between the two i.e. the *Sharī'ah* and Psychology, in this concept of legal capacity in order to shed light on some of the issues that are rather vague like the one at hand.

Among the books written about it are the following: There is a book entitled *Al-Mustasfā* written by Al-Imam Al-Ghazālī. This book discussed legal capacity, though not in detail. It presented first, an introduction to *Ahliyyah*, where the author mentioned the two categories of *Ahliyyah* as follows; the *Ahliyyah* of acquisition (*Ahliyyah al-wujūb*) and that of execution (*Ahliyyah al-ādā'*). The book went on to give the definition of the term *Ahliyyah*, stating that *Ahliyyah* is the state in which an individual possesses a capacity or ability, and becomes liable to execute the duties and responsibilities imposed on him or on her<sup>2</sup>. The author argues that, regarding the capacity of execution (*Ahliyyah al- ādā'*), a person should be mature both mentally

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<sup>2</sup> Al-Imām Al-Ghazālī, *Al-Mustasfā Min i'lm al-Usūl*, (Egypt: Al-Maṭba'ah al-Amīriyyah Bulaq, 1322H), vol.1, p. 156.

and physically, as a lack of either of the two, will always result in legal incapacity, (*Ahliyyah adā al-nāqīṣah*), which is found in children and abnormal people. He stated that talent and capabilities are determined by both the mental and physical state of a person. Thus, a child, however mentally sound, is still considered incapable simply because he or she is physically immature. The same thing applies to an abnormal person. No matter how physically mature a person may be, since mentally retarded, he or she is not considered capable, because all fall under the category of legal incapacity.

A remarkable area in legal capacity has also been covered by a book entitled, *kashf al- asrār ‘an Uṣūl Fakhr al-Islām al-Bazdawī*, written by Imam ‘Alā’al-Din ‘Abdu al-Aziz ibn Aḥmad al-Bukhārī. The book first introduces *Ahliyyah*, and then goes further to explain the two categories of *Ahliyyah*, i.e. legal capacity regarding acquisition and execution<sup>3</sup>. Then it explains the defective capacities and their causes as follows: first the natural capacity, which includes the following: a) Idiocy, b) Insanity, c) Forgetfulness, d) Sleep, e) Unconsciousness, f) Minority, g) Slavery, h) Chronic illness, i) Menstruation and post-natal state, and j) Death. For the acquired capacities, he mentioned, a) Folly, b) Intoxication, c) Ignorance, d) Unintended act, e) Coercion or Duress, f) *Al-hazl* (Jest), and g) Journey.

A book entitled *Uṣūl Al-Sarakhsi*, written by Al-Imam Abūbakar, Muḥammad ibn Aḥmad, bin Abi Saḥli Al-Sarakhsi, is also among the books that discusses legal capacity (*Ahliyyah*), which focuses on the two categories of legal capacity i.e. the capacity of acquisition (*Ahliyyah al-wujūb*) and the capacity of execution (*Ahliyyah al-ādā’*). The author argued that, though there are several branches of capacity of execution, in reality all culminated in one single thing which is the capacity acquired

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<sup>3</sup> Imām Al-Bukharī, A‘lā udīn Aḥmad, *Kashf al –Asrār ‘an Uṣūl Fakhr al –Islām Al-Bazdawī*, (Beirut: Dār al-Kitāb al-Arabī, 1994) , 2<sup>nd</sup> edition, vol.4, p.436

by an individual so that he or she is liable before the Law<sup>4</sup>. He went on to discuss the two categories of *Ahliyyah* as mentioned in the previous books. He said that these capacities are, in fact, agreements made by men to execute the Laws of the Creator. That is why animals are not included. The book did not elaborate more on this concept of *Ahliyyah*.

There is another book entitled *Uṣūl al-Fiqh* written by al-Sheikh Muḥammad-Abūzahrah. It comprises the introductory part on *Ahliyyah* in which the definition of *Ahliyyah* is given. It also explains the two divisions of capacity i.e. the capacity of acquisition and the capacity of execution<sup>5</sup>. It discusses the rights of a child in the prenatal state under the capacity of acquisition where the child deserves a complete capacity for the acquisition of rights and obligations. It also looks into the issue of the legal capacity of execution which commences with maturity. The book also discusses the natural and acquired causes of defective capacity. The author pointed out the following regarding the natural causes of defective capacity: a) Idiocy, b) Insanity, c) Forgetfulness, d) Sleep, and e) Unconsciousness. Meanwhile, for the acquired causes he highlighted the following: a) Folly, b) Intoxication, c) Ignorance, d) Unintended act, and e) Coercion or Duress.

Another book which also talked about the legal capacity by Dr. Wahaba-Zuhaili entitled *Uṣūl al-Fiqh*. It explained and introduced the concept of *Ahliyyah* and provided solutions to its problems from the time the child is still in the womb i.e. the prenatal period, to infancy, adolescence, up to adulthood. It touches on some points about the nature of *Ahliyyah* (*Hālāt al-Ahliyyah*), both acquired and executed *Ahliyyah*<sup>6</sup>. It also explains the deficient and complete capacities. Meanwhile, it does

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<sup>4</sup> Al-Imām al-Sarakhsi, *Uṣūl al-Sarakhsī*, (Beirut: Dār al-Kutub al-‘Ilmiyyah), Vol. 2, p.332.

<sup>5</sup> Al-Sheikh Abū zahrah, Muḥammad, *Uṣūl-al-Fiqh*, (Cairo: Dār al-Fikr al-Arabi ), p. 264.

<sup>6</sup> Zuhaili, Wahba, *Uṣūl al-Fiqh*, (Beirut: Dār al-Fikr al-Mua’sir.), vol.1, p.166.

not differ from the previous book (*Kashf al Asrār*) in as far as the listing of the natural defective capacity and acquired capacity is concerned. Here you also find issues like slavery, menstruation, and the state of a woman in the post-natal period, and all those issues explained by the prior book i.e. *Kashf al-Asrār* pertaining to this matter. It also mentioned *Alhazl* (jest) and journey in as far as the acquired capacity is concerned.

*Al-madkhal fi al- ta'rif bi al-Fiqh al-Islāmiyy waqāwā'id al-milkiyyah wal-al-qu'ūd fi-hi* by Muḥammad Muṣṭafa Shalabī covers a reasonable area in legal capacity. It explains, after the introduction and definition, the concept of legal capacity, the two categories, and the different stages that a person goes through in his or her life until he or she is liable to *Ahliyyah*<sup>7</sup>. The book also explains the state of sound judgment (*Sinn al-Rushd*), where one is capable of managing one's own affairs promptly and systematically. The book also discusses various opinions of Muslim jurists concerning the determination of age for legal capacity (*Al-Ahliyyah*). In the list provided by this book about the natural defective capacity, the author discussed here another point which is not mentioned in the previous books which is the concept of "*Ghāflah*" which means ignorance. He then concluded afterwards by mentioning the rights governing the wealth of the deceased.

On the other hand, there is a book by Muṣṭafa Aḥmad al-Zarqā entitled *Al-Madkhal Al-Fiqhī al-ā'm*. The book comprises the theory of *Ahliyyah*, and explains the meaning of *Ahliyyah*, the kinds of *Ahliyyah*, and it also discusses differences of behavior related to legal capacity<sup>8</sup>. It has provided some solutions to the issue of the different stages that a person goes through in his or her life-span, from the prenatal period when the child is still in the womb of his or her mother, through adulthood up

<sup>7</sup> Shalabī, Muḥammad Muṣṭafa, *al-Madkhal fi ta'rif bi al- Fiqh al-Islāmī*, (Beirut: Dār-al-Nahḍah al-Arabiyyah) p.496.

<sup>8</sup> AL-Zarqā, Muṣṭafa, Aḥmad, *Al-Madkhal al-Fiqh al-ā'mm*, (Damascus: Matb'ā al- twaibin ), p.746.

to late adulthood. The book divided the concept of legal capacity of execution into two; one is about the execution of issues pertaining to 'Ibādah, while the other one is about the execution of issues concerning worldly affairs.

A book entitled *Development Across the Life Span*, written by Robert S. Feldman, has explained issues related to legal capacity where a person becomes independent and ceases to rely on his or her parents as before. It started with the introduction to life-span development, the beginning of life, genetic and prenatal development, birth and the newborn infant. Then it explains the physical development and social and personality development of a person. It states that at the age of 13 a child starts to mature physically and becomes a new person. This is the adolescence stage where identity becomes more important<sup>9</sup>. This stage is followed by adulthood at the age of 20 when the child is now fully mature, can make decisions, and is now able to manage his or her own affairs. The book then concluded this topic by discussing issues related to middle adulthood and the late adulthood. The other book which also discusses this issue is a book written by Laura E. Berk entitled, *Development Through the Life Span*. The book explains prenatal development, birth and the newborn baby, as well as infancy from the age of 2 years to the age of 6 years<sup>10</sup>. This is followed by an explanation about middle childhood from 6 to 11 years, then middle adolescence from 12 to 20 years, which is followed by adulthood when the child is now intellectually sound, and can at the same time run and manage his or her own affairs.

A book entitled *Life-span Development*, which is written by Helen L. Bee, is another book which discusses some issues related to legal capacity. It explains prenatal development and birth. This book discusses Piaget's views which stated that

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<sup>9</sup> Robert S. Feldman and Helen L., *Development Across the Life Span*, (New Jersey: Prentice Hall, Upper Saddle River, U.S.A.), p.443.

<sup>10</sup> Laura E. Berk, *Development through the life-span*, (Boston: Allyn and Bacon), p.8.



children between 7 and 11 years acquire concrete operational schemes gradually<sup>11</sup>, they (children) understand the conservation of weight at about 8 years but do not understand the conservation of volume until the age of 11. It goes on to explain that the formal operational age emerges fairly rapidly in early adolescence between the ages of 12 and 16. Adulthood is at the age of 20 to 30 where a person has more tissue, maximum bone calcium, more brain mass, better eye-sight, and a more efficient immune system and it is at this stage that he or she is considered more reasonable.

A book entitled *Business Law and Regulatory Environment Concepts and Cases* is written by Michael B. Metzger, Jane P. Mallor, James Barnes, Thomas Bowers, and Michael J. Phillips. This book has discussed the capacity of parties. It presented the following: first, the definition of capacity according to which it is the ability to incur legal obligations and acquire legal rights<sup>12</sup>. This is followed by an explanation of contracts of minors, the insane or defective and intoxicated persons. These are people considered to lack capacity, hence the Law is there to protect and safeguard them. It goes on to explain the nature of contracts regarding this different type of people, making it clear that the infant has the right to avoid or escape a contract, i.e. disaffirming and ratifying it later when having attained sufficient age to carry out such duties. It also discusses the age of majority according to common law which was previously 21 years but is now 18 years of age. There is also another book entitled *Business Law principles and cases* written by Harold F. Lusk, Charles M. Hewitt, John D. Donnell, and A. James Barnes. The book introduces and defines capacity. According to the authors, the term capacity denotes the ability to incur legally valid acts i.e. the ability to incur legal liability or acquire legal rights regarding

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<sup>11</sup>Helen L. Bee and Denise Boyd, *Life-span Development*,( Boston: Allyn and Bacon), p.343.

<sup>12</sup> Michael B. Metzger, Jane P. Mallor, James Barnes, Thomas Bowers, and Michael J. Phillips, *Business Law and Regulatory Environment: Concepts and Cases*, (Homewood: Rechar D. Irwin Inc), p.237.

parties. The book stated that there must be two (2) parties, the promisor and the promisee, and that an individual cannot establish a contract with himself or herself. It points out the privilege of disaffirming a contract that the infant has, and the period of infancy and early adulthood, which is under 21 years old, though there are some modifications which came about after the 1971 federal legislation which gave an eighteen (18) year old the right to vote<sup>13</sup>. The book also explains necessities like food, clothing, shelter, medical care, and basic education as some of the rights to be taken into account. Regarding the contract of an insane person, the book stated that his or her contract is voidable. It is the knowledge of insanity on the part of sane person, which gives the insane the right to disaffirm just as the infant has. Concerning the married woman, the book explains that she cannot contract in common law, i.e. contractual capacity in common law, is the right of a husband. But this disability as explained by the book has been removed and totally eradicated by the married woman statutes adopted by various states in the US.

There is also a thesis which is written on this issue by Muḥammad Hanīf ibn Husin entitled *Capacity to contract in Islam*. It covers issues pertaining to capacity, like the definition of capacity, capacity that enables a party to enter into relations as well as to bear legal responsibilities. It explains the difference between Islamic and English positive law in terms of capacity<sup>14</sup>. The thesis also goes on to discuss the time limit from the prenatal stage to the stage of intelligence and awareness. It discusses the contractual capacity of parties, including minors, adults, and corporations, and finally it explains the factors that eliminate the capacity of contract and their exceptions.

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<sup>13</sup> Harold F. Lusk, Charles M. Hewitt, John D. Donnell, and A. James Barnes, *Business Law principles and Cases*, (Homewood: Rechar D. Irwin Inc), P.207.

<sup>14</sup> Muḥammad Hanīf ibn Husein, *Capacity to contract in Islam, a comparative study of the Law of Contract*, (Kuala Lumpur: Malaysia), Session 1991, 1992. pp. 28-51

All the above mentioned books and research works, as far as my humble knowledge is concerned, have not touched on anything about legal capacity in the *Shari'ah* and developmental psychology, the area that I deem it necessary to explore.

## **RESEARCH CHAPTERIZATION:**

### **Chapter 1: Introduction**

- 1-1. Statement of the problem.
- 1-2. Objective of the research.
- 1-3. Research Methodology.
- 1-4. Literature Review.
- 1-5. References.

### **Chapter 2: The concept of legal capacity in the *Shari'ah* as discussed by Muslim Jurists (*Uşuliyūn*)**

- 2-1. Definition of legal capacity
- 2-2. Capacity for acquisition
- 2-3. Capacity for execution

### **Chapter 3: The concept of legal capacity in Positive Law and Developmental Psychology.**

- 3-1. Legal capacity in Positive Law.
- 3-2. Psychologists' views and arguments about Human Development and legal capacity.

### **Chapter 4: Comparison and analysis between the perspectives of the Muslim jurists and psychologists.**

### **Chapter 5: Conclusion**

### **Bibliography**

## CHAPTER TWO

# THE CONCEPT OF LEGAL CAPACITY IN THE *SHARĪ'AH* AS DISCUSSED BY MUSLIM JURISTS (*UŞŪLIYYŪN*)

### DEFINITION OF LEGAL CAPACITY:

The term legal in its literal sense denotes something which is established or founded upon law, or something which is allowed by official rules. Meanwhile, capacity stands for absolute fitness or ability i.e. the ability to perform or produce A certain act<sup>15</sup>. Technically, according to Imam Al-Ghazālī, legal capacity means, the state in which an individual possesses ability or capability both physically and mentally and becomes liable to execute duties and responsibilities imposed on him or her<sup>16</sup>. In other words, it is a quality by which a person becomes fit and competent for what he or she is entitled for, i.e. to discharge legal obligations to which he or she is liable to perform in the eyes of the *Shari'ah* law. Meanwhile, according to Treietel, the term capacity, as used in law, denotes the ability to perform a valid act, that is, the ability to incur liability or acquire legal rights.<sup>17</sup>

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<sup>15</sup> Abdu al- Azīz al-Bukhārī, *Kashf al-Asrār a'n Usūl Fakhr al-Islām Al-Bazdawī*, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), vol.4, p.335. Also see, Nyanzee, Imran Aḥsan Khan, *Islamic Jurisprudence*, 110.

<sup>16</sup> Al-Imām Al-Ghazālī, *Al-Mustaşfā Min' ilm al-Uşūl*, (Egypt: Al-Matba'ah al-Amīriyyah Bulaq, 1322H), vol.1, p. 156.

<sup>17</sup> Treietel .G.H, *An Out line of the Law of Contract*,(London: Butterworth,1972), p.205

We have seen from the above definitions that, in order to establish, implement and execute duties and responsibilities, the aspect of reason or intellect should be adjudged. The Islamic *Shari'ah* values intellect and cognitive capabilities very much, and considers them as an important entity, in order to understand and comprehend what is ordered in the law. Thus, the person addressed should essentially be intelligent enough to understand its content, i.e. what the law says or orders, otherwise things will go out of hand and justice will not prevail. This implies that the absence of intelligence will not produce any expected and meaningful result in the law. It is well known, however, since time memorial that people differ in matters of personal intelligence. No one can argue that differences do not exist in the intellect of any one type of person within a class itself. This is found in any community that some persons are more intelligent than others. Sometimes, a child can surprise a person by showing superior understanding of a certain subject than a grown up (a mature person). Nevertheless, intellect or intelligence and physical ability are the bases of the *Shari'ah*. That is why there is always a correlation between adulthood, intellect and physical ability as far as the *Shari'ah* is concerned. The ability or capability that people possess has made them to appropriately fall under either of the two (2) categories of *Ahliyyah* in the Islamic Law, and the categories are: *Capacity for acquisition (Ahliyyah al-wujūb)* and *Capacity for execution (Ahliyyah al-ādā')*. These two kinds of *Ahliyyah* have been further subdivided respectively into; Complete capacity for acquisition (*Ahliyyah al-wujūb al-kāmilah*), and Deficient capacity for acquisition (*Ahliyyah al-wujūb al-naqīṣah*)<sup>18</sup>.

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<sup>18</sup> Al-Imām, Abū zaḥrah Muḥammad, *Uṣūl al-Fiqh*, (Cairo: Dār al-Fikr al Arabī), p.271

## CAPACITY FOR ACQUISITION (AHLIYYAH AL-WUJŪB):

Capacity of acquisition is the ability of a human being to acquire or inherit rights and obligations<sup>19</sup>. The *manat* or basis for the existence of the capacity for acquisition is the attribute of being a human. This form of capacity is possessed by each human being irrespective of his being a *mukalaf*<sup>20</sup>. *Mukalaf* in legal parlance is that person whose act invokes a *ḥukum*. It is an essential condition for an obligation affecting this person that he has legal capacity, whether he performs the act directly or through delegation<sup>21</sup>. The first requirement for this person in Islamic *Sharī'ah* as stated by *Al-Imām al-āmidī* in his book *Al-ihkām fī uṣūl al-ahkām* is that, he should be able to comprehend the communication creating the obligation<sup>22</sup>. In addition to that, he or she must fulfill all the conditions related to legal capacity before the law can finally operate either for him or for her, or against him or her<sup>23</sup>.

### Complete Capacity of Acquisition:

Complete capacity of acquisition is the Capacity that makes a human being eligible for acquisition of all rights and obligations.<sup>24</sup> Otherwise, without it there would not have been any difference between human beings, who are the most valued creatures created by Almighty Allah, and the animals, as mentioned in the Holy Qur'an<sup>25</sup>. According to Muslim jurists, this kind of capacity is solely or entirely associated with

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<sup>19</sup> *Ibid*, p.264

<sup>20</sup> Imām Al-Bukhārī, Ala'udīn Aḥmad, *Kashf al-Asrār a'n Uṣūl Fakhr al-Islām al-Bazdawī*, (Beirut: Dār al-Kitāb al-Arabī, 1994), 2<sup>nd</sup> edition, vol.4, p.436

<sup>21</sup> Nyanzee, Imran Aḥsan Khan, *Islamic Jurisprudence*, (Kuala Lumpur: Academe Art and Printing Services, 2003), p. 109.

<sup>22</sup> *Imām Al-āmidī*, Saif al-dīn Abū al-Ḥasan Ali bin Ali bin Muḥammad, *al-Ihkām fī uṣūl al-Ahkām*, (Beirut: *Dār al-Fikr*, 1997), vol.1, p.107

<sup>23</sup> Nyanzee, Imran Aḥsan Khan, *Islamic Jurisprudence*, (Kuala Lumpur: Academe Art and Printing Services 2003), p. 110.

<sup>24</sup> Al-Imām Al-Sarakhsī, *Uṣūl al-Sarakhsī*, (Beirut: Dār al-Kutub al-Ilmiyyah), Vol. 2, p.332.

<sup>25</sup> *Sūrat al-Isrā'a* (17: 70)

*dhimmah*. In other words, in the opinion of some of the Muslim jurists, the term *dhimmah* also means the ability to acquire rights and obligations<sup>26</sup>. Meanwhile, the majority (*jumūhr*) of the jurists consider *dhimmah* to be an imaginary container or receptacle that holds both the capacity for acquisition (*Ahliyyah al-wujūb*) and the capacity for execution (*Ahliyyah al-ada*). Hence *dhimmah* is the location or place of residence for the two kinds of capacity. That is to say, it is the balance-sheet of a person showing his rights and obligations. Thus as seen above, (*dhimmah*) is deemed a requisite or condition for the existence of *Ahliyyah* by the Muslim jurists. That is why complete legal capacity for acquisition, is something which concerns only human beings. Animals are exempted because they have no *dhimmah* as such. It is human beings who have signed a contract or covenant with Almighty Allah s.w.t. as mentioned in the Holy Qur’ān<sup>27</sup>. This has been explained by *al-Sarakhsī*, who believed that *dhimmah* is the “trust” that was offered to the heavens, the earth, and the mountains but they refused to undertake it, and it was man who undertook it<sup>28</sup>. This is clearly stated in the Holy Qur’ān that: “We did indeed offer the Trust to the Heavens, and the Earth, and the Mountains, but they refuse to undertake it, being afraid thereof, but Man undertook it, he was indeed unjust and foolish”<sup>29</sup>.

Thus *dhimmah* is an attribute conferred by the Lawgiver; it is a trust resulting from a covenant (*‘ahd*) that we have made. This covenant (*‘ahd*) made by human beings has also been mentioned in another place in the Holy Qur’ān where Almighty Allah says that “When thy Lord drew from the children of Adam their loins, their descendants and made them testify concerning themselves, saying Am I not your

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<sup>26</sup> *Ibid*, p.110.

<sup>27</sup> *Sūrat al-Aḥzāb* (33: 72).

<sup>28</sup> Al-Imām Al-Sarakhsī, *Uṣūl al-Sarakhsī*, (Beirut: Dār Al-Kutub al-Ilmiyyah), Vol. 2, p.333.

<sup>29</sup> *Sūrat al-aḥzāb* (33: 72).

Lord? They said: yea! “We do testify”<sup>30</sup>. This, lest ye should say on the Day of Judgment: of this we were not mindful”. This is also found in the Holy Qur’ān that “Every man’s fate we have fastened on his own neck: on the Day of Judgment we shall bring for him a scroll which he will see spread open”<sup>31</sup>. This argument also denotes clearly the universality of Islam and the Islamic *Sharī’ah* which is meant for the entire humanity who have made a covenant with their Creator (Allah the Almighty) before they were brought to this superficial and transitory world. Hence, the entire humanity is involved. However, this complete capacity is found in the human being after his or her birth, which implies that a child in the womb of his or her mother is considered part of the mother, not an independent person. Whilst having some legal positions like *Ahliyyah al- wujūb*, he or she is without the power to hold responsibility as transactions which may be injurious to his or her interest. Nevertheless, he or she is capable in this regard to hold rights for its own interest as in heritance, wills, etc.

**Incomplete or Deficient Capacity (*Ahliyyah Al- Wujūb Al-Nāqisah*):**

Deficient capacity is the capacity which is established for the unborn (*janīn*), which implies that, the *janīn* has no obligations. The reason being that, it (the *janīn*) is considered as part of the mother in some respects, while in other respects, it is considered independent, preparing for separation from the mother. By virtue of this deficient capacity, the *janīn* acquires certain necessary rights out of which the

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<sup>30</sup>*iSūrat al-A’rāf* (7: 172)

<sup>31</sup>*Sūrat al-Isrāa* (17: 13)