THE CONCEPT OF IMPEDIMENTS TO LEGAL CAPACITY (*ʿAWĀRIḌ AL-AHLIYYAH*) IN ISLAMIC LAW OF CONTRACT AND THE EGYPTIAN CIVIL CODE OF 1948

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ABSTRACT

The purpose of this study is to examine in detail the concept of impediments to legal capacity(*ᶜawārid al-ahliyyah*) in Islamic law in comparison with the Egyptian Civil Code of 1948 (ECC). It is undertaken on the premise that *ᶜawārid* is regulated in Islamic law within its primary sources as well as the work of classical and contemporary jurists. There is a general notion that the ECC regarding legal capacity has drawn heavily upon Islamic law, thus, the present study attempts to verify this claim by showing the similarities and differences between the two systems.

This research employs library based methodology. It has adopted a combination of Islamic and Civil law approaches to the subject of impediments to legal capacity. With respect to Islamic law reference has been made first to the Qur'ān and the *Sunnah* together with their commentaries. As far as the works of jurists are concerned, the study focuses only on the four *Sunni* schools of law namely: the Ḥanafī, Mālikī, Shāfiᶜī and Ḥanbalī. Reference has also been made to the works of contemporary jurists. For the purpose of comparison with the ECC the latest amendment of the Code (up to December 2003) has been the main reference. In addition , commentaries of the ECC and other related legislation as well as the writing of jurists have also been referred to.

This thesis consists in six chapters preceded by an introduction and ending with a conclusion drawn from the analysis therein. The first chapter acts as an introduction to the general theory of legal capacity outlining the basic features of the concept. The remaining five chapters represent the core of the research. i.e. impediments to legal capacity . Chapter two is devoted to examining minority *(ṣighar*)and its effect on contract. The concept of insanity *(junūn*), prodigality *(safah*) and duress *(ikrāh*), as well as mistake *(ghalaṭ*) are examined in chapters three, four, five and six respectively. It has been found that although there are differences between the two systems, such as the use of different terminologies, the study concludes that to a large extent the concept of impediments to legal capacity in the ECC is in harmony with that of Islamic law. In the case of dissimilarities, suggestions have been made to revise some provisions in the ECC to be in line with or approximate to that of Islamic law.

DECLARATION/ STATEMENTS

DECLARATION

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

Signed.....

Date.....30/3/06.....

STATEMENT 1

This thesis is the result of my own investigation, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references. A bibliography is appended.

Signed.....

Date.....30/3/06.....

STATEMENT 2

I hereby give consent for my thesis, if accepted to be available for photocopying and for interlibrary loan and for the summary to be made available to outside organizations.

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Date.....30/3/06.....

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NOTES ON TRANSLITERATION

The transliteration used in this thesis is based on Encyclopaedia of Islam with slight variation.

Consonants

ء	(hamza)	'	ض	(ḍād)	ḍ
ب	(bā')	b	ط	(ṭā')	ṭ
ت	(tā')	t	ظ	(ẓā')	ẓ
ث	(thā')	th	ع	(ᶜayn)	c
ج	(j̄im)	j	غ	(ghayn)	gh
ح	(hā')	ḥ	ف	(fā')	f
خ	(khā')	kh	ق	(qāf)	q
د	(dāl)	d	ك	(kāf)	k
ذ	(dhāl)	dh	ل	(lām)	l
ر	(rā')	r	م	(m̄im)	m
ز	(zay)	z	ن	(nūn)	n
س	(s̄in)	s	و	(wāw)	w
ش	(sh̄in)	sh	ه	(hā')	h
ص	(ṣād)	ṣ	ى	(yā')	y

Vowels

ـَـ	(*fatḥah)*	a	long *fatḥah*	ā
ـِـ	(*kasrah)*	I	long *kasrah*	ī
ـُـ	(*ḍamma*h)	u	long *ḍammah*	ū

Tanwīn ـًـ ـٍـ ـٌـ is represented by an, in, un respectively

Transliteration involves only Arabic words. Others will be written in *italics*

ABBREVIATIONS

ECC	Egyptian Civil Code of 1948
EMECC	Explanatory Memorandum of the Egyptian Civil Code
EgCC	Egyptian Court of Cassation
P B U H	Peace be Upon Him
CPC	Civil Procedure Code
LGP	Law of Guardianship Over Property of 1952
(x : xx)	Relating to Quotations from *the Qur'ān* where x indicates *sūrah* (chapter) and xx indicates *āyah* (verse) such as (1:2) which means *sūrat al-Fātihah* verse 2

INTRODUCTION

Freedom to enter into contract is one of the features of Islamic law of contract. According to this principle, every person is entitled and eligible to be part of the contracting party as long as certain requirements are fulfilled. A person is said to be competent when he is fully possessed of legal capacity. However, there is a limitation imposed by the *Sharīᶜah* upon certain parties from entering into a contract if there is impairment in legal capacity, so imposed either to protect one of the contracting parties or both. This is known as 'impediments to legal capacity' (*ᶜawāriḍ al-ahliyyah)* which is the crux of the present study.

Objectives of the Research

The purpose of this study is to examine in detail the concept of impediments to legal capacity in Islamic law; thus, reference will be made to both primary and secondary sources of Islamic law encompassing the Qur'ān and the *Sunnah* as well as the works of jurists; classical and contemporary. The study also aims to establish that Islamic law has regulated the concept of impediment. In addition, this study will also make a comparison between Islamic law on impediments to legal capacity and Egyptian law. There is a general belief that Egyptian law regarding legal capacity has drawn heavily upon Islamic law; thus, this study will endeavour to ascertain this claim by showing the similarities and differences between the two systems. In the case of dissimilarities between Egyptian law and Islamic law, suggestions will be made to revise these dissimilarities.

Scope of the Research

Islamic law on 'impediments to legal capacity' is the crucial part of this study. The research will touch only on matters relating to contract, which have a monetary element in nature such as sale; thus, the contract of marriage, for instance, will not be the focus of the study despite the presence of monetary element since the nature of this contract is more connected with personal status. Discussion will also be restricted to impediments which have their counterpart in Egyptian law, regardless of the legal terminology used by this law. Thus, the concept of duress (*ikrāh)* and mistake (*ghalaṭ)* in spite of being categorized under the topic of defects of 'will' (*ᶜuyūb al-irādah)* [1] will be included in this study. Furthermore, the relationship between 'impediments to legal capacity' and 'defects of will' in the Egyptian Civil Code [2]is so close that some writers conclude that the existence of both would lead to the same effect. This is further strengthened by the fact that these two concepts are discussed under one umbrella term by the vast majority of jurists.[3] It is to be noted that Islamic law in a broader sense has recognized a number of impediments; however, this study is only confined to those which concern contract; namely, minority(*ṣighar*), insanity(*junūn*), prodigality (*safah)* duress *(ikrāh)* and mistake *(ghalaṭ*). As such, impediments such as journey(*saṭar*) and menstruation *(ḥayd*) will be left out. Apart from this, another criteria taken into consideration in determining the area of research is that the ECC has clear provisions

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[1] Defects of will (*ᶜUyūb al-irādah)* and defects of consent(*ᶜuyūb al-riḍa)* are synonymous, both terms will be used interchangeably throughout the this study.

[2] Hereafter cited as the ECC

[3] Some jurists discuss these concepts under causes of nullity *(asbāb al-buṭlān*) while other discuss them under defects of consent(*ᶜuyūb al- riḍa*). According to this latter, factors such as deception *(ghubn)* and mistake *(ghalaṭ*) are indications *(qarīnah*) of defects of consent as similar to minority *sighār* which is also considered as indication to defects of consent. See, al-Ḥājj, *Naẓariyyat al-Buṭlān fī al-Fiqh al-Islāmī wa fi al-Qānūn al-Madanī al-Miṣrī*, n.p, n.d, p.357

regarding these impediments. It is important to note that in discussing legal issues emphasis will be given to the *Sunni* school especially those belonging to the four famous schools of thought.[4] The reason for restricting this study to the *Sunni* sect is due to the fact that Egypt belongs almost exclusively to this sect. Indeed, the exhausting number of references and divergences of opinion among the *Sunni* school increase the need to narrow down the focus of the research.

With regard to Egyptian law, the study will focus on the New Civil Code of 1948. However, some other laws such that of Guardianship Over Property of 1952 and that of Personal Status will be referred to whenever necessary.

Methodology of the Research

The proposed study attempts to explore the concept of impediments to legal capacity in Islamic Law and Egyptian law. Therefore, research methodology is mainly library based in nature. With respect to Islamic law, reference will be made first to the text of the Qur'ān and *Sunnah* together with their commentaries.

With regard to the classical *Sunnī s*chools of law, the opinions of the four established schools, namely Hanafī, Mālikī, Shāfiʿī and Hanbalī are to be consulted. The classical manuals such as *al-Mabsūṭ, Mawāhib al-Jalīl* , *Al-Majmūʿ* and *al-Mughnī,* are examples of various books representing these schools. Aside from this, classical books on principle of jurisprudence (*usūl al-fiqh)* such as *Kashf al-Asrār* and *al-Tawḍīh* are of equal importance to the topic of impediments to legal capacity which is treated quite

[4] These schools are: the Ḥanafī, the Mālikī, the Shāfiʿī and the Ḥanbalī.

comprehensively therein. The works of contemporary scholars are no less important; thus, for instance, the writing of Ahmad Ibrāhīm and Khallāf on this subject will be analysed .

It should be noted that in citing the views of jurists, the writer will not cite any opinion from any book which does not constitute an original source. For instance, *al-Mughnī,* despite the fact that its author is Hanbalī, also contains other opinions such as those of Hanafī and Shāfiᶜī: thus the opinion of Hanafī cited in this book will be omitted unless expressed by Hanafī in their own works.

For the purpose of comparison with Egyptian law, the latest amendment of the New Civil Code of 1948 (up to December 2003)will be the main reference; of equal importance are commentaries to this Code, such as *al- Wasīṭ by* al- Sanhūrī, *al-Taᶜlīq ᶜalā al- Qānūn al-Madanī by* Anwar Ṭulbah and the like. The Code referred to is in the Arabic version and its translation into English, especially that of ᶜAbd al-Fattāḥ Murād, however, if there is any discrepancy between the two, the Arabic version will prevail.

Besides this, as the nature of the study is Egyptian law in general and the Civil Code in particular; reference will also be made to the works of Egyptian jurists pertaining to this research. Therefore, books like *al-Madkhal ilā al-Qānūn by* Nabīl Ibrāhim, *Maṣādir al-Iltizām by* Faraj al- Suddah, *Durūs fi Nazariyyat al-Iltizām by* Muhammad ᶜAli Uthmān *and Maṣādir al-Ḥaqq* by al-Sanhūri will be consulted. As in the case of the Code itself some of the works of Egyptian law concerning the research are available in English; if any confusion between views arises, the Arabic work will thus prevail.

Equally important to this study are the Egyptian Court rulings. Although Egypt follows a civil legal system whereby the rulings of one court does not bind the other or even itself, the value of these decisions can be seen from the strong tendency from judges to follow the previous judgments of the Highest Court-the Court of Cassation-.[5] Constant reference will therefore be made to these rulings as appropriate.

It should be noted that as far as terminology is concerned, - unless otherwise stated -the research will employ the English term followed by its Arabic equivalent in the first appearance of any term. However in certain instances whereby the Arabic terms are inevitable and commonly used then such terms will take priority. Should there be any confusion reference may be made to the glossary provided at the end of this thesis. In any discussion involving Islamic law, unless otherwise stated the term jurists will refer to both classical and modern jurists. Similarly if a discussion involves Egyptian law the term jurist will refer to those who are experts in Civil law; this includes law commentators (*shurrāḥ al-qānūn*), academicians, lawyers and the like. It is equally important to note that the English translation of the Qur'ān is based on Abdullah Yūsuf Ali; occasionally the original text in Arabic is maintained whenever necessary.

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[5] Created in 1931 the Court is at the apex of the ordinary justice. It is divided in two chambers: civil(civil and commercial cases, personal status) and criminal. Its main function is to control the judgements of the Court of Appeal following a motion for cassation introduced by any interested party including the public prosecutor. The motion must be founded on an error of law which would have been committed by the lower court. The allegations can be the misapplication or misinterpretation of law, irregularity in the language of the judgement or procedural errors. Other than cases punishable with death penalty the control of the Court of Cassation only bears on these questions and not on the facts. See, Maugiron, Nathalie Bernard and Dupret, Baudouin (editors), Egypt and Its Laws, Kluwer law International, London/ The Hague/ New York, n.d, p.xxxi

Literature review

The present study is not a pioneer in this subject; rather it is undertaken based on previously related works. As far as classical jurists are concerned – to the best of the writer's knowledge – there is no specific book devoted to the subject of impediments to legal capacity (*ᶜawāriḍ āl-ahliyyah)*. Most of the works of jurists on this subject are found scattered throughout huge volumes of *fiqh* literature. However, the Ḥanafī school is distinguished from others since they devoted a specific chapter to impediments within their work on *uṣūl al-fiqh* such as *Kashf al-Asrār* by ᶜAbd ᶜAzīz al-Bukhārī.. As for other schools the treatment of this topic is mostly carried out within the heading of *mahkūm ᶜalayh* (person upon whom legal rules are addressed);example of this kind of work is *al-Muṣtaṣfā* by al-Ghazālī.

With regard to contemporary literature on the subject, a number of writings have contributed to the shaping of the present study such as the work of Husayn al-Nūri entitled: *Dirāsah fī ᶜAwāriḍ al-Ahliyyah* . In this book, the author has discussed in quite detail the theory of impediments to legal capacity, nevertheless, the scope of such a concept has been narrowed down to cover only mental illnesses. Apart from this, although there are discussions relating to Egyptian law, it appears that such discussions are selective in nature, in the sense that that not every part of impediments is treated from both Islamic and Egyptian law.

Another important work is *ᶜAwāriḍ al-ahliyyah ᶜInd al-Uṣūliyyin* by al-Jabūri. As obvious from the title, the author has adopted the perspective of *uṣūl al-fiqh* to be the basis of his study to cover all types of impediments. In other words, contrary to al-Nuri's

work, al-Jaburi is more comprehensive in terms of widening the concept of impediments.

Apart from the above mentioned, there are some works dealing with the subject of impediments to legal capacity in a different approach in that such a concept is treated from a different nomenclature i.e. defects of consent (*ᶜuyūb al-riḍā)* within the framework of the theory of contract. This kind of writings has been carried out mostly by modern jurists, be they of Islamic or Civil law. Examples of this approach are *Maṣādir al-Haqq* by al-Sanhūri and al-*Milkiyyah wa Naẓariyyat al-Ḥāq* by Abū Zahrah.

In the light of this, the present study is undertaken to differ from the previous works in two aspects. Firstly, a combination of different perspectives namely, perspectives of Islamic jurisprudence (*fiqh)* and its principles (*usūl)* as well as modern law. Secondly, this study focuses only on types of impediment which are related to contract.

Outlines of Chapters

This thesis consists of six chapters excluding the introduction and the conclusion. The introduction explains the purpose of the research, its scope and the methodology used as well as the outline of the chapters.

Chapter one is devoted to introducing the general theory of legal capacity which includes the meaning of such a concept. It also deals with the general meaning of

impediments to legal capacity (*ʿawārid)*. The discussion involves both Islamic law and the ECC.

Chapter two focuses on minority *(sighar*) as an impediment. It explains in detail the meaning of minority and its effect on contracts in both Islamic law and the ECC. In doing so the meaning of contract and its relationship to disposal and obligation are also discussed.

Chapter three deals with insanity *(junūn*) and its effect on legal capacity. Apart from discussing the concept from Islamic law and ECC, the meaning of insanity has also been explained from medical perspectives. This chapter also touches on imbecility (*ʿatah)* as an impediment to legal capacity and its differences from insanity.

Chapter four is designed to explain the theory of prodigality *(safah*) in Islamic law and the ECC. Unlike other impediments the meaning of prodigality from literal and legal point of view as well as its effect on contracts are discussed extensively.

Chapter five deals with duress *(ikrāh*). It covers issues ranging from definition, classification to the measurement of duress. The chapter also discusses the effect of duress on contract and legal capacity in both Islamic law and the ECC

Chapter six is about mistake *(ghalaṭ*) from the perspective of Islamic law and the ECC. Four main issues are examined namely, the meaning of mistake, the existence of such concept in Islamic law, its measurement and its effects on contract.

Finally, the conclusion consists of an overall analysis and findings of the thesis.

CHAPTER ONE: INTRODUCTION TO GENERAL THEORY OF LEGAL CAPACITY (*AHLIYYAH*)

1.1. Legal capacity in Islamic law and the ECC

1.1.1.Islamic law[1]

1.1.1.1 Literal meaning

The equivalent Arabic word for legal capacity is *ahliyyah* which derives from the word *a ha la*(ل ه أ). The author of *Mukhtār al-Ṣiḥāḥ* [2]presumably categorized it as an already understood word. Thus, he gives no definition other than stating some examples on how to use the word correctly. The other meanings of *ahliyyah* are fitness *(ṣalāḥiyyah)*) and deservingness(*istiḥqāq*). We say for example that a person is *ahl* to do this work, meaning that he is fit to do it. In addition we also say that a person is *ahl* to be honoured i.e. he deserves to be honoured.[3]

Having said this, it should be noted that the literal meaning of *ahliyyah* is not confined solely to the positive aspect,[4] nor does it apply only to jurisprudence *(fiqh*) literature only. Therefore, some writers are inaccurate in stating that the literal meaning for *ahliyyah* is the fitness of a person to perform an act, or for its demand of him or for

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[1] Islamic law is also referred to as the *Sharī*ah. Since this term is widely used there is no need to explain it in detail. In brief Islamic law is the commandment or prohibition of the lawgiver to his servant. This was revealed through the Qur'ān and the *Sunnah* of the Prophet P B U H. After the demise of the Prophet P B U H other methods of deducing legal rules such as *ijmā*ᶜ (consensus) and *qiyās* (analogy) were systematically used by jurist. See, Mahmasānī, Ṣubḥī, *Falsafat al-Tashrī al-Islāmī*, English edition by Farhat J Ziadeh, Penerbitan Hizbi, Malaysia, 1987,p.6 and pp.76-82, seel also, Zaydān, ᶜAbd al-Karīm, *al-Madkhal li Dirāsat al-Sharī*at al-Islāmiyyah*,Dār ᶜUmar al-Khaṭṭāb, Alexandria, n.d, p.38

[2] Al- Rāzī, Muḥammad bin Bakr , *Mukhtār al- Ṣiḥḥāḥ* , edited by Shihāb al-Dīn Abū ᶜUmar,Dār al-Fikr, Beirut, 1993, p. 56

[3] See : Al-Zuhaylī, Muhammad , *al-Nazariyyāt al- Fiqhiyyah* , *Dār al-Qalam*. Damascus, 1993. 1st edition, p. 130

[4] For instance the term *ahl al-Nār*(inhabitant of hell) is used in many places in the Qur'ān

his entitlement for it.[5] This is because such a meaning only implies restricting the positive aspect of the word, whereas the reliable sources of Arabic lexicon[6] are silent on this restriction.

1.1.1.2 Technical meaning

Legal capacity (*ahliyyah*) generally means the competence of a human being to acquire rights or have obligations required of him. According to the Ḥanafī, this is an attribute by which a human being becomes entitled and qualified to receive rights or bear responsibilities. [7] Al-Zarqā' defines it as a quality presumed by the law to be in a person rendering him capable of receiving a legal injunction. [8] Al-Ḥijī gives a more precise definition where he states that Legal capacity is an attribute given by a lawgiver to a person, in order to become entitled to be the subject of legal injunctions.[9] El-ᶜ Ālamī refers to it as the fitness of a person to enter into obligation that is to bind and be bound.[10]

It seems from the above definitions that the technical meaning for legal capacity as a term can barely be found without referring to its classification, as these definitions either cover some of the classification or all of it. It can also be concluded that legal capacity is a set of qualifications in accordance with which the person becomes able to

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[5] Ahmad Hasan : The Principle of Islamic Jurisprudence, Islamic research Institute, International Islamic University Islamabad, n,d, vol, 1 p. 294.

[6] See for instance, al-Fayrūz Ābādī, *al-Qāmūs al-Muḥīṭ*, edited by *Maktab Taḥqīq al-Turāth, Mu'assat al-Risālah*, Beirut, 2003,7th edition, p.963

[7] Al-Bukhārī,ᶜAbd al-ᶜAzīẓ bin Muḥammad, *Kashf al-Asrār* , *al-Fārūq al-Hadithah li al-Tibāᶜah,* 1995, 2nd edition, vol 4. p237,

[8] Al-Zarqā', Mustafā , *al-Madkhal al-Fiqh al-ᶜĀm ,Dar al-Fikr*, Damascus, 1968, 9th edition, vol 2, p. 737

[9] See al- Kurdī , Ahmad al-Ḥijī, *al -Aḥwāl al- Shakhṣiyyah, Manshūrāt Jāmiᶜah Halab,* 1990, p. 11

[10] El-Ālamī. Dawoud S, The Marriage Contract in Islamic Law, Graham & Trotman, London, 1992, p. 49

acquire rights, bear obligations and conduct actions and transactions that are able to produce their legal effect.[11] In the field of Islamic law, when the word *ahliyyah* is used alone, it normally refers to *ahliyyat al- adā'* (active legal capacity)

1.1.1.3. Legal capacity in Legal Texts *(Nuṣūṣ Shar^{c}iyyah)*

As a matter of fact every discussion concerning Islamic law must be referred to its source. The primary sources are the Qur'ān and the *Sunnah* followed by consensus of jurists (*ijmā^{c}*)and analogy (*qiyās)* The first two sources are also known as legal texts *(nuṣūṣ shar^{c}iyyah*). As far as *ahliyyah* is concerned there is no direct verse from the Qur'ān or the *Sunnah* stating clearly the terminology of *ahliyyah* as used by the jurists. However, this is not to suggest that there is no basis from these two sources regarding the concept of legal capacity since there are several verses which are connected with legal capacity (*ahliyyah)*. Amongst others are:

In the Qur'ān (48:26) Allah says:

" Allah sent down His tranquillity to His Messenger and to the believers and made them stick close to the command of self restraint. And well were they entitled to it (*wa ahlahā)*"

Commenting on the verse Ahmad Hassan states that the word *ahl* used here implies right and obligation relating to capacity,[12] and according to some authors [13]the basic authority for all the preposition of law relating to legal capacity is the Qur'ānic

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[11] Zahrā' , Mahdī , The Legal Capacity of Women In Islamic Law [1996] ALQ , p. 245
[12] Ahmad Hassan, The Principle of Islamic Jurisprudence, p. 295
[13] See Mir Wali ullah, Muslim Jurisprudence and the Quranic Law of Crime, Taj Company. Delhi, 1990,p .68

verse (2:286) whereby Allah says: " On no soul doth Allah place a burden greater than it can bear"

In addition in (7:172) Allah says:

"When thy Lord drew forth from the children of Adam from their loins, their descendants, and made them testify concerning themselves (saying). Am I not your Lord? They said: Yea we do testify. (This) lest you should say on the day of judgement of this we were never mindful."

The above verses denote by implication the basic requirements for a human being in order to be held responsible for his deeds. This is actually among the matters relating to legal capacity in Islamic jurisprudence.

1.1.1.4. Types of legal capacity

Broadly speaking, there are two main categories of legal capacity : receptive legal capacity(*ahliyyat al-wujūb*) and active legal capacity(*ahliyyat al- adā'*). These two can be further divided into incomplete(*nāqiṣah*) and complete(*kāmilah*)[14]

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[14] See for instance , Zahu , Aḥmad al-Najdī , *Uṣūl al-Fiqh al-Islāmī* ,*Dār al-Thaqāfat al-ᶜArabiyyah*, Cairo. n.d, vol 1, pp. 164-166 , al-Baᶜlī ,'Abd al-Ḥamīd, *Ḍawābit al-`Uqūd* , *Maktabah Wahbah*, Cairo, n.d, 1st edition, pp. 159-160 , Dabūr, Anwar Maḥmūd , *al-Madkhal li Dirāsat al-Fiqh al- Islāmī* , *Dār al-Thaqāfat al-ᶜArabiyyah*, Cairo, 1986, pp. 432-433

1.1.1.4.1 Incomplete receptive legal capacity *(ahliyyat al-wujūb al- nāqiṣah)*

This type of legal capacity has been defined as the fitness of human beings to acquire rights but not to undertake duties or responsibilities.[15]In other word 'incomplete receptive legal capacity' only possesses a positive aspect called 'indebtedness' *(dā'iniyyah)* [16]. This kind of legal capacity is associated with the foetus (*janīn*) before delivery. The incompleteness of this foetus is due to two reasons; firstly, the foetus bears two possibilities, viz: it might be delivered alive or dead. If it is delivered dead, then it acquires no rights. But if it is delivered alive, certain rights will be given to it. With only these possibilities, it is not entitled to all rights. Secondly, during pregnancy the foetus is considered as part of its mother. As a result, some legal consequences affecting its mother will also involve it .For instance, if its mother is manumitted then it will be similarly affected.

The basis for in incomplete receptive legal capacity is 'humanity'(*insāniyyah*)[17]. However, due to the uncertainty of life for the foetus, it only enjoys the positive aspect of this capacity: that is to acquire some rights and bear no obligation.

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[15] See :Al-Husari ,Āḥmad, *al-Ḥukm al-Shar ᶜī Wamaṣādiruhu*, *Dār al-Jīl*, Beirut, 1997, 3rd edition p.224,

[16] Al-Zarqā' , *al-Madkhal* vol 2 ,p. 741

[17] ElᶜĀlamī, Dawoud S, Legal Capacity with Special Reference to the Marriage Contract, ALQ ,May, 1991,p.191. There are also jurists who opined that *dhimmah* is the basis for *ahliyyat-al-wujūb;* see Musa, MuḥammadYusuf, *al-Amwāl wa Nazariyyat al-ᶜAqd fī al-Fiqh al-Islāmī, Dār al-Fikr al-ᶜArabī,* Cairo, 1996, p.292

1.1.1.4.2. Complete receptive legal capacity(*ahliyyat al- wujūb al-kāmilah*)

The definition given to complete receptive legal capacity is the fitness of a person for receiving rights and taking responsibilities.[18] Contrary to incomplete receptive legal capacity (*ahliyyat al-wujūb al- nāqiṣah)* which only possesses the positive aspect, this type of legal capacity has both the positive and the negative aspect. In other words, a person possessing this capacity can be both debtor and creditor.

The jurists are agreed that the basis for this legal capacity is human life, but they are of different opinions as to when it begins. The Ḥanafī are of the opinion that it starts after the major part of the baby has been delivered whereas the majority hold that the baby must be fully delivered for this capacity to begin.[19] This kind of legal capacity will remain until death and some jurists even opined that it would remain after death until the deceased's debt is fully settled.[20]

1.1.1.4.3. Active legal capacity *(ahliyyat al- adā')*

This generally refers to the capability of a human being of producing acts to be in accordance with the *Sharī ᶜah*. [21]Al- Zarqā' defines it as the fitness of a person to exercise activities which are dependent on 'reason' (ᶜ*aql*) to be legally valid[22]. Another

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[18] Dabūr, *al-Madkhal* p. 434

[19] Al-Ṣabūnī, ᶜAbd al-Raḥmān, *al-Madkhal li Dirāsat al-Tashrī al-Islāmī, Maṭbaᶜah Riyāḍ* , Damascus, 1980, 4th edition, vol2 , p.29

[20] This view was criticized by Khallāf. He wrote : There is no reason to adopt such a view . In fact the characteristic of human being will vanish upon his death. Therefore he no longer possesses *dhimmah* and *ahliyyah* be it complete or incomplete. As for the argument that their creditor can still claim their debt it is because the debt has become the responsibilities of the heirs to settle it. See : Khallāf, Abd al-Wahhāb, ᶜ*Ilmu Uṣūl al-Fiqh* , *Maktabat al-Daᶜwat al-Islāmiyyah*, Cairo, n.d, p.p .136-137

[21] Amīr Badshāh, *Taysīr al-Taḥrīr, Dār al-Fikr*, n.d, vol2, p.447

[22] Al-Zarqā', *al-Madkhal* , vol 2 p .742

definition offered by Abū Ẓahrah is the competence of a person to acquire rights and to create them for others through his verbal action (*taṣarrufāt qawliyyah*)[23]. It is quite clear that al-Zarqa's definition is more comprehensive since it includes word and deed rather than confining it to verbal action. Similar to receptive legal capacity this type of capacity can also be divided into 'complete' and 'incomplete' due to the development of the life of human beings.[24]Incomplete active legal capacity (*ahliyyat al-adā' al –nāqiṣah*) is the fitness of a person to conduct certain actions only. The cause for this capacity is discernment[25] (*tamyīz);* thus, a discerning child is only entitled to conduct some transactions. With regard to complete active legal capacity *(ahliyyat al-adā' al-kāmilah)* it is the highest degree of legal capacity when a person is fit to conduct action without any limitation. This is achieved by reaching the age of majority with no mental deficiency. In addition to these two kinds of legal capacity, a person could be lacking both types of active legal capacity , as in the case of the insane.

The above classification for active legal capacity is in accordance with the view of the majority of jurists. On the other hand the Shāfiᶜī are of the opinion that a person may only be of full or be lacking in capacity. This is because the bases for this capacity in their view are both puberty (*bulūgh)* and reason(*ᶜaql)* [26]

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[23] Abu Zahrah , Muḥammad, *al-Milkiyyah wa Naẓariyyat al-ᶜAqd fī al-Sharīᶜat al-Islāmiyyah* , *Dār al-Fikr al-ᶜArabī*, Cairo, 1977, p .281

[24] Mūsā , *al-Amwāl* , p. 295

[25] Some add reason(*ᶜaql*)together with discernment as the basis for this capacity. This is in my opinion not necessary as in order to be discerning one must possess reason . See Badrān , Abū al-ᶜAynī , *Tārikh al-Fiqh al-Islāmī wa Naẓariyyat al-Milkiyyah wa al-ᶜUqūd* , *Dār al-Nahḍat al-ᶜArabiyyah*, Beirut, n.d, p. 428

[26] Al-Zuhaylī, Muḥammad , *al-Nazariyyat al- Fiqhiyyah* , p. 136

1.1.2 The Egyptian Civil Code of 1948 (ECC)

Introduction to the Egyptian Civil Code of 1948

Before elaborating the meaning of legal capacity as applicable in the ECC, it is worth introducing the background of Civil law in general and the ECC in particular. To begin with, the history of Civil law has its origins in what was introduced in Rome for the purposes of governing matters relating to its citizens. This set of laws applied only to the citizens of Rome, however; foreigners were subject to what was known as the People Law. Civil law then developed during the reign of Justinian to become synonymous with Roman law by the unification of law to govern all regardless of their citizenship, and the compilation of the Encyclopaedia of Civil law.[27] The meaning of civil law broadened in medieval times to cover a set of rules applied in individual private relationships regarding both financial and personal matters. Thus, the Civil law was also known as private law.[28] However, at the present time, the notion of this law has become narrower after the separation of some of its content to create a new independent law.[29]

As stated above, the Civil law governs relationships among individuals in terms of both financial and personal status. This is the situation in most countries adhering to the Civil law system such as France and Italy. In Egypt, however, the Civil Code concerns only matters pertaining to financial status, leaving personal status to be governed by religious law.[30] When the New Civil Code was promulgated in 1948, the situation remained unchanged except for few provisions concerning legal capacity

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[27] Tanāghū, Samīr ᶜAbd al-Sayyid, *al-Nazariyyat al-ᶜĀmmah li al-Qānūn,Munsha'at al-Maᶜārif,* Alexandria, 1984, pp.576-577 see also, J.A..C. Thomas, Roman law, in An introduction to Legal Systems, edited by J.Duncan M Derret, London, Sweet & Maxwell, 1968, p.1

[28] Salamah, Aḥmad, *al-Madkhal li Dirāsat al-Qānūn,Dār al-Nahḍat al-ᶜArabiyyah,* Cairo, 1974, p.6

[29] *Ibid*

[30] See, Luṭfī, Ḥusām Maḥmūd, *al-Madkhal li Dirāsat al-Qānūn Fī Ḍaw' Ārā' al-Fiqh wa Aḥkām al-Qaḍā',al-Nasr al-Dhahabī li al-Ṭibāᶜah,* Cairo, 1998, p.62

[31]which were attached to the Code. Nevertheless, provisions for legal capacity can still be found in personal status law.

The reasons for excluding personal status may well be because of religious factors as well as historical. As observed by Ahmad Salamah,[32] the importance of nationalism over universalism led to a distinction between financial and personal matters. This is because, as far as personal matters are concerned, there is no unified law for all Egyptians, rather, the law follows the religion of the litigant. Thus, what was applied to the Muslims is different from that applied to the Christian or the Jew[33]. This is not the case when the litigation involves financial matters, as all are governed by a unified law regardless of sect.

In addition, the formal sources of both financial and personal status have contributed to the exclusion of personal status from the Civil Code. With regard to financial status, the formal sources are legislative provision, custom, Islamic law and natural law. As for personal status, the main source is religion and it has very little codified law compared to financial status.[34]

This said, the question arises as to what exactly is meant by personal status and what criteria are taken into consideration in distinguishing this concept from financial status. The vagueness of the concept can be seen from definitions offered. In fact, there is no single and solid definition of personal status(*aḥwāl syahkṣiyyah)*, the reason being that no standard measurement exists to differentiate between what is considered as

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[31] Anderson, J. N. D, The *Sharī`a* and the Civil law ( The Debt Owned by the New Civil Code of Egypt and Syria to the *Shāri`a*) The Islamic Quarterly, Vol 1, No 2, July 1954, p.35

[32] Salamah, *al-Madkhal, p.8*

[33]Luṭfi, *al-Madkhal , p. 62*

[34] See, Salamah, *al-Madkhal, p.9*

personal status and what is financial, and where the two elements are combined.[35] If the element of finance were to be considered as the measurement, there are transactions such as gift and endowment which are still considered personal, in spite of the apparent element of finance.

In spite of this difficulty, the ruling of the Egyptian Court of Cassation[36] has to some extent shed light on the meaning of personal status. In one of its rulings,[37] the court states:

> "What is meant by personal status is a set of characteristics which distinguish human beings from others, such as the state of being female or male, married, widow or divorced whether legitimate child or not, enjoying full legal capacity or not due to legal process [.....] Also included are endowment, gift and bequest due to religious nature".

This was echoed in a later ruling by the same court:

> "According to this court's ruling, personal status is a group of characteristics, which differentiate human beings from others [.....], with regard to monetary matters, these are considered as financial."[38]

The difficulty in determining personal status can be traced back as early as the emergence of the term personal status itself. Before the introduction of foreign law during Mohamed Ali's reign, Islamic law had been prevalent in the country, in the sense that every aspect of litigation would be tried according to the *Sharīʿah*, regardless of the nature of cases be it criminal *(jināyah)* or transaction *(muʿāmalah)*. Since the term *muʿāmalah* in Islamic law includes both financial and family matters, there was no need

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[35] Tanāghū, *al-Naẓariyyah* , p. 273
[36] Hereafter cited as EgCC
[37] EgCC dated 21/6/1934
[38] EgCC, dated 28/4/1985, It is remarkable that although the period between the two rulings is about fifty years, there is still no difference between the two. This concludes that the meaning of *aḥwāl shakhsiyyāḥ* has not developed very much. If Islamic law is accused of being rigidity by some quarters the same is true with regard to the modern law

to differentiate between them as far as the court jurisdiction is concerned. Nevertheless, all matters relating to personal status like marriage, divorce and the like might be referred to as family law *(aḥkām al-usrah* or *munākahāt)*

However, after the advent of foreign law (especially that of French), the terminology of personal status (*aḥwāl shakhṣiyyah)* has been used instead of family law *(aḥkām al-usrah*) in spite of the superiority of *Sharī ᶜah* court over personal status. The term personal status is rather used to have its counterpart in French Civil Code despite the fact that the concept of personal status in French law is not identical to that of Islamic law. This is due to the obvious role of religion in Islamic law compared to French law.

According to some jurists[39], the terminology of personal status was justifiably used when there was separation in court jurisdiction; i.e. a special court to look into matters relating to personal status, and another for financial matters. However, after the abolition of the *Sharīᶜah* courts by virtue of law No 462 of 1955, all litigation has been put under a unified system - the National Court. Thus, the continuous usage of personal status is no longer justifiable.

In my opinion, although this argument has its strengths, the term personal status has a very close connection with religious points of view. For Muslims no law repugnant to Islam shall be imposed on them, especially those related to their personal matters. As for the rest of the law it can be seen that there are provisions in the ECC which are not in accordance with *Sharī ᶜah*. In other words, matters relating to personal status are too sensitive to be touched upon by foreign law when introduced in Egypt.

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[39] See, Tanāghū, *al-Naẓariyyah*, pp. 277-279

It should be noted that the New ECC was promulgated in 1948 to repeal the old one and came into force in 1949.[40] In general, the sources of this Code were described as comparative law, Egyptian civil law and the *Sharī'ah.* In drafting this Code reference was made not only to the French codes but also to all major codes systems such as Germanic and Polish codes[41]. The ECC contains 1149 articles divided into four main chapters with provisions relating legal capacity are mainly placed in the preliminary chapter.

Having said that, as far as the meaning of legal capacity is concerned, the ECC does not stipulate any definition for it, leaving the matter to be interpreted by jurists and judges. Some jurists define this term as the fitness of a person to receive rights and bear obligation as well as perform legal acts[42], while others refer to it as the capability of a person to be subject to rights – whether for or against him – and to assume legal acts related to such rights.[43] It is observed from these definitions that, similar to Islamic law , Egyptian law also recognizes two type of legal capacity; receptive and active. Yet, the Muslim jurists seem to have restricted legal capacity to human beings as can be seen from their definitions.[44] However, Egyptian jurists have clearly extended the concept of

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[40] See, Enid Hill, Al-Sanhuri and Islamic law, Cairo Papers on Social Sciences, The American University Press, Cairo, 1987, pp.66-70

[41] Richard A.Debs, The Law of Property in Egypt, Islamic law and Civil Code, n.p, n.d,p.147

[42] Abū Satīt, Aḥmad Ḥishmat, *Naẓariyyat al-Iltizām fī al-Qānūn al-Madanī al-Miṣrī, Maktabah Wahbah*, Cairo, 1945, p.101

[43] See for instance, Yahyā, ᶜAbd Wadūd , *Durūs Fī Mabādi' al-Qānūn, Dar al-Nahḍat al-ᶜ Arabiyyah*, Cairo, 1980,p. 262, Shanab, Muḥammad Labīb, *al-Madkhal li Dirāsat al-Qānūn, Dār al-Nahḍat al-ᶜArabiyyah,* 1968, p. 129, Salamah, *al-Madkhal* , p. 31, al-Sharafī, Muḥammad Ali Abdullah, , *Hukm al-Tasarrufāt al-Qānūniyyah li Fāqid al-Ahliyyah fi al-Qānūn al-Yamanī, Dirāsah Muqāranah,* Phd Thesis, Cairo University, p. 26

[44] The word human being (*insān*) as appears in classical definitions of legal capacity seems to suggest that there was no systematic treatment regarding juristic person in Islamic law. This has perhaps led some authors such as Schacht to deny the existence of juristic person in Islamic law, see, Introduction, p. 125. It is worth citing the words of Abdur Rahim regarding the stance of

person to cover both natural person and juristic person, such as companies and corporations. [45]

1.1.2.1 Receptive legal capacity

Similar to Islamic law, this is the fitness of a person to acquire rights and bear obligations i.e, his fitness to be either in positive or negative aspect regarding rights. In other words receptive legal capacity is the fitness of a person in order that he receives rights and performs duties.[46] Some jurists while discussing the concept of legal capacity have also referred to it as legal personality *(shakhṣiyyah qānūniyyah)* as evidenced by al-Sanhūri 's statement. After defining 'receptive legal capacity' he writes;

> "In fact, receptive legal capacity by this definition is from legal point of view the person itself. Thus, a person- whether natural or juristic- is considered as such in the eye of law due to the fact that he is entitled to receive right and bear duties. Accordingly all human beings (after the abolition of slavery) are deemed to be legal persons fulfilling the criteria of legal capacity"[47]

Muslim jurist toward the concept of juristic person (*shakhṣiyyah iᶜtibāriyyah*). He states : " It may be doubted whether the earlier jurists would recognize an artificial or juristic person. The state or community is regarded by them as holding and exercising the rights of God on His behalf through the Imam. Similarly the deceased is spoken of as having rights and obligations and not his estate, for the law deal both with a man's spiritual and worldly rights and obligations of a person cannot be said to be altogether lost on his death, inasmuch as he is entitled to have his funeral expenses and his debts and other obligations discharged out of the estate. But later jurists seem inclined to recognize an artificial person, for instance they would allow a gift to be made directly to a mosque, while the ancient doctors would require the intervention of a trustee" , The Principles of Muhammadan Jurisprudence, P L D publishers, Lahore. n.d, p.218, see also al-Khūlī, Aḥmad Maḥmūd, *Naẓariyyat al-Shakhṣiyyat al-Iᶜtibāriyyah bayn al-Fiqh al-Islāmī wa al-Qānūn al-Waḍ'ī, Dār al-Salām*, Cairo, 2003, 1st edition, p75 onwards.

[45] Article 52 of the ECC concerning juristic person among others states; juristic person are 1-the states, the Provinces, Towns and Villages in accordance with the provisions fixed by law, besides The administrations, department and other public institution to which the law has granted the status of juridical personality.

[46] Al- Badrāwī, ᶜAbd al-Munᶜim, *al-Naẓariyyat al-ᶜAmmah li al-Iltizāmāt*, n.d, n.p, p.116 . ᶜArjāwī, Muṣṭafā, *Ḍawābit al-Ahliyyah wa ᶜAwāriḍuhā fi al-Fiqh al-Islāmī wa al-Qānūn al-Waḍ'ī, Majallat al-Buhuth al-Fiqhiyyah wa al-Qānūniyyah,* Azhar university, Damanhūr, 1986, vol 2, p. 129

[47] Al-Sanhūrī, ᶜAbd al-Razzāq, a*l-Wasīṭ fī Ṣharh al-Qānūn al-Madanī al-Jadīd, Dār Iḥyā' al-Turath al-ᶜArabī,* Beirut, n.d, vol 1, p.268, Also belong to this view are Abd Munᶜ im Faraj al-Ṣuddah ,see;*Maṣādir al-Iltizām, Dār al-Nahḍat al-ᶜArabiyyah*, Cairo, n.d, p.160, Jamīl al-Sharqāwī , *Durūs fi al-Naẓariyyat alᶜĀammah li al- Ḥaqq* ,p.120

Therefore, according to this view legal personality can be either incomplete on complete in a similar way to receptive legal capacity [48]; hence ,foetus in the womb is said to possess incomplete legal personality because of the incompleteness of its legal capacity.

On the other hand, there are jurists who distinguish between 'legal capacity' and 'legal personality' in the sense that every one possesses 'full legal personality', even the foetus in the womb. With regard to the extent of right which this personality can acquire this may differ from one person to another .In other words, according to this view legal capacity can be either incomplete or complete whereas this is not the case in legal personality.[49]

1.1.2.2. Active legal capacity

As in Islamic law when the word legal capacity is used alone it refers to active legal capacity [50] which is defined as the capability of a person to perform "legal acts" (*taṣarrufāt qānūniyyah)* or to utilize his right [51]. The term "legal acts" here denotes the intention directed to create a specific "legal effect"[52]. Since this legal effect is caused by that direction of intention it does not naturally result in such an effect except by 'a conscious willing' of it.[53] Therefore, in order to make a legal act valid in the eyes of the

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[48] Similar to Islamic law legal capacity can be divided into two; incomplete and complete. The incomplete capacity carries only the positive aspect, meaning that it has only the capability to acquire certain rights and it is not responsible to perform duties. This kind of legal capacity is restricted to foetus in the womb in similar way to Islamic law,

[49] ᶜArjāwī, *Ḍawābit*, pp.130-131,
[50] Al-Fiqī, Muḥammad ᶜ Ali Uthmān, *Durūs fiNazariyyat al-Iltizām*, n.p, 2002, 1st edition, p.115
[51] Al-Sanhūrī, *al-Wasīṭ*, vol 1,p.268, al-Baᶜlī, *Ḍawābiṭ al-ᶜUqūd*, p.163 , al-Badrāwī, *al-Nazariyyat al-ᶜAmmah li al-Iltizāmāt*,p.118, Salamah, *al-Madkhal*, p.39, Jumaiᶜī, Hasan, *Mabādi' al-Qānūn*, n.p, 1996,p.400
[52] Al-Baᶜlī, *Ḍawābit al-ᶜUqūd*, p. 163
[53] Al-Badrāwī, *al-Nazariyyah*, p.118

law a person from whom this act proceeds must possess active legal capacity. However, if the acts involved-whether beneficial or harmful- are physical or tangible (*ᶜamal māddī*)[54] active legal capacity is not necessary for a person to be held responsible because the law alone determines the effect of such acts.[55]

The basis for active legal capacity is discernment *(tamyīz*); thus, every legal act should come from "a discerning will"(*irādah mudrikah*) through 'reason'. Therefore a person who is possessed of the highest level of discernment is considered as having complete active legal capacity which entitles him to perform legal acts. Likewise, in the case of insufficient discernment he is said to be possessing incomplete active legal capacity.[56]

1.2.Relationships between legal capacity and some associated terminologies

1.2.1 Legal capacity and *dhimmah*(engagement*)*

1.2.1.1 Islamic law

The discussion on legal capacity in the work of jurists has inevitably led to the discussion of *dhimmah;* literally, a word that has more than one meaning. Among its meanings are covenant(*ᶜahd*), peace *(amān*) and guarantee *(ḍamān*).[57]Though there is somehow a close connection between these three, as far as the research is concerned, the most suitable meaning for *dhimmah* is covenant .

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[54] A physical act is an act which is not intended to bring legal effect by the will of a person, its legal effect is by virtue of law irrespective of whether or not the act was intentional; for example when a person damages another's property with or without intent, it is the law which orders those involved to pay compensation. See, al-Badrāwī, *al-Nazariyyah*, p.118

[55] *Ibid,* p. 120

[56] Sanhuri, *al-Wasīṭ*,

[57] Al-Kabāshī , , *al-Dhimmah wa al- Ḥaqq*, p. 17

The word *dhimmah* appears in the Qur'ān in more than one place; for instance, in (9:10) Allah says:

"In a believer they respect not the ties either of kinship or of covenant(*dhimmah*). It is they who have transgressed all bounds."

Technically, jurists are of different opinions in defining *dhimmah*. According to some Ḥanafi, *dhimmah* is an attribute by which a person becomes fit for what he is entitled to and what he is obliged to do.[58] It is obvious from the definition that *dhimmah* is a quality attached to a person, and this view accords with some Mālikī, Shāfiᶜī and Ḥanbalī although with some differences in the wording.[59] In contrast, some other jurists such as al- Bazdawī and Ibn Malik have opined that *dhimmah* is not an attribute but is an essence (*dhāt*) and soul; thus, they defined *dhimmah* as a soul or person who bears the responsibility through his covenant.[60] In this definition *dhimmah* has been construed as a covenant with the soul, a receptacle of that covenant. The relationship between *dhimmah* and man is one between something being contained (*ḥāll*) and its container (*maḥal*), a relationship between a body and its place[61]. Having its close relationship with man, *dhimmah* has therefore been personified. That is, the place in which the quality resides assumes the name of that quality(*tasmiyyat al- maḥal bi ismi al- ḥāll*)[62] It is perhaps

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[58] Al-Kabāshī, *al Dhimmah wa al- Ḥaqq* , p. 18

[59] For instance Al-Khirshī from the Mālikīs says; *Dhimmah* is a quality assumed to a person which accept *iltizām* (to be obliged)and *ilzām* (to oblige)

Al-Bujayrimī from the Shāfiᶜī defines *dhimmah* as: A standing attribute in a person suitable to *ilzām* and *iltizām* , *Hāshiyat al-Bujayrimī*, vol 2, p.406

Al-Bahūtī from the Ḥanbalī says; *Dhimmah* is a quality by which a person becomes fit to *ilzām* and *iltizām*, *Kashshāf al-Qināᶜ*, vol 3, p.289

[60] Al-Jabūrī , *ᶜAwāriḍ al-Ahliyyah* , pp .95-97

[61] Ahmad Ḥasan , The Principle of Islamic Jurisprudence, p. 298

[62] *Ibid*

according to this view that the personification of *dhimmah* is necessary to avoid the establishment of legal rules *(ḥukm shar^{c}ī)*on a non existent presumption.[63]

Apart from the opinions discussed, there are some other jurists who hold that there is no need to give a technical meaning to *dhimmah.* According to them, every analysis involving *dhimmah* in *fiqh* literature refers only to its literal meaning.[64]In their view, for example, when the *Sharī^{c}ah* has enabled a creditor to secure repayment from his debtor, this enablement alone is the cause to oblige *(ilzām)* and be obliged *(iltizām),* and therefore there is no need to presume the existence of *dhimmah.*[65]

This said, it is notable that the differences of views regarding the definition of *dhimmah* whether it is a quality or an essence or neither, render no legal consequences upon any rights and responsibilities for human beings, as is argued by Ahmad Ibrāhīm

> "Human beings are responsible (*mukallaf*).[66] They are entitled to rights and subject to duties no matter what it (the position of *dhimmah*) is. The assumption as to whether *dhimmah* is existent or not has no effect on such rights or responsibilities. The matter (the existence of *dhimmah*) might be hypothetical, or it might be a real phenomenon dwelling in the human being as part of his inseparable essence..... The reason for this assumption may only be formalism in order to draw up legal injunctions (*aḥkām*) in a more systematic and proper manner. Others opine that there is no need for such an assumption, rather it is required to focus on undeniable facts and to tie legal injunction to it. Actually the outcome (of this disagreement) is the same."[67]

Having accepted this elucidation, the question that may arise is that of the relationship between legal capacity and *dhimmah.* As elaborated earlier, receptive legal

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[63]Al-Khafīf, Ali ,*al-Ḥaqq wa al-Dhimmah*, p 89 as quoted from Maḥmūd Bilāl Mahrān , *al-Ahliyyah wa `Awāriḍūḥā n.p, n.d, p* .23

[64]Al-Kabāshī, *al-Dhimmah wa al-Ḥaqq,* p. 26

[65] Abū Zahrah, *al-Milkiyyah* , p .274.

[66] A person upon whom observance of religious practices is incumbent.

[67] Ibrāhīm Aḥmad, *al- Ahliyyah wa ^{c}Awāriduhā wa al-Wilāyah, Majallat al-Qānūn wa al-Iqtiṣāḍ,* vol 3, 1931, p.352

capacity is the fitness of a person to receive rights and undertake responsibilities. Some jurists therefore consider this kind of legal capacity as identical to *dhimmah*. According to them *dhimmah* thus means the capacity to accept rights and obligations.[68] Conversely, the majority of jurists maintain that receptive legal capacity is not *dhimmah* itself; for them receptive legal capacity is caused by *dhimmah* due to the fact that it comes after *dhimmah* in existence.[69] In addition receptive legal capacity means the fitness of a person to assume rights and obligations but *dhimmah* is the place where these rights and obligation reside.[70] *Dhimmah* is very important to receptive legal capacity but the concepts nevertheless are not identical. In other words receptive legal capacity depends on *dhimmah* and follows from it.[71] In my opinion, while acknowledging juristic discussion on the differences between receptive legal capacity and *dhimmah* it appears the relationship between these two term is so close that they are often used interchangeably.

1.2.1.2 The ECC

The jurists define *dhimmah* as a group of financial rights and duties given in favour of a person or against him[72]. It is clear from the definition that *dhimmah* according to Egyptian law is limited to financial aspects only, thus, the *dhimmah* in the ECC has a narrower concept compared to Islamic law. This is because in Islamic law the term *dhimmah* is used for both financial and non-financial matters, For example, acts of

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[68] Ahmad Hasan, The Principle, p 298
[69] Al-Kabāshī ,*al-Dhimmah wa al-Ḥaqq*, p.29
[70] Aḥmad Ḥasan, The Principle, p.298
[71] *Ibid*
[72] Al- Ṣuddah, ᶜAbd Mun ᶜim Faraj, *Uṣūl al-Qānūn* , *Maṭbaᶜah Muṣṭafā al-Ḥalabī*, Cairo, 1965, p. 349

worshipping such as prayer and fasting depend on *dhimmah* in a similar way financial matters depend on.

1.2.2 Legal capacity and Guardianship *(wilāyah)*

1.2.2.1 Islamic law

Guardianship in the parlance of jurists is the legal authority (*ṣulṭah shar^{c}iyyah*) by which a person is able to create contracts and carry out acts.[73] It has been divided into three, namely; restricted guardianship *(wilāyah qāṣirah* or *dhātiyah*) unrestricted guardianship *(wilāyah muta^{c}addiyah*) and deputed guardianship *(wilāyah niyābiyah*).[74] The first two kinds of guardianship are the main concern pertaining to the relationship between legal capacity and guardianship. Restricted guardianship refers to the authority of a person to act on his own behalf whilst the unrestricted guardianship gives him an authority to act on another's behalf. The correlation between legal capacity and guardianship is obvious in complete active legal capacity in the sense that the former is a prerequisite (*shart*) for guardianship. Thus, in order to be a guardian a person should have attained active legal capacity, whereas a person enjoying this legal capacity may not necessarily be a guardian.[75] A clear example of this can be seen in a marriage guardianship. A grandfather, for instance, although possessing complete active legal capacity cannot be appointed as a guardian to conclude a marriage contract in the presence of the bride's father. In short, a 'restricted guardianship' seems to be identical to complete active legal capacity.

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[73] Shalabī , *al-Madkhal* , p .518 , Dabūr , *al-Madkhal* , p. 463
[74] Dabūr, *al-Madkhal* , pp. 463-465
[75] Al-Zuhaylī, *al-Nazariyyāt* , pp. 157-158

1.2.2.2 The ECC

Guardianship is an authority assigned to a person which makes him capable of performing legal acts on behalf of others,[76] or an attribute attached to a person which gives him authority in both financial and personal matters of another person.[77] It is clear from the definition that guardianship concerns the act of person to perform act on other`s behalf and not for himself. The differences between active legal capacity and guardianship can be summarized in the following:

-Legal capacity as mentioned is the fitness of a person to act on his own behalf whereas guardianship is concerned with the act of a person on behalf of others.

- Legal capacity is the usual case while guardianship is exceptional

-In the case of the absence of active legal capacity, this will lead to the nullification of acts whereas in the case of guardianship, if this is void then this will not affect other.

Apart from the ECC, law governing guardianship can also be found in the Law of Guardianship Over Property of 1952.

1.2.3 Legal capacity and Responsibility *(mas'ūliyyah)*

1.2.3.1 Islamic law

The term responsibility(*mas'ūliyyah*) is mostly used by jurists in matters relating to crime or liabilities of tort .It connotes a realistic punishment (*mu'ākhadhah wāqi^{c} iyyah*) and in criminality it is the consequence borne by the criminals when deliberately

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[76] Al-Badrāwī, *al-Nazariyyah*, p. 121

[77] Yaḥyā, Yāsīn Muḥammad, *al-Madkhal li Dirāsat al-Qānūn, Dār al-Nahdāt al-^{c}Arabiyyah*, Cairo, 1991, 6th edition, p.253, al-Sharafī,, *Hukm al-Ṭaṣarrufāt al-Qānūnīyyāḥ* , p. 33

committing prohibited acts. [78] Legal capacity differs from responsibility because the former is an inseparable quality integral to human beings and by its virtue a person is qualified to carry out activities such as concluding a contract. This quality remains with him regardless of whether the activities have been actually carried out or not. To illustrate, a person of sound mind is qualified to enter into a contract of sale even though the sale has yet to be concluded. This is not the case in responsibility because it is a dispensable attribute in human life.[79]The existence of responsibility is only apparent after an activity is actually carried out by human beings. Thus, for instance, a person is not responsible for paying blood money(*diyah*) unless a murder has been committed.

It is noteworthy that a person lacking in legal capacity such as a minor might be held responsible for his actions. For instance, if he causes damage to the property of another, he is liable to pay compensation although he has no full legal capacity.

Another important point in the work of jurists on legal capacity is that they tend to discuss it in matters relating to either contract or personal status which also include the discussion of impediment to this capacity (*ᶜawāriḍ al-ahliyyah*). However, with regard to crime there is no direct discussion on legal capacity. This is perhaps because of the negative impression of the concept of crime itself. For example, a person is entitled to conclude a contract and remarkably he is also entitled to commit murder. However, there is some common ground in juristic discussion regarding legal capacity and responsibility such as in the case of duress. The only difference is that in contract, duress is considered

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[78] Al-Jundī, Muḥammad al- Shaḥḥāt , *Jarā'im al-Aḥdāth Fī al-Sharī`at al-Islāmiyyah* , *Dār al-Fikr al-ᶜArabī*, Cairo, 1986, 1st edition, p. 13
[79] *Ibid*, p. 118

as an impediment to legal capacity whereas in crime the term 'obstacle of responsibility' (*mawāni^{c} mas'ūliyyah)* is preferred.

1.2.3.2 The ECC

Similar to Islamic law, the question of whether or not 'responsibility' is attached to a person does not arise unless an act (legal or physical) has been actually done. Hence, it is unusual to describe a person as having fitness to perform a physical act (*^{c}amal māddī*) such as bringing harm to others. But if such harm is inflicted, the person is said to be responsible for what he has carried out. In other words, legal capacity is not identical to 'responsibility' as a person may be lacking of legal capacity but at the same time he is responsible of illicit act committed, therefore according to the ECC a discerning child is responsible for damages caused to others irrespective of the incompleteness of his legal capacity.[80]

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[80] Article 164/1 reads: An individual shall be responsible for his illicit acts as long as he is capable of discretion.

1. 3 Impediments to legal capacity (*ᶜawāriḍ al-ahliyyah*) in Islamic law and the ECC of 1948

1.3.1 Islamic law

1.3.1.1 Definition

As previously discussed, 'receptive legal capacity' is integral to human beings from birth to death; and, since the basis for this capacity is humanity itself thus, it will not be affected by any circumstances that might occur. For instance, the insane can still enjoy receiving rights (which is one of the feature of legal capacity) irrespective of insanity. As for 'active legal capacity' it is not permanently integral to human beings; rather its presence might be exposed and vulnerable to changes due to certain factors. In Islamic law, circumstances that affect (active legal capacity) are known as impediments to legal capacity (*ᶜawāriḍ al-ahliyyah).* A brief account of this topic will include the definition of *awāriḍ,* and its classification in both Islamic law and the ECC.

To begin with, it is essential that before exploring the technical or legal meaning of ᶜ *awārid* , the literal meaning should also be fully discussed, for it might play a decisive role if there is disagreement in legal definitions. The word ᶜ*awārid* in Arabic is the plural of ᶜ*ārid* or ᶜ*āridah,* derived from ᶜ*araḍa kadhā* (to become visible, appear when one thing appears to prevent another from functioning)[81] Thus, for example, the clouds are also known as ᶜ*āriḍ* because they prevent sunshine from penetrating the earth.[82] Similarly, in presenting juristic arguments the *muᶜāraḍah*(contradiction) is often used. It is known as such because sets of evidence may counter each other and prevent

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[81] Al-Bukhārī, , *Kahsf al-Asrār* , , vol 4, p.262

[82] *Ibid*, see also, *al-Rāzī, Mukhtār al-Ṣiḥāḥ* , pp. 516-517.

establishing legal rules(*ithbāt al-ḥukm.*).[83] Another salient feature of the literal meaning of ᶜ*awārid* is its non essence attribute.[84]

As far as legal meaning is concerned, various definitions have been offered for ᶜ*awārid.* According to al-Bukhāri for example, ᶜ*awārid* is a matter affecting legal capacity which makes it unsustainable as it is.[85]The term may also be defined as whatever affects active legal capacity, resulting either in its removal or changes in legal ruling,[86] while another classical jurist, Amīr Badshāh has summarized ᶜ*awārid* as dispensable circumstances which negates legal capacity in general[87]

From these definitions, it seems that ᶜ*awārid* is a group of factors by which a person is restricted from enjoying rights according to his "will"(*irādah*). It may not be necessary that ᶜ*awārid* therefore does remove legal capacity; it may also include factors which change legal rules whether great or small as is evidenced by al-Bukhāri's statement: "Some of them(ᶜ*awārid*) such as sleep and faintness remove active legal capacity . Some others effect changes on certain legal ruling virtually without affecting legal capacity."[88]

Aside from the above mentioned, the definition of ᶜ*awāriḍ* can also be found in the works of contemporary jurists .To mention a few of these Khallāf defines ᶜ*awārid* as something which occurs to a person which has an effect on his mind (ᶜ*aql*) and

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[83]Al-Bukhārī, *Kashf al-Asrār*, vol 4, p.262.
[84] Al-Tiftāzānī, *Sharḥ alTalwīḥ* , vol 2, p. 462.
[85]Al-Bukhārī, *Kashf al-Asrār* , vol 4, p.262.
[86] Al-Talwīh ᶜAlā al-Tawḍīḥ, vol 2, p. 462, see also: al-Ṣāmrā'Ī, ᶜAbdullah ᶜAbd al-Laṭīf,*al-Safah wa al-Ghaflah wa Atharuhuma fī al-Taṣarrufāt fī al-Sharīat al-Islāmiyyah wa al-Qānūn*, PhD Thesis, Cairo University, 1976, p.50
[87] See *Taysīr al-Taḥrīr* , vol 2, p.258
[88] *Kashf al-Asrār*, vol 4, p. 262

discernment (*tamyīz*), or puts limitation on his acts.[89] On the other hand, al-Nūrī refers to it as a disease affecting mental capability or prudence, while[90] Sirāj sees *ᶜawāriḍ* as attributes which affect the legal capacity of human beings.[91]

A thorough examination of the definitions offered by these scholars perhaps leads to the conclusion that they either concur with the view of classical jurists (which widens the scope of *ᶜawāriḍ*) or restrict it to certain *ᶜawāriḍ* only, as can be seen in al-Nuri's definition. From al-Nuri's perspective it is vital to restrict the concept in this way. Indeed, he severely criticizes those jurists who do widen its scope, especially those belonging to the Ḥanafī. He argues;

> " Most of the matters referred to by the jurists as *ᶜawārid* in fact are not accurate. This is evidenced from their discussion of *ᶜawārid* itself, in which they concede that there is no connection between these factors and legal capacity such as mistake, slavery, jest, and death sickness [...] They view *ᶜawārid* not from the point of view of legal capacity but rather from the effect of that *ᶜawārid* on the establishment of legal rulings. Thus, there is confusion between *ᶜawārid* and other matters which may have a similar effect on a person's acts.....:[92]

This view is echoed by another scholar; in his book *al-Hukm al-Sharᶜī ᶜind al-Uṣūliyyīn,*[93]Hassān stresses that the classical jurists have not differentiated between impediments (*ᶜawārid al-ahliyyah)* and "hindrance on performing legal obligation' *(mānical-taklīf*). According to this view, matters discussed by classical jurists pertaining to *ᶜawārid al-ahliyyah* can in fact be categorized into three; *ᶜawārid al-ahliyyah* such as insanity, *mānical-taklif* such as menstruation , and both *ᶜawārid* and *mānicon*currently such as faintness(*ighmā'*). Regarding this last category, Hassān differs from al-Nūri, as according to the latter what is considered as impediment is to be found in

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[89] Khallāf, ᶜAbd Waḥḥāb, *al-Ahliyyah wa ᶜAwāriduḥā, Maṭbaᶜat al-Naṣr*, Cairo, 1955, p. 23
[90] *Al-Nūrī, Ḥusayn, Dirāsah fīᶜAwāriḍ al-Ahliyyah fi al-Sharīat al-Islāmiyyah, Maṭbaᶜah Lajnat al-Bayān al-ᶜArabī*, Cairo, 1953 p 101.
[91] *Sirāj. Muḥammad, Uṣūl al-Fiqh al- Īslāmī, Munsha'at al-Maᶜārif*, Alexandria, 1998, p. 83
[92] *Dirāsah fl ᶜAwārid al-Ahliyyah* ,p. 93
[93] See, pp-179-180

insanity(*jun ūn*), imbecility(*ᶜatah*) an prodigality(*safah*) as well as unawareness(*ghaflah*) [94] whereas the former still considers faintness as an impediment to legal capacity. In this regard Hassān states:

> " Some of the impediments mentioned by the jurists can also be counted as hindrance (*māniᶜ al-taklīf)* as they eliminate the condition of *taklīf;* at the same time they are also considered as impediments (*ᶜawārid)* due to their effect on reason (*ᶜaql*). For instance, faintness on one hand is an impediment , while one the other it negates "will" from a person; thus from this point faintness is considered as hindrance (*māniᶜ al-taklīf)*"[95]

Another contemporary jurist, al-Zarqā', also maintains that classical jurists had confused the concept of impediment[96] with others. Judging from this scholar's writing on 'impediment' together with the work of the abovementioned contemporary, it can be concluded that they are in agreement as to criticizing the scope of impediment as discussed by classical jurists. Although there is agreement amongst them with regard to the cause for impediment nevertheless they differ as to what can be regarded as impediment. As far as the cause is concerned, it seems that the cause of impediment is the opposite of its basis; hence, having accepted that the basis is reason and discernment, the cause of impediment should accordingly be the lack of these two elements. Consequently, according to these scholars, any matter which does not effectively influence the reason and the ability to discern cannot be regarded as 'impediment' [97] Furthermore, the nature of the 'impediment' itself must be exceptional in the sense that it may occur only to specific persons. Therefore, 'minority' for instance, is not an impediment due to the fact that it occurs to every person.[98]

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[94] see *Dirāsah* ,p 101

[95] Ḥassān, Ḥusayn Ḥāmid, a*l-Ḥukm al-Sharᶜ Īᶜnd al-Uṣūliyyīn,Dār al-Nahdat al-ᶜArabiyyah*, Cairo, 1972, 1st edition, p .180

[96] *Al-Madkhal* vol 2. p.800.

[97] Al-Nūrī,*Dirāsah* ,p 96

[98] *Ibid*, 94. al-Zarqā', *al-Madkhal*, vol 2, p.812

With regard to what should be considered as impediment to legal capacity, al-Nuri has restricted it to insanity(*junūn*), imbecility(*ᶜatah*) and prodigality(*safah*) as well as unawareness *(ghaflah)*.[99] On the other hand, al-Zarqā', conceding to some of the impediments [100] mentioned by the classical jurists, has added indebtedness(*madyūniyyah*) and bankruptcy(*iflās*) to be impediments.[101] Hassān, however, did not clearly express his view, nevertheless, it seems from his writing that he followed al-Nūri 's point of view.[102]

These then are the views and arguments maintained by some contemporary scholars.[103] In short, it can be concluded that the scope of impediment should not in their view be widened to cover what is not actually impediment. This said, it is noteworthy that a deeper study of their views leads to the conclusion that these scholars seem to contradict their own arguments. Al- Zarqā', for instance, has considered indebtedness as an impediment despite the fact that an indebted person still possesses reason and discernment.[104] Likewise, what has been mentioned by al-Nuri as impediment such as prodigality and unawareness has no connection with the actual cause of impediment to legal capacity. In addition, judging from his condition that in order to be impediment a matter must be exceptional, it seems that the reason for imposing this condition is due to misconception and confusion between impediments (*ᶜawārid)* and unexpected matters (*ṭawāri)'*, as evidenced by his statement " Impediment (*ᶜawārid)* as we have explained, is an unexpected matter (*umūr ṭāri'ah*)occurring to human being [....] it is a state of illness

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[99] Al-Nūrī, *Dirāsah* , p. 101

[100] They are insanity, imbecility, faintness, sleep, death sickness and slavery. Also included are intoxication and foolishness.

[101] *Al-Madkhal*, vol 2, p.800

[102] See, al-*Ḥukm al-Sharᶜī*, p.180 onwards

[103] The scholars mentioned above represent those who disagree with the view of classical jurists. In contrast, there are also contemporaries such as Ahmad Ibrāhīm and ᶜAbd al-Wahhab Khallaf who follow the classical jurists in their discussion of legal capacity.

[104] As mentioned earlier, both are the basis for legal capacity.

bearing an attribute of continuity which affects the capability of a person to produce legal acts"[105] Thus, he excludes minority from being an impediment; it is not unexpected as it occurs to every person.

However, by referring to the meaning of *ᶜawārid* and *tawāri'* from a literal perspective it can be seen that there is a difference between the two. The word *tāri'* in Arabic language connotes the meaning of peculiarity in human life; hence, it is not synonymous with *ᶜārid* (singular of *ᶜawāriḍ*) since the latter does not necessarily have this element of peculiarity. For example, human beings are vulnerable to insanity, prodigality, sleep and mistakes which are not peculiar to them. Furthermore, *ᶜārid* (which means to prevent something from occurring)[106]covers all types of *ᶜawārid* ,as discussed by classical jurists.[107]

In my opinion, the classical definition of impediment (*ᶜawārid)* is perhaps put in such a way because from the jurist's point of view impediment is the opposite of the meaning of legal capacity itself, not its basis. In other words, they look at the effect of legal capacity on the act of a person who possesses full legal capacity. Therefore, if a person enjoying full legal capacity performs a transaction, the transaction is valid; otherwise if the act is carried out for instance under duress it will be void, despite the fact that the basis of legal capacity (i.e. reason and discernment) still exists. To put it simply, if legal capacity means the fitness to act, impediment to this capacity means the unfitness to perform this act.

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[105] *Dirāsah*, p. 96
[106] See literal meaning of *ᶜawārid* ,p.31
[107] See *Al-Safah wa al-Ghaflah* , p. 51

1.3.1.2 Classification of impediments to legal capacity

Generally speaking, impediment to legal capacity can be divided into two kinds: natural (*samāwiyyah)* and acquired *(muktasabah*). Indeed, there is no legal implication resulting from this classification except for the purpose of proper arrangement.[108]Moreover, the existing classification is a result of legal reasoning (*ijtihād*)of the jurists in the absence of legal text thereto.[109] Natural impediment[110] is related to causes that are beyond the control of human beings and result from an act of the Lawgiver,[111] meaning that a person has no choice or will to accept or refuse its presence. Since what comes from the Lawgiver is not all predictable, it can be said that this kind of impediment is not actually restricted to certain factors only. Nevertheless, as far as human knowledge is concerned, the Hanafī have identified several factors to be among natural impediments; minority (*ṣighar*), insanity(*junūn*), imbecility(*ᶜatah*) , forgetfulness *(nisyān*), sleep(*nawm*),faintness *(ighmā')*, slavery *(riqq*), illness *(maraḍ*), menstruation(*ḥayḍ*), post natal blood *(nifās*) and death *(mawt*).[112] It should be noted that it is not the intention of this study to examine deeply all these impediments rather as mentioned earlier [113] the focus will be on minority and insanity. [114]

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[108] Al-Zarqā', *al-Madkhal*, vol 2, p. 799

[109] There is no legal text from the *Qur'ān* and *Sunnah* pertaining the classification whether direct or indirect.

[110] Literally, *samāwiyyah* denotes whatever comes from the sky (highness), which is out of a person's will. See: *Kashf al-Asrār*, vol 4, p 263.

[111] Al-Bukhārī, *Kashf al-Asrār*, vol 4, p. 263, Amīr Badshāh, *Ṭaysīr alTaḥrīr* , vol 2, p.258, al-Tiftāzānī , *Sharḥ al-Ṭalwīḥ* , vol 2, p. 462, see also: Nyazee, Imran Ahsan Khan, Theories of Islamic law, Adam Publishers & distributors , Delhi, 1996, 1st edition,p. 91

[112] *Taysīr al-Ṭaḥrīr* , vol 2, p.258.

[113] See Introduction, p. 2

[114] Apart from these two, other impediments falling within this category are briefly as follows;

Forgetfulness (*nisyān*)

This is the state of not knowing what was once known which occurs unintentionally. Basically, forgetfulness does not remove legal capacity; but it may change some ruling if it occur without a person's intention such as eating with respect to a fasting person.

In contrast to natural impediments, acquired impediments are those created by man, or in which human will and choice are the basic factors;[115] Although there are a number of acquired impediments this study will focus only on the concept of prodigality*(safah)* and mistake(*ghalaṭ*), as well as duress (*ikrāh)*. [116]

Sleep(*nawm*)
As for a sleeping person, as far as crime and contracts are concerned, he will not be held liable for what he does when he is asleep; however, he is responsible for paying compensation for damages caused.

Slavery (*riqq*)
With regard to slavery, this is a defect in legal capacity created by the *Sharī'ah* , being an impediment to having the powers of bearing witness and holding the office of a judge or other office

Menstruation (*Ḥayḍ*)
As for menstruation, this is the monthly discharge of blood from the uterus of the woman who is neither a diseased nor a minority This impediment does not destroy the legal capacity of a woman whether receptive or active. The greatest effect it can have is to prevent particular rituals from being valid, such as fasting and prayer. See:Sirāj, *Uṣūl al-Fiqh*,p.85, Ahmad Ḥasan, The Principle, pp.317-318,

[115] Nyazee, Theories of Islamic Law, p. 97, Amīr Badshāh, *Taysīr al-Taḥrīr*, vol 2, p. 258.
[116] Other acquired impediments include;

Ignorance (*jahl*)
This is a quality which is an antonym of knowledge, even where there is probability and imagined knowledge. As a general rule, every legal injunction established by the *Qur'ān* and s*unnah* as well as *ijmāᶜ*, no excuse on the pretext of ignorance will be accepted for those who live in the Muslim community, such as ignorance of the obligatory five prayers. However, in certain matters ignorance constitutes an excuse; for example, in the contract of agency, if an agent is not aware that the contract has been terminated, all transaction carried out are valid until he becomes aware of the termination. Likewise, in the contract of pre-emption (*shuf'ah)* the ignorance of pre emptor (*shafī*)about this contract does not invalidate the right of pre emptor .

Intoxication (*sakr*)
Intoxication is a condition which overtakes a man on account of the repletion of his mind with the ascending vapours towards it, resulting in the suspension of that intelligence which distinguishes between that which is good and that which is bad . The jurists are agreed that if intoxication is caused by permissible means such drinking wine under duress, all a person's acts including contract would be void. However, there is disagreement among the jurists if the intoxication is caused by forbidden means such as drinking wine voluntarily. According to Ḥanafī and some Shāfiᶜī, a person who becomes drunk by forbidden means is responsible for all his deeds and utterances;,thus, all his act such as contract, divorce and the like are still valid. On the other hand , the Ḥanbalī and the Mālikī are of the opinion that the contract of a drunken person is void due to the absence of the element of consent which is regarded as the main condition for a contract to be valid.

Jesting (*hazl*)
Jesting means to utter words or expression as a joke without intending to convey their literal or metaphorical meaning. As far as creation (*inshā'āt)* is concerned the effect of jesting can be divided into two; firstly, if jesting involves revocable contracts, such as sale and lease, the

1.3.2 The ECC

According to this Code, factors affecting legal capacity can be divided into two categories; impediment to this capacity and defects of will. Impediment to legal capacity is a natural or physical factor which affects a person's mind causing the removal of his legal capacity or downgrading it.[117] It can be concluded from this definition that the ECC has differentiated between two impediments, the first of which concerns only factors that remove legal capacity which the Code has restricted to insanity and imbecility. [118] Other factors (prodigality and unawareness) will only downgrade legal capacity; in other words in the presence of such factors the legal capacity would be incomplete. [119] Apart from the said impediments the Code has also annexed several matters to resemble impediment although the terminology may differ.

With regard to defects of will, the Code has restricted this to duress and mistake as well as fraud (*tadlīs)* The differences between defects of consent and impediments to legal capacity can be summarized as follows;[120]

1- Impediment to legal capacity affects 'reason' of a person while in the case of defects of will the reason still exists, but it affects the consent of a person.

2-Normally, the period of existence of impediment in human beings is longer than that of defects of will.

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contract will be void whereas in the case of that which is irrevocable such as the contract of marriage, the contract is valid. See: Ahmad Hasan , The Principle, pp.341

[117] Salamah, *al-Madkhal,* p .59

[118] Article 45/1 states; A person devoid of discretion owing to minority, feeble-mindedness or insanity is incapable of exercising his right

[119] Article 46: Whoever reaches the age of discretion but has not reached majority and a person attaining his majority but is prodigal or imbecile has a limited legal capacity according to the provisions of law

[120] Al-Samrā'ī , *al-Safah wa-al-Ghaflah wa Atharuhumā fī al-Taṣarrufāt*, p.58

3.The existence of defect of will does not lead to interdiction (*ḥajr*) whereas in the case of impediment the rules of interdiction will be imposed.

In my view, since the existence of either "impediment" or "defects" will lead to the same effect, i.e , the invalidity of an act carried out by a person affected by these two, the differentiation is of little significance and hence the terminology used by the classical Muslim jurist is preferable.

1.4. Summary

Legal capacity in Islamic law has been treated from different perspectives in the works of classical jurists; their works (except that of Hanafī) on the subject are not unified and are therefore scattered in nature. Contemporary jurists, however, have focused in a unified manner on legal capacity in their work on principles of jurisprudence (*uṣūl al-fiqh)*. Legal capacity in Islamic law is divided into two; 'receptive legal capacity' and 'active legal capacity'. The former is concerned with the ability of a person to acquire rights and bear duties, whereas the latter is connected with the fitness of that person to perform legal acts. These two types of legal capacity are further divided into 'incomplete' and 'complete'.

Humanity exists as the basis of receptive legal capacity and under no circumstances shall it be removed from human beings. On the contrary, active legal capacity may not be permanently integral to human beings, as its existence is vulnerable to removal or to changes. These changes which are caused by the presence of several factors known also as impediments to legal capacity (*ʿawārid al-ahliyyah*) influence the

acts of a person and determine whether those acts are valid or void . Although there is disagreement among Muslim scholars (especially those of contemporary jurists) on the classification of impediments, generally Islamic law recognizes the following to be among the impediments to legal capacity; insanity, minority, imbecility, forgetfulness, sleep faintness, ignorance, prodigality , mistakes and duress.

With regard to the ECC, it is accepted that to a large extent the Code follows Islamic law in the concept of legal capacity from the definition through to the classification. The Code has also recognized the existence of receptive legal capacity and active legal capacity. Despite this, there are also differences between the two systems of law; for instance, the concept of *dhimmah* in the ECC is different from Islamic law, as well as the notion of legal personality, which covers both natural and juridical persons. As far as impediment to legal capacity is concerned, the Code limits this to four factors only; insanity, imbecility and prodigality as well as unawareness. The remaining factors, which are considered as impediments in Islamic law are classified as 'defects of will' in the ECC. In Islamic law, all factors are discussed under the term impediments to legal capacity, although there are some contemporary jurists who tend to follow the classification of impediment according to the ECC without convincing evidence. Since the purpose of this research is to compare Islamic law with the ECC, the classification of Islamic law is thus preferred, bearing in mind that the study will be restricted to impediments, which have their counterpart in the ECC regardless of terminology.

CHAPTER TWO: MINORITY *(ṢIGHAR)*) AND ITS EFFECTS ON CONTRACT

2.1 Introduction

This chapter will attempt to examine "minority" as one of the impediments on legal capacity. As such, the notion of minority will be explained concerning both Islamic and the ECC. The concept of contract and its relationships with disposal *(taṣarruf)* and obligation *(iltizām)* will also be elaborated, together how the contract is affected by the presence of minority. The discussion will involve an analysis of Islamic law followed by the ECC.

2.2 Meaning of minority

2.2.1 Islamic Law

2.2.1.1 Literal meaning

In general, the word *ṣighar*(minority) in Arabic is used interchangeably with *ṣabī* , *ḥadath*, *ghulām* and *yāfi*^{c} all of which literally mean the 'beginning of age'.[1] According to al-Suyūṭī, what is in the womb is called *janīn,* which after birth it is called *ṣabī* until the time of weaning, after which it is called *ghulām* up to the age of seven.[2] These words are used in various places in the Qur'ān; for instance the word *ṣaghīr* (minor) appears in (17:24) which read:

"My lord bestow on them thy mercy even as they cherish me in my childhood (*saghīran*)" Likewise the word *ṣabī* is also mentioned in (19:29) "They said : how can we talk to one who is a child(*ṣabiyyān*) in the cradle". In (19:7) the word *ghulām* also

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[1] *Tartīb Mukhtār al-Ṣiḥāh,* p.166, Ibn Manzūr, *Lisān al-*^{c}*Arab,* vol 7, pp.282-283

[2] Al-Suyūṭī, *al-Ashbāh wa al-Nazāir, Dār al-kutub al-*^{c}*Ilmiyyah*. Beirut, 1st edition, 1403 , p.240.

appears "O Zakariya We give you good news of a son*(bi ghulāmin)* his name shall be Yahya". In addition the Qur'ān has also used the word *ṭifl* referring to one of the various stages faced by human beings throughout their lives as stated in (22:5): "Then do we bring you out as babies *(ṭiflan)*"

It is clear from these verses that the Qur'ān has used various terms to refer to a stage of human life i.e., the beginning of age.

2.2.1.2 Legal Meaning

Legally, minority is defined as a period of age during which a person has yet to reach the age of majority,[3]and jurists are unanimously agreed that developmental stages of a minor can be divided into two categories; non discerning(*ghayr mumayyiz*) and discerning(*mumayyiz*).[4]

2.2.1.3 Stage of non discernment in Islamic Law

Jurists are of different opinions as to the exact period during which a child is considered as a non- discerning child. According to the Ḥanafī,[5] a child is said to be 'non

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[3] Al-Suyūtī, *al-Ashbāh wa al-Naẓā'ir*, *Dār al-Kutub al-ᶜIlmiyyah*, Beirut, 1st edition, 1403 H, p.219, Ibrahim, ᶜAtiyyah ᶜAbd al-Mawjūd, *Madā Ahliyyat al-Ṣabī fi al-Taṣarrufāt al-Māliyyah, Dirāsah Muqāranah bayn al-Sharīah wa al-Qānūn al-Madanī*, PhD Thesis, Azhar University, 1987, p. 136. See also. al-Buhūtī, *Kashshāf al-Qināᶜ*.edited byMusṭafa Hilāl, *Dār al-Fikr*, Beirut, 1402 H, vol 3,p.442, Ibn al-Humām, *Sharh Fatḥ al-Qadīr, Dār al-Fikr*, Beirut, n.d, 2nd edition, vol 5, p. 154. As will be discussed later there is disagreement amongst the jurist on how to determine the age of majority.

[4] See *Kashshāf al-Qināᶜ*, vol 3 p.450, *al-Hattab, Mawāhib al-Jalīl,Dār al-Fikr* , Beirut, 1398, 2nd edition, vol 5,p.62 , *al-Hidāyah* vol 3, p.280,al-Sharbīnī, *Mughnī al-Muhtāj,Dār al-Fikr*, Beirut, n.d, vol 2,p. 166, Abū al-Rīsh, Muḥammad Ismāᶜīl, *al-Ḥajar wa Asbābuhu fī al-Fiqh al-Islāmī, Maṭbaᶜat al-Amānah*, Cairo, 1988, 1st edition, p. 29

[5] Al-Sarakhsī, *al-Mabsūṭ,Dār al-Maᶜrifah*, Beirut, 1406 H, vol 24, p.162, Ibn ᶜ Ābidīn . *Radd al-Muhtār,Dār al-Fikr*, Beirut,1386 H,,2nd edition, vol 4, p.257, al-Sharafī, Muhammad Ali. *Ḥukm al-Taṣarrufāt al-Qānūniyyah li Fāqid al-Ahliyyah*, p. 76

discerning' soon after his birth until he reaches the age of seven; this limitation was directed by the Prophet (PBUH) himself. They argue that in a *Ḥadīth* narrated by ᶜUmar bin Saᶜad (through his father and his grandfather) that the Prophet (PBUH) is reported to have said " Instruct your children to perform prayer when they are at the age of seven, and beat them (if they do not comply) when they are ten years old, and separate them in their beds"[6]

This *Ḥadīth* indicates that when a child reaches the age of seven, he has the ability to understand commands and the potentiality to be taught and trained, and thus, he is considered to be a discerning child. In addition, there is a report that the Prophet P. B. U. H invited his cousin ᶜAlī to embrace Islam when he was seven; this further proves that a child can understand what is communicated to him.

On the other hand, the majority of jurists,[7] conceding the authenticity of the *ḥadīth* , hold the view that there is no specific age for the beginning of discernment. This is because individuals vary in intellectual capacity from one to another; for instance, there are persons to whom Allah has granted the ability to understand in the early stages of their lives even though they have yet to attain the age of seven. Similarly, there may be children whose ability to discern has yet to come, even if they have already reached the age of seven. It is therefore, suggested -according to this view- that in order to identify the age of discernment, a child should be tested as to whether or not he has the ability to understand basic things, such as understanding questions posed to him. In the

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[6] Narrated by Abū Dāwūd, *Kitāb al-Ṣalāh*, chapter 26, *Ḥadīth no*. 495. It is often at this point in his life that the child begins to use his mind and to make use of what he has already experienced. In early childhood he becomes fairly capable of absorbing correct statements and reacting logically, Abdul Aziz Mohammed Zaid, The Islamic law of Bequest, Scorpion Publishing Ltd, London, 1986, 1st edition, p.18

[7] See, Al-Nawawī, *al-Majmū ᶜ Sharḥ al-Muhadhdhab*, ed, Mahmūd Maṭraḥī, *Dār al-Fikr*, Beirut, 1996, 1st edition vol 7, p. 26, , *Mawāhib al-jalīl*, vol 4, p.244

event that he is able to understand, he can be considered as discerning regardless of his real age. If it is clear however, that the child does not comprehend, then he is still 'non discerning'.

Although both groups of jurists put forward strong arguments, I am inclined to prefer the view that fixes the age of seven as the age of discernment. This is because - having admitted that some people may attain early or late discernment- the age of seven (as identified by the Prophet PBUH) is the most common age at which discernment is reached, shared by the overwhelming number of children in many situations such as the beginning of school. Furthermore, as far as consistency in law is concerned, fixing a certain age can assist those working in legal fields (especially the judges) to accurately pass their judgment as to whether or not children possess the capacity to discern. In addition, it is rare to find a child who might be discerning before the age of seven; thus, according to legal maxim, a "rarity" is tantamount to non existence" (*al-nādir ka al-maᶜdūm*).

2.2.1.4 Stage of discernment

A child is considered to be discerning upon attaining the age of seven and he will no longer be counted as a child when he reaches the age of majority. Attainment of the age of majority(*bulūgh*) is significant in Islamic law, since no legal injunctions are imposed unless a person has attained the age of puberty which is determined in two basic ways. Firstly, in order to determine whether a person has reached majority, there are several signs and indications, in presence of which the age of majority is constituted. These signs are known as natural signs of puberty(*bulūgh -ṭabīᶜī*). Secondly in the case

of the absence of natural signs, jurists have defined puberty as a time when a person reaches a certain age; a method known as assumptive puberty (*bulūgh taqdīrī*)

As far as natural signs are concerned, some of them are shared by both men and women i.e. wet dreams(*iḥtilām*) and pubic hair(*inbāt)* while others (menstruation and pregnancy) concern only women.

2.2.1.4.1 Wet dreams *(iḥtilām)*

To begin with, a wet dream is a state of producing semen either in dreams or in wakefulness[8], and the jurists are unanimously[9] agreed that this factor is a sign of attaining puberty. They base their opinion on a verse from the Qur'ān (24:59) in which Allah commands:

"When the children among you come of age(*ḥulum*), let them (also) ask permission as have those before them."

Here it is stressed that since Allah commands the minor to seek for permission to enter a private domain if he or she has experienced wet dreams, then this connotes that the minor has reached the age of puberty.

In addition, the are also several *Ḥadīths* which support the above Quranic verse; in one of these *Ḥadīths* the Prophet PBUH is reported to have said: "The pen is

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[8] Al-Sharbīnī, *Mughnī al-Muhtāj*, vol 2, p.166

[9] See, Ibn Qudāmah, *al-Mughnī, Dār al-Fikr*, Beirut, 1405 H,1st edition, vol 4, p.297, *Mughnī al-Muhtāj* , vol, 2,p.166, al-Dardīr,*al-Sharh al-Kabīr*,ed, Muḥammad ʿUlaysh, *Dār al-Fikr*, Beirut, n.d, vol 3, p.293

suspended (liability is exempted) in three cases; a sleeping person until he wakes up, an imbecile until he becomes sane and a minor until he experiences a wet dream."[10]

It is clear from this *Ḥadīth* that a minor is not considered fit to comply with legal rulings, such as prayer and fasting until he or she attains the age of majority through experiencing a wet dream.

This said, it should be noted that there is no specific age by which a minor is able to experience a wet dream, for it may vary from one person to another depending on environmental factors; nevertheless, some jurists have identified the age of nine to be the earliest age at which this occurs for both girl and boy, while others have agreed on the age of ten for boys and the age of nine for girls.[11]

2.2.1.4.2 Pubic hair(*inbāt)*

Jurists are in disagreement as to whether or not puberty can be determined through the appearance of pubic hair. In general, according to the majority of jurists, the appearance of pubic hair is considered a sign of puberty; this opinion is based on a narration concerning ᶜĀtiyyah al-Qurazī who is reported to have said: "I was captured in the battle of Banū Qurayẓah, (for judgment to be passed upon us) They (Muslims) sentenced to death those who had pubic hair but took as prisoners those who had not. They then, searched me and found no pubic hair, therefore I was taken as a prisoner."

Moreover, it is also reported that during the time of ᶜUthmān the Caliph, a minor who had committed theft was brought to *ᶜUthmān.* (In passing judgment) ᶜUthmān

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[10] Narrated by Abū Ḍāwūd, *Kitāb al-Ḥudūd*, chapter 17, *Ḥadīth* no. 4403
[11] *Mughnī al-Muhtāj* , vol 2,p. 166

ordered: "Search him, (but after searching) they found no pubic hair, thus , they did not amputate his hand.

These *Ḥadīths* and others which are similar in meaning clearly show that the appearance of pubic hair is considered as a means of determining puberty, since (as in the case of ᶜUthmān) pubic hair was not found; therefore a legal ruling such as amputation of the hand could not be imposed

Nevertheless, it has been argued that the *Ḥadīth* on which the majority of jurists base their evidence, (especially that of Banū Qurayẓah)are weak, and consequently cannot be relied upon in establishing legal rules. However, this objection itself seems to be weak, since *Al-Ḍhahabi*(one of the expert in ḥ*adīth*) has confirmed that *Ḥadīth* Banū Qurayzah is authentic enough to constitute evidence.[12]

2.2.2. The ECC

2.2.2.1 Age of discernment

Jurists are unanimously agreed that a non- discerning child is a person who has not reached the age of seven, after which the age of discernment is said to begin. Their agreement is based on article 45/2 of the ECC, which reads, "A person who has not attained the age of seven is considered devoid of discernment". According to the presumption of law, the article also implies that a minor who has attained the age of seven is considered as "discerning". However, jurists differ as to both the degree of this "presumption" and whether it is rebuttable or not.

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[12] *Talkhīṣ al-Mustadrāk,* vol 3. p 35 cited from *Madā Ahliyyat al-Ṣabī,* p.113

Some jurists[13] are of the opinion that the above-cited article is not conclusive as the opposite meaning could be established, while others opine that the article is so conclusive that no other meaning can be assumed. Those who hold the second opinion differ amongst themselves as to the detail of this opinion; while some maintain that a child who has not attained puberty (although he has reached the age of seven) cannot be considered as a discerning child, other hold the view that a minor who is under seven is not discerning (even though in reality he has the ability to discern) but if he has attained the age of seven he will be considered as discerning(even though in reality he is not and has yet to attain puberty) [14]

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Apart from the abovementioned opinion, there are also jurists[15] who hold that article 45/2 of the ECC does not contain any "presumption of law" be it conclusive or inconclusive. In this regard al-Ṣuddah argues:

> "If we were to follow the view which suggests (that the article) contains "a rebuttable" presumption it would mean we have sidelined ourselves from the consensus of jurisprudence. This is because by saying so, it will lead to the destruction of a legal limitation (of the age of discernment as stated in the article) and thus article 45/2 will be meaningless. (This said) the view which asserts (that article 45/2) does contain irrebuttable presumption seems to be valid; however, it contradicts another view which denies the existence of irrebuttable presumption of law, since according to this view in order to constitute proof (in litigation) a matter must be rebuttable to give the opportunity to disputing parties to establish the opposite"[16]

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[13] Madkūr, Sāmī, *Nazariyyat al-Ḥaq*,p. 50 , al-Badrāwī, *al-Madkhal li al-ᶜUlūm al-Qānūniyyah*, pp.614-615. cited *from Madā Ahliyyat al-Ṣabī*, p. 131

[14] Al-Sanhūrī ,*al-Waṣīt* , *vol 1,p.801*

[15] Shanab, Muhammad Labīb, *al-Ithbāt*,p. 145, Yahyā, Abd Wādūd, *Durūs fī Qānūn al-Ithbāt*, p.131 cited from, Ibrāhīm, Jalāl Muḥammad, *al-Mas'ūliyyat al-Madaniyyah li ᶜAdīmī al-Tamyīz*, PhD Thesis, Cairo University. 1982, pp.185-186

[16] *Ibid*

It seems that this view is preferable in order to uphold the provision of law (art 45/2). Otherwise it would be meaningless for the legislator to enact a law which is later exposed to be rebutted.

2.2.2.2 Age of majority

Unlike Islamic law, the ECC does not contain provision regarding natural signs of the age of majority; i.e., the attainment of puberty through wet dream, the appearance of pubic hair and menstruation as well as pregnancy, is not stipulated in the Code. The only means to identify the age of majority recognized by the Code is through " assumptive sign of puberty" which is based on age factor. Although there is no clear provision stipulating the age by which a person is considered as pubescent (*bāligh),* it can be concluded that the age of seventeen-for both boys and girls-is legally the age of majority since in the absence of legal provision the Code itself has resorted to the most preponderant views in the Ḥanafī school of law[17], which considers the age of seventeen to be the age of majority, a matter which was also supported by the Court of Cassation.[18]

The ECC also contains provisions concerning the age of maturity (*rusd)* as stated in article 44/2 "The maturity of a person is fixed at twenty one completed in accordance with the Gregorian calendar". Having attained the age of twenty-one, a person is said to be prudent in the sense that he is capable to conduct acts as long as no interdiction is imposed upon him. This is clearly evidenced in article 44/1 of the ECC that reads " All

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[17] See also art 3 of Law No 1 of 2001 Promulgating Personal Status Law.

[18] In a case brought to the Court it was held that since the legal regulations contained in law 78 of 1931 are silent about fixing the age of majority at which a child attains puberty (in order to determine such an age) reference should be made to the most preferable view of the Ḥanafī school. EgCC dated 16/2/ 1982

persons attaining maturity in possession of their mental faculties, and not restrained by interdiction have full legal capacity to exercise their civil rights"[19]

2.3 The Effect of Minority on Contract

Since the concept of contract has a broad meaning, it is therefore worth mentioning such a concept briefly before examining the effect of minority on it. Equally important is the differences between three interlinked terminologies; i.e. contract, disposal *(taṣarruf)*and obligation *(iltizām)*

2.3.1 Meaning of contract (*ᶜaqd*)

2.3.1.1 Islamic law

The word *ᶜaqd* in Arabic has more than one meaning among which are the following;

- to fasten *(shadd)*, to tie *(rabṭ)*
- emphasis(*ta'kīd*),solidity *(iḥkām)* strengthening *(tawthīq)*
- determination(*ᶜazm*)
- collection *(jamᶜ)*
- covenant(*ᶜahd)*

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[19] It is important to note that according to Egyptian law, the age of maturity in financial matters and criminal matters are twenty-one and eighteen respectively for both boy and girl. However, with regard to matters relating to personal status such as marriage, the legal age is set at eighteen for husband and sixteen for wife. Although there is justification for these disparities due to difference jurisdictions, there exists somewhat contradiction between these ages. For instance, while the law regards a boy is mature enough to marry when he reaches sixteen, he has to wait until the age of twenty to be mature in terms of financial affairs. It thus suggested that the age of maturity be streamlined to govern all matters be they criminal, financial or personal.

The word itself occurs in the Qur'ān in many places; for instance, in (5:1) Allah says: "O You who believe fulfil contract" which according to Quranic commentators means to fulfil the covenant. [20] In (4:33) Allah says: "With whom you have your covenant"

Undoubtedly the word *ᶜaqd* and its derivatives as used in these verses have a close connection with the literal meaning of the *ᶜaqd* itself, which in spite of its various meanings is in fact interlinked.

As far as technical meaning is concerned, Muslim jurists have looked at the definition of contract from two different perspectives- general and specific meaning.

2.3.1.1.1 General meaning of contract

This is defined as every commitment (*iltizām*) undertaken by a person, whether this commitment involves exchange with another such as sale, or does not involve exchange such as taking oaths, and whether this commitment is religious or concerns worldly matters.[21]In this regard Ibn ᶜArabī states: "Having admitted that...the tying of *ᶜaqd* may be with Allah or with human beings either in words or deeds"[22]According to this definition, every human act can be considered as a contract regardless of its classification such as prayer, sale, divorce and so on.

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[20] *Tafsīr al-Qurtūbī*,edited by al-Bardūnī, Aḥmad ᶜAbd al-ᶜAlīm, *Dār al-Shaᶜb*, Cairo, 1372 H. 2nd edition, vol 6, p.33,al-Qurradāghī, ᶜĀlī Muḥyiddīn ᶜAlī, *Mabda' al-Riḍā fī al-ᶜ Uqūd* ,*Dār al-Bashā'ir al-Islāmiyyah*, Beirut, 1985. 1st edition, vol 1, p. 106

[21]Al-Qurrahdāghī, *Mabda' al-Riḍā fī-al-ᶜUqūd*, vol 1, p.112, Khafīf, ᶜAli, *Aḥkām al-Muᶜāmalat al-Sharᶜiyyah*, pp.204-205

[22] Ibn al-ᶜ Arabī, *Ahkām al-Quran* , edited by al-Bajāwi, ᶜĀlī Muḥammad, *Dār al-Maᶜrifah*, Beirut, n.d, vol 2, p.526

2.3.1.1.2 Specific meaning of contract

Before discussing the definition of contract, it should be noted that when the word is used in the works of jurists, it is normally used in the narrow sense, for which various definitions exist. For instance, Ibn Humām defines contract as the combination of offer and acceptance from two persons, or from one person only representing both parties,[23] while according to Qudrī Bāshā contract is the linkage between offer and acceptance from two parties in a manner which brings effect on subject matter.[24]

It can be concluded that 'contract' according to this specific meaning is limited only to acts issuing from two persons; i.e., offer and acceptance. Thus, prayer, divorce and taking oaths are not considered as contract since they involve one party only.

2.3.1.2 The ECC

The Code does not clearly state the definition of contract; instead the manner by which a contract is concluded has been stipulated, as can be seen in article 89 which reads " a contract shall be concluded once parties mutually exchange the expression of congruent volition subject to observing other specific term to be further provided by the law for concluding a contract". However, the Preliminary Draft of the Code has defined contract as an agreement between two parties or more to create, modify or terminate legal

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[23] *Sharḥ Fath al-Qadīr*, vol 3,p. 187

[24] Bāshā, Muḥammad Qudrī, *Murshid al-Hayrān Ilā Maᶜrifah Aḥwāl al-Insān, Maṭbaᶜah Amīriyyah*, Cairo, 1891, 2nd edition p. 27, see also Nyazi, Liaquat Ali, Islamic law of Contract, Research Cell, Dyal Sing Trust Library, Lahore, 1991, pp.10-11

ties,[25]a definition criticized since it does not differentiate between contract and agreement.[26]

Another definition offered by jurists is conformity of two 'wills'(*irādah*) to create, modify or terminate legal ties.[27] According to this definition a contract is so called if two or more parties are involved as in the contract of sale and lease; thus in the case of divorce (which comes from one party only) the meaning of contract does not apply. In addition, in order to be considered as a contract in the eyes of the law, an agreement must concern legal matters; hence, for instance, an agreement between two parties relating to social affairs (such as an invitation to attend a wedding ceremony) is not legally considered to be a contract. Apart from this, it is also noticeable in this definition that the Code has emphasized the ' subjectivity' [28]in the sense that it looks more at the contracting parties, rather than the remaining elements of contract such as the 'subject matter'. On the contrary -as claimed by some writers- Islamic law emphasizes 'objectivity' when dealing with contract, as evidenced by Ahmad Ibrahim's statement: "Whether or not a person wants to bring the effect of the cause, this effect will still legally exist regardless of the will of contracting parties"[29]

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[25] *Al-Wasīṭ.* Vol 1, p.138

[26] Al_Qurrahdāghī, *Mabda' al-Riḍā fī-al-ᶜUqūd* , vol 1, p. 138, This criticism is refuted because there is no legal consequence arising from the differentiation ,see, ᶜAlam al-Dīn, *Madkhal al-ᶜUlūm al-Qānūniyyah wa al-Iltizām,* p.151

[27] Marqus, Sulaymān, *al-Madkhal li al-ᶜUlūm al-Qānūniyyah , Dār al-Nashr li al-Jāmiᶜat al-Miṣriyyah,* n.p, 1957 p. 468, Yahyā, *Durūs fīMabādi al- Qānūn*, p. 183

[28]In contract the term subjectivity *(nafṣi or dhātī)* refers to real and inner intention over the manner in which it is expressed whereas objectivity (*mawḍūᶜī or māddī*) means a verbalistic exteriorization of inner contractual elements laying a great stress on certain verbal formality. See, Owsia, Parviz, Formation of Contract, a Comparative Study under English, French, Islamic aand Iranian law, Graham & Trotman, London/ Dordrect/ Boston, pp.231-234, Saleh, Nabil, Definition and Formation of Contract Under Islamic and Arab Laws, ALQ, vol 5 May 1990, p.110

[29] Ibrāhīm, Aḥmad, *al-Iltizāmāt fi al-Sharᶜi al-Islāmī ,Dār al-Anṣār,* Cairo, n.d, p. 92

These seemingly contradictory views between the ECC and Islamic law with regard to objectivity and subjectivity can still- in my opinion- be harmonized. This is because as far as the ECC is concerned the will of contracting parties is not absolute, meaning that they do not enjoy absolute freedom in concluding a contract. In other words, the contracting parties have to abide by and not contravene any provision of law.

Similarly, Islamic law, while emphasizing the role of objectivity, has not totally neglected the role of subjectivity in the sense that the 'will' of contracting parties is also taken into consideration in determining the validity of a contract. Thus, for instance, the contract of the insane person is void due to the absence of 'will'.[30]

2.3.2 Scope of contract

2.3.2.1 Islamic law

As previously discussed, the general meaning of contract is so wide that it covers every human commitment (*ta^{c}ahhud)* whether in the form of unilateral (such as divorce) or bilateral agreement (such as sale), between mankind and their creator such as solemn pledge(*nadhar*), among individuals themselves, or between individuals and government, whether monetary or not. The very early scholars in their writings mostly use this general meaning.

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[30] Al-Sāmrā'ī, *al-Safah wa-alGhaflah wa Atharuhuma fī al-Taṣarrufāt* , p. 204

With respect to the specific meaning as used by the vast majority of jurists. contract covers only bilateral ties, whether it concerns individuals, governments, or financial or non- financial matters.[31]

2.3.2.2 The ECC

As a matter of fact, a contract is considered to be such when it is governed by private law; i.e., Civil Code. Therefore, matters which fall outside the jurisdiction of this Code, such as those of international and public law are not terminologically considered as contract.[32] For example, international agreements and administrative contracts are not in fact contract according to the ECC, as was ruled by the Egyptian Administrative Court (EAC):

> "Administrative contracts differ from civil contracts, in the sense that the former is between public law (represented by juristic persons) and individuals, partners or groups targeting public interest in facilitating public utilities; it is therefore noticed (in administrative contracts) that the interest of contracting parties is not equal, since the public interest must be first taken into consideration before the interest of the individuals [……] This goal must be under the control of authority in order to organize public utilities.."[33]

In light of this ruling it can be concluded that the scope of contract in Islamic law is wider than that of the ECC because –as previously mentioned-the former recognises any linkage between offer and acceptance as a contract regardless of the nature of the contracting parties.

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[31] *Mabda' al-Riḍā fī al-ᶜUqūd,* vol 1, p. 145

[32] Yahya, *Durūs fī Mabādi' al-Qānūn* , p. 183, al-Ṣuddah, Faraj, *Maṣāḍir al-Iltizām* , pp.54-55, Shanab, Muhammad Labīb, *Durūs fi Naẓariyyat al-Iltizām*, pp.24-25

[33] Al-Badrāwi, *al-Naẓariyyat al-ᶜ Āmmah li al-Iltizāmāt* , p. 43

2.3.3 Relationship between contract and disposal(*taṣarruf)*

2.3.3.1 Islamic law

It is noteworthy that the classical jurists did not gather into one single place all references to a particular area (e.g. theory of contract) as do modern law jurists. However, this is not to suggest that the substance of such theories are not existent in classical works; on the contrary, the topic of contract for instance is found scattered in their writings .It is contemporary Muslim jurists who have collected the works of their predecessors in a manner in keeping with modern law jurists. Among the theories discussed is the theory of contract in which the meaning of disposal is also explained. For instance, Abu Zahrah [34]sees disposal as " every verbal act of a person which has a future legal effect" and this definition clearly confines disposal to verbal aspects only. A more comprehensive definition as offered by al-Zarqā'[35] is " whatever issues from a person in the form of words or deeds which has an effect from the perspective of *Sharī*ᶜ *ah"*; this latter is the preferred definition since it covers all that which issues from a person –verbal act or physical deeds whether willing or unwilling and accordingly it can be said that the concept of disposal is wider that that of contract, since the latter only concerns verbal acts and is limited to acts issuing from two parties.[36]

2.3.3.2 The ECC

Technically, there is no provision in the ECC stipulating the meaning of disposal leaving the matter to be interpreted by jurists so as to comply with the needs of public

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[34] *Al-Milkiyyah wa Nazariyyat al-ᶜAqd* , p. 201
[35] *Al-Madkhal al-Fiqh al-ᶜĀmm,* vol 1,p.195
[36] Every contract is disposal ant not *vice versa* or in other words contract is part of disposal

interest.[37] The jurists for their part have offered various definitions of disposal; for instance, al- Sharqāwī defines it as "direction of will manifested by words to create a legal effect recognized by law whether such an effect is in the form of creation (*inshā'*) , modification (*ta^{c}dīl*) or termination of rights (*inhā'*)[38].Al-Suddah[39] defines this concept as initiating 'a pure will' (*irādah maḥḍah*) directed to the creation of a specific legal effect; al-Faraj while concurring with al-Suddah's adds to this definition " to gain , transfer, modify or terminate rights" to the definition.[40]

These definitions show juristic consensus that disposal is a kind of act of will (*^{c}amal irādī*) which is considered to be a basis for disposal; however, according to some writers, none of these definitions is comprehensive, since the acts of persons lacking in will are excluded. Alternatively, suggestions have been made to define disposal as "the movement of a person to create a legal effect"[41]Similar to Islamic law disposal has a broader meaning than that of contract in the sense that it covers both contract and 'unilateral will' (*irādah munfaridah*)[42]

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[37] It can be noticed throughout the provisions of the ECC that it hardly deals with definitions. According to al-Suddah the Code is right in doing that because definition is matter concerning jurisprudence and it should be left to the jurists to exercise legal reasoning (*ijtihād). Maṣādir al-Iltizām*, p.51

[38] *Al-Naẓariyyat al-^{c}Āmmah li al-Iiltizām*, p.39

[39] *Maṣādir al-Iltizām*, p. 42

[40] Hasan faraj, *Mabādi' al-Qānūn, p.50*

[41] Al-Sharafī , *Hukm al-Taṣarrufāt al-Qānūniyyah li Fāqid al-Ahliyyah* , p. 198

[42] Al-Sharqāwī, Jamīl, *al-Nazariyyat al-^{c}Āmmah li al-Iiltizām, Dār al-Nahḍat al-^{c}Arabiyyah*, Cairo, 1981 p.39

2.3.4 Relationship between contract and obligation *(iltizām)*

2.3.4.1 Islamic law

In juristic discussion of contract, it appears that the concept of obligation is closely related thereto. As such, it is vital to elaborate what is meant by obligation in the parlance of jurists (both Muslim and Egyptian) in order to avoid confusion and misuse of both terminologies; i.e. contract and obligation

In Arabic, the word *iltizām* means to engage *dhimmah* with something (*shagl al-dhimmah bishay'in*). It also means to impose a duty upon oneself[43].

With regard to technical meaning, as far as classical jurists are concerned, the vast majority of them had offered no definition of obligation; this is perhaps, due to the nature of classical works themselves in focusing more on branches of *fiqh (furū)* and problems (*masā'il)* rather than formulating theories, as suggested by al-Kabāshi. In this regard he affirms: "The reasons [....] is that the jurists in general were not concerned to compile theories in transactions *(mu^{c}āmalat*) as their main concern was directed to deal with 'branches' and 'problems' as clearly seen in the books of *fiqh* from various schools"[44]

However, al-Ḥaṭṭāb -a Mālikī jurist - is perhaps the only classical jurist who gives the definition of obligation when he states that " the lexical meaning of the term is the commitment of a person to do something which he is not obliged to do; in this sense obligation includes sale, lease, marriage and other contracts. In the custom of jurists obligation means to oblige oneself to do something of good deed(*ma^{c}rūf*),be it absolute

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[43] A Dictionary of Modern Written Arabic, p.865
[44] *Al-Dhimmah wa-al-Ḥaq wa al-Iltizām* , p. 284

(muṭlaq) or conditional (*muᶜallaq*); thus, it also carries the meaning of donation (*ᶜatiyyah)*. It *(*obligation) is also used to denote what is more specific; i.e. the commitment to do good deeds using the word obligation and this meaning is the most prevalent in present days"[45]

As far as contemporary jurists are concerned, various definitions of *iltizām* have been offered; these are examples:

-Ahmad Ibrāhīm has divided obligation into two categories; general and specific. The specific meaning is the commitment of a person to something well known (*maᶜrūf)* whether absolute or conditional. As for general meaning, this is the imposing of something on a person (done by himself) whether through his will or the *Sharīᶜah*.[46] It thus seems that here this jurist was influenced by the definition given by al-Ḥaṭṭāb.[47]

-Ali al-Khafīf defines obligation as a personal undertaking (*taᶜahud shakhṣiy*) for which no person other than the obligor *(multazim*) is responsible, and which concerns only during his lifetime properties left after his death provided that such property is not affected by death.[48]

-Al-Zarqā' defines the term as ' the state of a person being responsible (*mukallaf)* –according to the S*harīᶜah*- for carrying out an act or refraining from it in the interest of others'[49]

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[45], *Fath al-ᶜAlī al-Mālik by ᶜUlaish* , vol 1, p. 217 quoted from *al-Dhimmah wa al-Ḥaqq wa al Iltizām* ,p.284

[46] *Al-Iltizāmāt fi al-Sharᶜ al-Islāmī*, p.21

[47] See al-Ḥaṭṭāb's definition on page 55

[48] Al-Khafīf, ᶜAlī, *Ta'thīr al-Mawt fī Ḥuqūq al-Insān wa Iltizāmātihi, Majallat al-Qānūn wa al-Iqtiṣād*, vol, 6, p. 515

[49] *Al-Madkhal al-Fiqh al-ᶜĀmm* , vol 1, p.435

From these definitions it can be observed that these scholars had recourse to a Civil law approach. For instance, Ahmad Ibrahim's definition is an attempt to approach between the meaning of obligation in Islamic law and Civil law, thus; he emphasizes the 'objectivity' aspect of obligation .This is perhaps due - as previously mentioned – to the fact that there is no specific manner of dealing with obligation in the works of classical jurists; therefore, to compare the concept of obligation in Civil law with that in Islamic law contemporary Muslim jurists have chosen the approach adopted by the Civil Law jurists. This is conceded by al-Sanhūri when he states:

> "Obligation or personal right (*ḥaq shakhsī*) is an expression (*taᶜbīr*) which we borrowed from western jurisprudence because it is not usual for this expression to occur in Islamic jurisprudence; we will see that the reason is that what we call *iltizām* in Islamic law in fact, consists of several legal ties (*rawābiṭ qānūniyyah*) distinguishable from each other. Classical Muslim jurists did not attempt to put these ties united and governed by one system called *iltizām*"[50]

Looking at the above definitions one might conclude that they contain two aspects of obligation, the first of which is a result of the 'will' of human beings, whether it involves two 'wills' such as sale or one will such as solemn pledge (*nadhar).* The second aspect is concerned with the will of the *Sharīᶜah* meaning that the *Sharīᶜah* alone imposes such obligation regardless of the will of human beings such as obligatory maintenance required from the husband. Therefore, according to these definitions the sources of obligation includes contract, single will, good deeds, bad deeds and the *Sharīᶜah* itself.

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[50] Al-Sanhūrī, *Maṣādir al-Ḥaq fi al-Fiqh al-Islāmī, Dār al-Nahḍat al-ᶜArabiyyah.* Cairo, n.d, Vol 1, p. 9

2.3.4.2 The ECC

The word obligation in the ECC is also synonymous with personal right (*ḥaq shakhṣi*), nevertheless, the latter is rarely used in legal fields in the sense that the legal text by which it is governed is not often found using the term personal right *per se* due to the prevailing usage of obligation .Even though both terms are identical in term of their connotation obligation is more dominant, perhaps due to the essential role of obligor(*multazim)* in creating obligation itself.[51]

Jurists differ in defining obligation. This disagreement has arisen from their different approaches to the way obligation must be looked at. Those who prefer to look at obligation from a subjective point of view (*nazrah nafsiyyah*) define it as ' a legal tie (*rābiṭah qānūniyyah*) between a creditor and a debtor by virtue of which the debtor is obliged to perform certain act or refrain from it in the interest of creditors'. On the other hand those belonging to an objective point of view (*nazrah māddiyyah*) define obligation as ' a legal condition (*ḥālah qānūniyyah*) the goal of which either the performance of or refraining from certain acts by specific persons '[52]

Apart from this, there are also jurists[53] who combine the two approaches in their definition; thus, according to them obligation is a legal condition by virtue of which a person is tied to perform an act or refrain from it.

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[51] Sharqāwī , *al-Nazariyyat al ᶜ Āmmah lial-Iltizām*, pp.8-9, Salamah, *al-Madkhal* , p. 257

[52] Al-Sharqāwī, *al-Nazariyyat*, p. 9

[53] Among those are al-Sanhūri, Sulaiman Marqus, al-Badrāwi and a-Suddah. see, Sharqāwi, *al-Nazariyyat* , p. 10

Having said this, it should be noted that the definition of obligation must not be connected to either approach *per se*; rather, the term itself must be looked at regardless of external factors. Thus, it is suggested that obligation be defined as a legal obligation resting on a person's shoulders to perform financial acts in favour of another person.[54]

According to this definition, a matter cannot be considered as obligation unless three criteria are fulfilled. Firstly, obligation must concern legal obligation (*wājib qānūnī*) in the sense that it is recognized and governed by law; for instance, if a debtor does not fulfil his obligation toward the creditor (i.e. repayment of debt) then the latter has the right to secure his money through legal process. Therefore, matters that do not concern legal obligation such as those of moral and religious commitment are not considered to be obligation. Secondly, this legal obligation requires a specific person upon whom it is incumbent at the time obligation comes to force. This is because the existence of obligation is not imaginable without a person bearing its requirements..

Another criteria of obligation is that it concerns matters which are monetary or can be valued financially such as repayment of debt. Consequently, any legal obligation not involving finance such as the obligation of a wife to obey her husband is not obligation. Fourthly, this legal obligation must be in the interest of a specific individual; however it is not necessary for this person to be actually available at the time obligation is created as he might become available on its execution. For instance, if a person offers a reward for those who find a lost item, obligation is already created at the time the offer is

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[54]Al-Fiqī, Muhammad Ali, *Durūs fī Nazariyyat al-Iltizām* , p.3 ,

issued regardless of persons concerned. In other words, the existence of a debtor is a requisite for the creation of obligation whereas this is not the case for the creditor.[55]

This said, similar to Islamic law, the concept of obligation in the ECC is wider than that of contract since the latter is part of the former. To put it simply, every contract is obligation but not *vice versa*. However, compared to Islamic law obligation in the ECC has a narrower scope as it is limited to 'legal obligation' only together with monetary matters, while this is not the case in Islamic law.

2.3.5 Types of Contract

2.3.5.1 Islamic law

Jurists have divided contract into numerous categories; however for the purpose of this study the focus will be on categories which have a close connection to the present study.

2.3.5.1.1 Classification of contract according to bindingness (*luzūm*) and non-bindingness (*ghayr luzūm*)

Contract can be divided into 'binding' and 'non- binding'. The binding contract refers to that which cannot be revoked unless by mutual consent from both contracting parties such as sale, lease, transfer of debt, sharecropping, gift etc. The non- binding contract is a contract that gives authority to the contracting parties to revoke the contract without prior consent from another party. This contract includes the contract of

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[55] Al-Fiqī,*Durūs fī Nazariyyat al-Iltizām* , p.4

partnership, agency, loan etc. In addition, a contract may be a mixture of both elements, in the sense that it may be binding for one of the contracting parties but non- binding for another. For example, the contract of pledge(*rahn*) is binding upon the pledgor (*rāhin*) not the pledgee (*murtahin*), thus the pledgee has the right to terminate the contract even without the consent of the pledgor, however the pledgee must agree before the pledgor can terminate the contract.[56]

2.3.5.1.2 Classification of contract according to its validity (*ṣiḥḥah*)

Contract may also be classified according to the nature of its legal attribute (*waṣf shar^{c}ī*) The jurists are of different opinions as to this classification. According to the Ḥanafī the legal effect of a contract can be either valid(*ṣaḥīḥ*) ,void (*bāṭil*) or irregular(*fāsid*).[57] A contract is valid when all its elements and pre-requisites are fulfilled resulting in bringing legal effect(*āthār shar^{c}iyyah*).[58] In other words, a valid contract is what is lawful in terms of essence and quality(*al-mashrū^{c} dhātan wa ṣifatan*)[59]. A contract is considered to be void if the pillars of the contract are breached, such as when a contract issues from an insane person or a person lacking in competence the contract is void as though it had never been formed. Similarly, if the underlying cause of the contract is dissolved and it concerns the object of sale as for example, when it involves an unlawful object then the contract will also be considered as void [60]

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[56] Aḥmad Ibrāhīm, *al-Iltizamāt fī al-Shar^{c} al-Islāmī*, pp.192-193

[57] *Ibid*, p.190

[58] Khafīf ,Ali, *Aḥkām al-Mu^{c}āmalat al-Shar^{c}iyyah*, p.364, Abu Zahrah, *al-Milkiyyah wa al Nazariyyat al-^{c}Aqd*, pp. 369-370

[59] Al-Qurradāghī, *Mabda al-Riḍā fī al-^{c}Uqūd*, vol 1, p.155

[60] Rayner, S,E, The Theory of Contracts in Islamic law, Graham & Trotman, London/Dordrecht/Boston, 1991, 1st edition, p. 150, *Maṣādir al-Ḥaqq*, vol 4, pp. 146-147

As for irregular contract, according to the Hanafī, this is defined as when something in the contract is defective other than the pillar or the cause. In other words, the contract is lawful with regard to its essence but not to its quality.[61] For example, in the contract of sale if the price is unknown the contract would be irregular. Contrary to the Hanafī's view which divides contract into three categories, the majority of jurists[62] including the Mālikī, the Shafi^{c}ī and the Hanbalī maintain that a contract can only be divided into valid and void. While concurring with Ḥanafī in the meaning of a valid contract, they do not differentiate between void and irregular contract as both terms can be used interchangeably.

In fact this disagreement between the Hanafī and the majority of jurists resulted from their disagreement on another principle; i.e. the effect of the prohibition issuing from the *Shārī^{c}āḥ* on certain contracts. According to the majority of jurists, when the *Sharī^{c}ah* prohibits from entering into a contract, it renders such a contract to be non-existent, meaning that if a person concludes a contract which is prohibited by the *Sharī^{c}h* his act cannot be considered as contract which is then nullified as if it never existed, regardless of the kind of prohibition (*nahī*) whether it refers to the essence or the quality of the contract.[63]They base their opinion on a *Ḥadīth* in which the Prophet PBUH was reported to have said " Every act which is not in accordance with our practice is rejected"[64] . Since a void contract is repugnant to the *Sharī'ah*, it is clear from the *Ḥadīth* that no legal effect can be sustained. In addition, they argue that what is absolutely

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[61] The Theory of Contract, p.150
[62] *Maṣādir al-Ḥaqq*, vol 4, p. 147
[63] Al- Khafīf, *Aḥkām al-Mu^{c}āmalat*, p. 369, *Maṣāḍīr āl-Ḥāqq*, vol 4, pp.147-148
[64] Narrated by Bukhārī and Muslim

prohibited is considered as sinful; hence it is inconceivable to accept that a contract can still have a legal effect when the contract itself is prohibited. [65]

On the other hand, the Ḥanafī opine that if the prohibition concerns the essence and essentials of the contract such as its pillars and subject matter, the contract would be null and void; however, if the prohibition merely refers to an attribute of the contract it will nullify the attribute only, while the nature of the contract remains lawful.[66] They argue that the existence of a contract relies on the existence of its pillars, and if there is any prohibition which does not concern the pillars in themselves such a prohibition will not render the pillars to be non-existent and as such, the contract therefore still exists. According to them, when the *Sharīah* forbids something, such prohibition will not necessarily affect the existence of that thing. This is because of the possibility of combining prohibition and existence, since the effect of prohibition is revocation of the contract as sinful which does not deny the existence of the contract, rather, in order to revoke a contract the existence of that contract is required in the first place.[67] The difference between the Ḥanafī and the majority on the concept of voidity (*buṭlān*) and irregularity (*fasād*) is also due to the degree of evidence by which a contract is forbidden. While the majority hold that such a degree plays no role in determining whether the prohibition constitutes voidity or irregularity, the Hanafī maintain that if the prohibition is deemed through conclusive evidence (*qaṭ'ī*) the effect will be void. Otherwise if the evidence for the prohibition is not conclusive then the contract would be merely irregular. [68]

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[65] Al-Qurradāghī, *Mabda' al-Riḍā fī al-ᶜUqūd* , vol 1, p. 163, see also, Abu Zahrah, *al-Milkiyyah* pp. 370-372

[66] Al- Khafīf, A*hkām al-Muᶜāmalat al-Sharᶜiyyah*, p. 369

[67] Abu Zahrah, *al-Milkiyyah*, p. 371

[68] Khallāf ,ᶜ *Ilm Uṣūl al-Fiqh*, pp.126-127 , al-Qurradāghī, *Mabda' al-Riḍā fi al-ᶜUqūd* , vol 1, pp.170-171

2.3.5.1.3 Classification of contract according to its effectiveness (*nufūdh*)

A valid contract can be divided into enforceable (*nāfidh)* and suspended(*mawqūf*) Jurists are agreed that if a contract issuing from a competent person fulfils all requirements as to its pillars and essentials, such a contract is regarded to be enforceable at the time of conclusion. For example, if in a contract of sale the buyer who is competent agreed to buy a car the sale would be enforceable with immediate effect. On the other hand, jurists are not agreed as to the meaning and validity of a suspended contract; according to the Ḥanafī and the Mālikī this is a contract which has fulfilled all requirements other than that relating to the contracting parties. In other words a contract would be suspended if the contracting parties have no authority to enter into the contract. A clear example is in the case of unauthorised agent *(fuḍūlī*). The significance of " suspension" lies in the fact that there is no legal effect when the contract is concluded unless consent is obtained from those concerned, otherwise such a contract will remain suspended. For example, in the contract of sale the ownership of the sold object will not transfer to the buyer if the real owner does not agree to this. . Al-Shāfi^{c}ī, however holds the view that a suspended contract is one of the categories of void contract due the fact that the authority of the contracting parties is a condition for the creation of a contract, not only for its enforcement. Thus, according to him every contract issuing from those who have no authority to conclude it would be void at the time of concluding that contract.[69]

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[69] Abu Zahrah, *al-Milkiyyah wa Nazariyyat al-^{c}Aqd* ,p. 37, Aḥmad Ibrāhim, *al-Iltizāmāt*, pp.191-192

2.3.5.2 The ECC

There is little difference between the ECC and Islamic law regarding the classification of contract. The ECC also recognises terminologies such as a binding or non-binding contract, effective or suspended contract, valid or void contract. It should also be noted that jurists have classified contract according to legal purpose. For instance, if the purpose is to verify whether or not a contract involves exchange of property then that contract is classified as either synallagmatic (*muᶜāwaḍah)* or donotary (*tabarruᶜāt)* .[70] Likewise if the purpose is to look at the role of time in the conclusion, contract is divided into immediate (*fawrī*) and temporary (*mu'aqqa*t). This means that a contract could thus at one time bear more than one criterion , for example a contract could be both 'immediate' and 'temporary' .

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[70] Al-Badrāwi, *al-Naẓariyyat* , p.84

2.3.6 Can a minor enter into a contract?

2.3.6.1 Islamic law

It is noteworthy that since the contract of sale is regarded as prototype for the remaining nominal contracts (*ᶜuqūd musammāt*) , all rules relating to sale will also apply to other contracts unless if there is significant disparity . The rules relating to the contract of minors are divided into two categories; a non -discerning and a discerning child.

2.3.6.1.1 A non- discerning child (*ṣabī ghayr mumayyiz*)

Generally, jurists[71] are in agreement that a non- discerning child cannot enter into any kind of contract, be it beneficial to him or not. This is because the child at this age is considered to be lacking in reason . However, the juristic interpretation of the absence of reason(*ᶜadīm al-ᶜaql*)must be correctly understood. What is perhaps meant here is the absence of a sufficient level of understanding enabling the child to conclude a contract. The jurists however, pay little attention to the actual subject matter (*maᶜqūd ᶜalayh*) of a contract made by a non -discerning child. Indeed, there is a view in the Hanbalī [72]school of law which upholds the validity of a contract made by a non-discerning child, provided that the subject matter of the contract is trivial. For instance, in a contract of sale, the contract is valid if the sold item is trivial.

Having said this, the question arises as to how to determine whether or not the subject matter is trivial. Should it be left to the discretion of the child or the authorities to

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[71] *Al-Majmūᶜ* , vol, 9, p. 147, Ibn Rusd, *Bidāyat al- Mujtahid*, *Dār al-Fikr* , Beirut, n.d, vol 2, p.129

[72] Al- Buhūtī, *Kashshāf al- Qināᶜ* , vol, 3, p.151

decide it? To answer this question, it is an acceptable fact that any matter which has no direct legal injunction should be referred to custom, meaning that if the matter is approved as trivial in the light of custom, the contract would then be valid; hence, it is suggested that this view be preferred.

2.3.6.1.2 A- discerning child (*ṣabī numayyiz*)

The law relating to the contract of a discerning minor differs according to the nature of the contract itself. Generally, this element can be divided into three; purely beneficial, purely harmful or a mixture of beneficial and harmful. A purely beneficial contract refers to that bringing benefit to the child without any return such as receiving a gift; according to the majority of jurists such a contract if entered into by a discerning child is considered valid even though concluded without the consent of the guardian.[73] They argue that the wisdom behind the guardianship relates to the supervision of the interests and welfare of the child in order to prevent him from falling into harmful activities since he cannot make proper judgments due to lack of mental capacity. As this kind of contract is by no means harmful the consent of the guardian would therefore be meaningless.[74]

With regard to a purely harmful contract the jurists are unanimously agreed that a child is not allowed to be a contracting party because of the nature of such contracts, which involve the discharge of ownership from the child without any return. Falling

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[73] Al-Kāsānī, ᶜAlā' al-Dīn, *Badā'iᶜ al-Ṣanā'iᶜ*,*Dār al-Kitāb al-ᶜArabī*, Beirut, 1982, 2nd edition, vol 7, p. 171,al-Sharbīnī, Muḥammad al-Khaṭīb, *Mughnī al-Muhtāj*, *Dār al-Fikr*, Beirut, n,d, vol 2,p. 166, *Mawāhib al-Jalīl*, vol 5, p. 62 , *al-Hajar wa Asbābuhu* p.30

[74] *Al-Badāiᶜ*, vol7,p.171, *Mabda' al-Riḍā*, vol 1,p. 276

within this kind of contract are the giving gifts, contract of guarantee, loan and the like. The jurists are also agreed that the consent of the guardian in these contracts will be of no effect, in the sense that the contract is considered as null and void even after obtaining the consent of the guardian. To this effect al-Kāsānī states;" The purely harmful contracts are not valid according to the consensus of the jurists"[75]

As for a contract which brings both benefit and harm such as a contract of sale, lease, partnership and the like, there is disagreement amongst the jurist as to the validity of this kind of contract. According to the Hanafī, a child is entitled to carry out this kind of contract; however the validity of it is not to be finalized until the consent of his guardian is obtained. Therefore, for instance in the contract of sale, the effect of sale including the transfer of ownership from the seller to the buyer is not final, pending the decision made by the guardian. In other words, once the sale is concluded it is said to be valid at the time of concluding but at the same time its effect is suspended (*mawqūfah*).

The Hanafī contend that a non discerning child should not be prevented from exercising his right as he also possesses legal capacity, but due to the incompleteness of this capacity the right of a discerning child to conclude a contract is not absolute. Hence, if there is a possibility of suffering from loss in his contract the guardian will nullify that contract. Likewise, in the case of gaining profit such a contract will also be ratified by the guardian. However, if the guardian prefers to remain silent, meaning he neither endorses the contract nor does he object to it, then the contract will remain suspended until the child reaches the age of puberty, at which time he has the right to opt (*khiyār*) i.e to decide whether to nullify or ratify the contract. [76]

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[75] Al-*Badāi*^{c} , vol 7, p.171
[76] *Ibid*, *Rādd al-Muhtār* vol 6,p. 154

The Shāfiᶜī on the other hand do not differentiate between a non- discerning and a discerning child with regard to the validity of a contract carried out by him. A child according to the Shāfiᶜī has no capacity to conclude a contract. In this regard al-Nawawī states " The sale carried out by a child is not valid, neither is a lease nor remaining contracts, whether for himself or for others... whether with the consent of his guardian or not"[77]. This is because 'prudence' (*rusd*) is one of the pillars of contract in the absence of which a person is not entitled to conclude a contract. This opinion is further based on several quotations from the Qur'ān and the *Sunnah* . in the Qur'ān(4:6)Allah says: " Make trial of orphans until the age of marriage if then ye found sound judgement in them release their property to them" .Commenting on the verse al-Shāfiᶜī affirms " the verse indicates that interdiction on the orphan will not be lifted until two things are achieved ; puberty and prudence"[78]. It is also argued that the meaning of *sufahā'* in the Qur'ān (4:5) as interpreted by Ibn ᶜAbbās is both a child and those who have mental weakness [79]. In addition, the Prophet PBUH was also reported to have said " The pen is lifted (liability is exempted) from three persons; a sleeping person until he wakes up, a child until he experiences wet dreams, and an insane person until he recovers" [80]. This *Ḥadīth* shows that since legal injunction (*taklīf*) is lifted from a child , this means that if he enters into a contract he is not bound to fulfil his obligation since *ilzām* (to oblige)is the result of *taklīf* in where a child is not commanded, for one of the features of contract is the fulfilment of its actual content based on the Qur'anic verse (5:1):" O you who believe fulfil the contract" Al-Nawawī has expounded the *Ḥadīth* by saying: " If the sale is valid

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[77] *Al-Majmūᶜ*, vol 9,pp.148-147

[78] Al-Shāfiᶜī, Muḥammad bin Idrīs, , *Aḥkām al-Qur'ān*, edited by ᶜAbd al-Ghanī ᶜAbd al-Khāliq, *Dār al-Kutub al-ᶜIlmiyyah*, Beirut, 1400 H vol 1, p. 138

[79] Ibid, vol 2,p 184

[80] Narrated by al-Tirmidhī, *Kītāb al-Ḥudūd*, chapter 1, *Ḥadīth* no.443

(from a child) it will require the child to deliver (the sold item) , the *Ḥadīth* clearly states that there is no such obligation upon a child"[81].

However, the majority of jurists refute this argument claiming that the Quranic verse and the *Ḥadīth* are both mistakenly understood and taken out of context. The first verse cited by the Shāfiʿī in fact indicates that the handover of property to orphans is not permissible until they reach puberty and prudence while the second verse prohibits giving the prodigal their wealth and there is no dispute on this. Moreover, the prohibition from handing over does not necessarily render a contract carried out by a child void when the consent of the guardian is obtained since this latter will eventually be the contracting party.[82]In the same vein the *Ḥadīth* quoted does not show that a contract remains void in the event of obtaining consent from the guardian.[83]

The Hanbalī, while concurring with Hanafī on the validity of a contract of a child, have also emphasized that such consent must be obtained before the contract is carried out and within the scope of this consent. Thus for instance, if the consent only permits the child to conclude a contract worth a specific amount, then that child is obliged to follow the condition, otherwise the contract would be void.[84]

It seems that the view of the majority is here preferred which validates the contract of a discerning child with the consent of the guardian. This is because the evidence put by the Shāfiʿī-as previously discussed- is not felt to be strong enough to

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[81] *Al-Majmūʿ*, vol 9, p. 148
[82] *Mabda' al-Ridā fī al-ʿUqūd*, vol 1, p.282
[83] *Ibid*
[84] *Kashshāf al-Qināʿ*, vol 3, p.457, *al-Ḥajar wa Asbābuhu*, p.32

support their argument. Furthermore, a discerning child possesses a certain level of capacity to understand and discriminate between what is beneficial and what is harmful.

This said, apart from the foregoing juristic discussion regarding the contract of a child in general, the jurists have discussed in detail certain kinds of contract carried out by a discerning child. These include bequest, hire and trading.

Bequest (*waṣiyyah*)

There are different views regarding the bequest of a child. According to the Malikī, the Hanbalī and one view of al-Shāfiᶜi, the bequest of a child is permissible and valid. This is based on the Qur'anic verse (22:77) :"O ye who believe bow down, prostrate yourself and adore your Lord and do good that ye may prosper". This verse shows that Allah has commanded his servant to do good things among which is bequest. Since the term 'o ye who believe' is general it also includes children. In addition there is a narration which states that a boy from the tribe of *Ghassān* whose age was ten had made a bequest to his uncle; the matter was brought to ᶜUmar who then validated the bequest"[85] It is also argued that bequest is a purely beneficial act, in the sense that it brings the child some reward and that nothing detrimental is inflicted upon him whether in this world or hereafter.

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[85] Narrated by Mālik in his *Muwaṭṭa'*, Ḥadīth no.734

On the other hand, the Hanafī,[86] the Zahirī[87] and Shafi°ī [88](in another view) opine that the bequest of a child is not valid both because he is not fit to comply with legal commandment (*mukallaf)* and because there exists an authentic *Ḥadīth* which stresses that the liability is exempted from a child until he reaches puberty. This means that any act issuing from the child including bequest is not valid. Unlike the previous view, they maintain that a bequest is one of the purely harmful acts because it causes loss of property in similar way to donation of which a child is not entitled. They also interpreted *Ḥadīth* of °Umar as referring to a child who was about to attain the age of puberty.

Having weighed both opinions together with their evidence I am inclined to prefer the view which validates the bequest of a child. This is because apart from the strong textual evidence, in my opinion a bequest cannot be considered as a purely harmful act since its effect begins only upon the death of testator(*mūṣī*) i.e. the child. Furthermore the law of bequest gives the right to the testator to revoke the bequest as long as he is alive.

Can a child hire himself?

If a child hires himself to work with another person (to become an employee) the Malikī and the Hanbalī consider such an act to be a mixture of both harm and benefit ; thus the act will only be valid if the consent of his guardian is obtained[89]. However, the Shafi°ī[90] are of the opinion that a child cannot enter into a contract of hire due to their

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[86] *Al-Hidāyah*, vol 4, p.234
[87] *Al-Muḥallā*, vol 9, p.330
[88] *Mughnī al-Muḥtāj*, vol 3, p.39
[89] Al-*Mughnī*, vol 6,p.4 , *al-Sharh al-Saghīr* vol 2, 264
[90] *Mughnī al-Muḥtāj*, vol 2,p.332

condition that in order to be a contracting party a person must be prudent. They even consider this hire as purely harmful and as such a child should not allowed to exercise a right to it. This view is also shared by the Hanafī, except that they hold that in the case where the contract is carried out, the child is entitled to a quoted wage (*ujrah musammā*). It appears that the view of the Mālikī and the Hanbalī is more preferable due to the fact that the final decision is vested with the guardian not the child himself.

Can a child take part in trading?

According to the Hanafī and the most preponderant view of the Hanbalī a guardian is authorised to give permission to children under his custody to enter into a contract of sale. This is based on the Qur'ān (4:6) which shows that the test of an orphan will only be realised by permitting them to conclude a sale without guardian so that they will know whether they gain profit or otherwise. In addition, a discerning child is considered to be of interdicted sound mind person similar to a slave; thus his act should be valid with the consent of his guardian. [91]It is also argued that the interdiction[92] on a child is not due to the childhood itself; rather it is due to a lack of the capacity to make judgements or decisions. Hence, this lack can be rectified by assistance from the guardian.[93]

On the other hand, the Shāfiᶜī and the Hanbalī in one view hold that the permission given by the guardian to a child is void; hence a contract issuing as a result of

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[91] Al-Mirghīnānī, ᶜAlī bin Abū Bakr, *al-Hidāyah Sharḥ al-Bidāyah* , *al-Maktabat al-Islāmiyyah*, Beirut, n.d, vol 4, p.11

[92] On the meaning of interdiction, see chapter three

[93] *Ibid*, al-Hawārī, Muḥammad ᶜAbd al-Raḥmān, *Baḥth fī al-Ḥajar wa Atharuhu fī Ḥimāyat al-Amwāl li Mustaḥqqīhā Fī al-Sharīᶜat al-Islāmiyyah, Dār al-Hudā*, Cairo, 1989, p. 89

that permission will also be void as what is established on void is also void. This is because according to the Shāfiᶜī principle, a mixed contract is invalid and void without subjecting it to the consent of the guardian as the permission to carry out a trading will depend very much on selling and buying of which one pillar is the prudence of the contracting parties.[94] The meaning of the Qura'nic verse cited by opponents to this view should be in- the words of al-Kiyā "that the testing *(ibtilā)* before puberty is not in the form of handing over a property... rather it is realised by testing in worldly and religious matters such as educating him to do good things and observing trading activities in order to grow up in good environment"[95] It is submitted that the first view which gives the guardian a role to consent a sale carried out by the child is preferable due to the strong argument based on the Qur'ān .

2.3.6.2 The ECC

Similar to Islamic law, minors in the ECC are of two categories; discerning and non-discerning .A non-discerning child is legally incapable of carrying out any contract regardless of the kinds of contract whether beneficial or harmful. Thus, for instance the child is not fit to receive a gift or other donations.[96] Article 45 clearly states that " A person devoid of discernment owing to minority, insanity or imbecility is incapable of exercising his/her civil rights, whoever has not attained the age of seven is considered devoid of discernment". As a result, any contract issuing from a non-discerning child is absolutely void as evidenced from article 110 which reads, " A non discerning child has no rights to dispose of his property, and all his disposition is void". It is noteworthy that "

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[94] Al-*Sirāj al-Wahhāj*, p .173
[95] *Ahkām al-Qur'ān* , vol 2, pp.113-114
[96] Al- Badrāwī, *al-Naẓariyyat al-ᶜĀmmah li al-Iiltizāmāt*, p. 120, Yahya, *Durūs fī Mabādi al-Qānūn*, p. 75,al- Sanhūri, *al-Waṣīṭ fī Sharḥ al-Qānūn al-Madanī al-Jadīd*, vol 1, p .273

absolute void" renders the acts of child as if they had never taken place and have no legal effect, a matter which carries two important consequences. Firstly, the nullification of a contract does not rest solely on the child and his guardian; rather, everyone who has interest can apply for nullification from court. Secondly, there is no concept of ratification in a void contract which means the consent of the guardian will be of no effect whatsoever on the contract concluded. In other words, the law has never recognised the existence of a void contract and its effect. For instance, in a contract of sale, the subject matter will never transfer from the seller to the buyer.[97]

With regards to the contract and disposition of a discerning child, the law recognises that the child at this stage has some kind of discernment even though it is not complete as in a mature person. According to general principle, a contract of a discerning child is valid if its nature is purely beneficial such as accepting a gift and a bequest.[98] Likewise, his contract will be null and void if it involves a purely detrimental act such as giving a gift or becoming a guarantor. In both cases, the consent of the guardian plays no role in determining the validity of this kind of contract. To this effect, article 111 of the ECC states " In the case of a discerning child , all his financial disposals shall be valid if they are pure beneficial, and void if they are pure harmful "

However, as for contracts that may fluctuate between benefit and harm (such as sale and lease),these will be voidable (*qābil lial- ibṭāl*) in favour of the child. The guardian and the court by virtue of law are authorised to ratify such contracts; in addition the child himself has the right of ratification after attaining the age of puberty.[99] This

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[97] Al-Fiqī, *Durūs fī Nazariyyat al-Iltizāmāt*, p. 118
[98] Al-Sanhūri, *al-Waṣīṭ*, vol 1, pp.275-276
[99] Article 111 of the ECC

means that once the contract is concluded the law recognises its existence and its effect unless there is repudiation from the child or his guardian. In the case of repudiation, the contract will be regarded as non- existent. Similarly if ratification is given whether by the guardian, court or the child himself upon reaching the age of puberty, this will be final, meaning that no further repudiation is allowed. It should be noted that the right to repudiation would lapse three years after attaining the age of puberty.[100]

The contract will remain valid so long as no proceeding to nullify it has been taken for which a verdict from a judge must be obtained. Thus, it is not sufficient to nullify a contract carried out by a discerning child by a mere action from those possessing authority (a guardian, the family court or the child himself), instead, a court proceeding is inevitable.[101] Therefore, according to this requirement, a contract of a discerning child is not void by merely not obtaining ratification from the parties concerned since the nature of the contract is not suspendable pending the consent of the guardian or the court; rather the contract itself is considered valid with all its effect until the nullification is obtained. Hence for instance, in a contract of sale, the contract will remain valid unless there is nullification, a matter which is contradictory to Islamic law since the latter considers such a contract to be valid only if the consent of the guardian is obtained, otherwise it would be void.[102]

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[100] Article 141

[101] Al-Badrāwī, *al-Naẓariyyāt*, p. 129. Indeed, the Preliminary Draft of the Code reads " It is sufficient to nullify the contract due to incomplete capacity by the announcement of another contracting party officially stating the reason of nullification and its evidence. If this is done the contract is considered void since the time of issuing". However, the Civil Code Committee at the Senate level has omitted this provision in order to avoid the generalization of principle relating to " request for nullification" and to avoid any difficulties that may arise from the implementation of the proposed provision. See, *Majmūᶜat al-Aᶜmāl al-Taḥḍīriyyah li al-Qānūn al-Madanī, al-Ḥukūmat al-Miṣriyyah , Maṭbaᶜah Dār al-Kitāb al-ᶜArabī*, Cairo, n.d, vol 2, pp. 340

[102] Al-Badrāwī , *al-Naẓaryyāt* .p.128

It is a fact that in the case of a contract being nullified, the effect of this will be retrospective; this enables the child to redeem what he has already paid to the other contracting party, although only where a certain amount of benefit arises from the enforcement of the contract.[103] It should also be noted that the child or the guardian retains the right to nullify the contract even if no[104]deception *(ghubn*) is inflicted[105]. In other words, deception is not a pre-requisite to invalidate a contract.

The preceding discussion is concerned with general rules imposed by the law on the contract of minors; however, there are some exceptions in which a child is assumed to possess full legal capacity. These exceptions are either by force of law or by power exerted by the guardian. As far as a discerning child is concerned these exceptions can be divided as follows.

2.3.6.2.1Starting from the age of seven

Article 61 of the Law of Guardianship Over Property of 1952 (LGP)states that " a discerning child has capacity to dispose of property placed under his custody for his maintenance according to the custom; his obligation is subjected to this property only". It thus clearly shows that a discerning child enjoys full legal capacity with regard to property given to him for his maintenance; He therefore has the right to dispose of it even if it involves a purely harmful act such as donation *(tabarru)* It seems that the purpose of this legislation as maintained by Ahmad Salamah is that " ... the legislator by providing

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[103] See article 143

[104] *Ghubn* is a condition in which one of the exchange matters (price and object) is not balanced to another such as the price of a sold item is lower or higher than the market value. The *ghubn* may be in the side of the buyer or the seller, see:Anwar Ṣulṭān, *Maṣādir al-Iltizām fī al-Qānūn al-Madanī al-Urdunī Dirāsah Muqāranah bi al-Fiqh al-Islāmī, Manshūrāt al-Jāmiᶜat al-Urduniyyah,* Amman, 1987, 1st edition, p. 83

[105] Al-Badrāwī, a*l-Naẓariyyāt,* p. 130

this exception has fulfilled the demand of practical necessity in the sense that it is illogical to implement the general rules on every transactions carried out by the child even if they involve only buying sweets or giving donations of the amount of five piasters"[106] Furthermore this exception has its counterpart in Islamic law whereby some scholars (especially those of Hanbalī) invalidate the contract of a child in trivial matters.

In addition, it is also allowed by virtue of article 62 of the same law for a discerning child to conclude a labour contract; however the court upon request by the guardian has the jurisdiction to terminate such a contract to protect the child's interest or his future or any other apparent interest.[107]

2.3.6.2.2Starting from the age of sixteen

When a child reaches the age of sixteen, he is fit to disposal including entering into a contract involving what he gains from his work. Undoubtedly, the legislator by this exception considered that by giving him full capacity as regards to these earnings a child who is able to gain income from his work would be morally supported. Thus, he is allowed to carry out transactions as he wishes.[108]

2.3.6.2.3Starting from the age of eighteen

An eighteen year old child is allowed to carry out trading activities (including a contract of sale) provided that permission from court is obtained. The wisdom behind the

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[106] Ahmad Salamah, *al-Madkhal li Dirāsat al-Qānūn*, p. 51
[107] *Ibid*
[108] *Ibid*, p.52

need to seek this permission is due to the risk of trading activities that may cause loss of property of the child.[109] Similarly, a discerning child having attained the age of eighteen may be permitted to manage and administer his property (***a^{c}māl idārah***). Such permission must issue either from his guardian in the presence of notary(*muwaththiq*) and be made public, or from the court on satisfying itself as to the child's justification, however, in the event of permission being denied by the court , the child must wait for a period of one year before re-applying.[110] The EgCC has ruled that once the consent of the guardian has been obtained, the child is considered to be having full capacity within the limit of this consent.[111]

A child is also entitled to execute a bequest after obtaining permission from the court; nevertheless, some jurists argue that by allowing such an act, the interests of the child are put at risk due to the fact that bequest is considered as a purely detrimental contract. However, in my view, the bequest can still be justified –as similar to Islamic law-because it will take effect after the death of testator, and hence no injury is inflicted on the child's property [112]

2.4 Summary

From the foregoing discussions, it can be concluded that there are more similarities than differences between Islamic law and the ECC with regards to contract of minors. Both systems agree for example that a non discerning child is not legally allowed to enter into a contract, however, there is a view in Islamic law which permits a non

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[109] Al-Fiqī, *Durūs fi Nazariyyat al-Iltizām*, p. 120
[110] *Ibid*, al-Sanhūrī, *al-Waṣīṭ*, vol 1, p. 276
[111] EgCC dated 4/3/1980
[112] Al-Suddah, *Maṣādir al-Iltizām*, p. 173

discerning child to enter into a contract of sale if the property involved is trivial, a principal that should be adopted by the ECC. As for the discerning child it seems that the ECC has adopted the Hanafī view in classifying the acts of the child; however, the ECC differs from Islamic law in determining the age of prudence at twenty one whereas in Islamic law it is determined by two means, physical and assumptive signs. Likewise the contract of a discerning child, which involves benefit and harm such as sale, is not held to be valid until the consent of the guardian is obtained whereas in the ECC the law presume such a contract valid unless there is nullification from the guardian or from the child himself after he attains the age of maturity. In short in many aspects the ECC does not contravene Islamic law.

CHAPTER THREE: INSANITY(*JUNŪN)* AND IMBECILITY (*ᶜATAH*)AND THEIR EFFECTS ON CONTRACT

3.1 Introduction

We have seen in chapter one that jurists are unanimously agreed on considering 'reason' (*ᶜaql*) as a basis for legal capacity. When 'reason' is defective a person is no longer said to possess such capacity. This defect, - generally known as 'insanity'- has been unanimously recognized by jurists as one of the impediments on legal capacity. In other words, the inclusion of insanity under 'impediment to legal capacity' (*ᶜawāriḍ al-ahliyyah*) is not disputable even by those jurists[1] who narrow down the scope of impediment. Similarly, the ECC has recognized insanity as an impediment, the presence of which will affect a person's fitness to enter into a contract. In this chapter, the study will thus involve the concept of insanity, its classification and consequences on contract. In addition the concept of imbecility and its relation to insanity will also be discussed.

3.2 The meaning of insanity

The attempt to determine the concept of insanity is regarded as one of the most complicated problems. Questions such as where and when 'reason' stops and when 'insanity' begins are the indicators of the difficulties of defining 'insanity' with accuracy, as Lord Blackburn has concluded: " I have read every definition which I could meet with and never was satisfied with one of them and I have endeavoured in vain to make one satisfactory to myself. I verily belief that is not in human power to do it"[2] Although there might be some exaggeration in his statement, it is indisputable that there is no single

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[1] Such as Husayn al-Nūrī and al-Zarqā', see chapter one, pp.33-34

[2] Cook, William G.H, Insanity and Mental Deficiency in Relation to Legal Responsibility. A Study in Psychological Jurisprudence, George Routledge & sons, London, 1921. p.1

definition of insanity which satisfies all branches of knowledge. Apart from being a question of what is set out in the ECC and Islamic law, insanity has also to be looked at from a medical point of view since it involves medical concepts in the first instance. However, the law is not necessarily bound by medical definition alone as it also cannot overlook the role of medical interpretation pertaining to insanity. For this reason, the meaning of 'insanity' will be examined from these three perspectives: Islamic law, the ECC and medical opinion.

3.2.1 Islamic law

It is an undisputed fact that jurists are not agreed on the exact meaning of insanity; this is despite the appearance of the term *junūn* (insanity) and its derivatives in a number of instances in both the Qur'ān and the *Ḥadīth*. As such, various definitions of insanity can be found in their work; nevertheless there is a common meaning –as will be seen later- shared by the jurists. It is noteworthy that jurists in discussing the meaning of insanity have *en passant* touched upon its antonym, i.e. 'reason'. For instance al-Bukhārī has discussed in detail the concept of 'reason' upon which the meaning of insanity is built. According to this juristic definition, a person possessed of reason is - in an abstract sense - able to demonstrate an unseen phenomenon from a seen one, is able to predict the outcome of a specific matter and distinguish between good and bad.[3] Thus, in the absence of such capacity the state of 'insanity' is said to exist.

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[3] *Kashf al-Asrār*, vol 4.p.263

Lexically, [4]the word *junūn* is derived from the root word *janna,* which means 'to cover or to conceal'; thus an embryo is called *janīn* because it is 'concealed' in the womb. Some lexicographers suggest the word *janna* also bears the meaning of 'darkness' such as *janna al layl (*the night has come*)*.[5] These literal meanings suggest that there is a correlation between them and *majnūn*(an insane person) in that a person becomes insane when his reason is concealed and 'in a state of darkness', so that it can no longer function.

Technically, there are a number of definitions with regard to 'insanity'. To mention but a few, Ibn Malik, one of the Hanafī scholars defines insanity as a 'pest' in a person's brain –physically normal-causing him to act against 'reason'.[6] According to Ibn Amīr insanity is a mental derangement that-except in rare situations- prevents the issuing of deeds and utterances in the normal manner as they issue forth in sanity,[7] while Tiftazānī sees it as a derangement of the ability to distinguish between 'good' things and 'bad' things, as well as the inability to know the outcome of something.[8]

From the above definitions, it seems that in spite of their differences in wording, their meaning is almost identical, in that all these definitions concur that insanity is a kind of mental disorder which prevents the brain from functioning normally. Thus, the existence of insanity will negate the ability to discern (*idrāk*) where a person affected with insanity (insane) is not aware of consequences that may arise from his acts, even if his act appears to be 'good'. It is to be noted that insanity results only from 'mental' not

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[4] *Tartīb Mukhtār al-Ṣiḥāḥ,* pp.151-152

[5] Hans Wehr, A Dictionary of Modern Written Arabic, edited by J Milton Cowan, Macdonal & Evans Ltd, London, Librairie Du Liban, Beirut, 1980, 3rd edition, p. 138

[6] Ibn Malik, *Sharḥ al-Manār fī uṣūl al-Fiqh, Maṭbaᶜah ᶜUthmāniyyah,* n.p, 1314 H, p. 340

[7] *Al-Taqrīr wa al-Taḥbīr,* vol 2, 231, Ahmad Hassan, The Principles of Islamic Jurisprudence, p.309

[8] *Sharḥ al-Talwīḥ ᶜAlā al-Tawḍīḥ,* vol 2,p. 167

'physical' disorder. In other words, a person might be normal in terms of physical structure but his mental capacity is defective, as can be seen clearly from Ibn Malik's definition. Another important point to note is that, jurists in their definitions seem to have emphasized the effect of insanity on the insane themselves, as well as upon others. They were not however, concerned with the methods to cure insanity as this is left to medical practitioners.

Having said this, it should be noted that- as mentioned earlier- the word *junūn* has been used in the Qur'ān and *Ḥadīth* as well as in the works of jurists. However, the question arises as to whether the concept of insanity as prevalent during the Prophet's time is similar to that discussed by the jurists. In other words, when the Prophet P B U H said " The pen has been lifted (liability is exempted)for three persons... an insane person until he recovers"[9], was he referring to a specific mental illness of his time, meaning that insanity is a static concept which cannot be developed beyond this context? To address this problem, it must be looked at from different aspects. Firstly -having admitted that the Prophet P B U H was able to cure some diseases -the main purpose of Islamic teaching is to guide mankind to the true path; thus it was not the prophetic task to explain in detail types of illness and their cures. Rather, the task from the point of view of *Sharīʿah* is to disseminate Allah's commands and prohibitions through the Qur'ān and the *Sunnah* . Secondly, with special reference to the *Ḥadīth* cited above, its purpose is to judge the effects of a deed carried out by an insane person, not its cause. Therefore, it can be concluded that the meaning of insanity in the *Ḥadīth* is the lack of reason; this meaning- in my opinion-is immutable until the present day albeit different nomenclature.

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[9] Part of *Hadīth* narrated by Abū Dāwūd, *Kitāb al-Ḥudūd* , *Ḥadīth* no 4403

3.2.2 The ECC

A survey of Egyptian law pertaining to the meaning of insanity should include how the legislature (the legal provision) and jurisprudence as well as judicial rulings interpret insanity in accordance with the way Egyptian law is generally studied. With regard to the legal provision embodied in the ECC, it is important to note that, unlike some other countries which prefer to fix the definition of insanity in their Code, the ECC has taken an opposite stance in not determining precisely what 'insanity' is. Although article 45/1 of the Code is meant to deal with 'legal incapacity' including that of insanity, the exact meaning of insanity remains unaddressed. Notwithstanding whether the legislator -as in most cases - has purposely ignored the need for legal definition or not, this tendency is in fact thought to be both plausible and laudable by a large number of jurists. For the creation of a legislated definition to be incorporated in statute form for any concept such as insanity may carry negative implications, aside from the impossibility of determining a comprehensive definition to cover everything regarding insanity. In other words, if a certain meaning of 'insanity' is fixed, the implication is that this is sufficient to incorporate all known mental illnesses at the time of legislating; however, this is not to say that other mental diseases may not be discovered in the future. As a result, the insane will be in jeopardy and society itself will not be protected from those newly judged as insane.[10]

Moreover, such a meaning is of no use in the case of a mental patient if that specific meaning does not cover his particular state of insanity. If this happens to be the

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[10] Ibrāhim, *al-Mas'ūliyyat al-Madaniyyah li ᶜAdīmī al-Tamyīz* ,p. 66

case, there will be a conflict between "reality" and "definition", regardless of that 'reality', raising the question of whether we are bound by that definition at the expense of reality or *vice versa*. Thus, since 'reality' cannot be neglected, there is no significance in giving definition to insanity. In addition, as maintained by Jalal Muhammad, to legislate for any concept such as 'insanity' would be extremely difficult due to the fact that medicine as a branch of knowledge by its very nature has the potential to develop and continue, whereas this is not the case for law as legal texts represent stability. As such, any attempt to legislate for the concept of 'insanity' will have to combine two contradictory elements, a task that is very difficult to achieve if not impossible.[11]

Nevertheless, this is not to suggest that legislation may not play any role in dealing with the clarification of insanity; rather, its role is required to put a general framework to the concept, leaving the details to be treated by jurisprudence and the judiciary.

The Jurisprudential view of insanity

Before further discussion, it is noteworthy that the aspect on which jurists have focused to define 'insanity' is different from that looked at by medical experts, in the sense that the former have taken into account both the concept of relating the legal act to the person (*isnād al-taṣarruf al-qānūnī*) who has committed it, and the extent to which that relationship is appropriate to that act. In other words, the legal definition of insanity is based on interest, meaning that the jurists when attempting to put a definition to insanity are not concerned with medical perspective; rather, the interest of those mentally

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[11] *Ibid*

affected and the other parties take priority. As such all the definitions given are based on this criterion.[12] For instance, ᶜAbd al-Bāqī defines insanity as a defect of a person's mind, resulting in removal of his discernment.[13] Nabīl Ibrāhim has also offered a similar definition where he maintains that insanity is an 'illness' affecting a person's mind, that negates his 'discernment'; as such his acts and words are void.[14]

It can be observed from these definitions that jurists have focused more on the 'interest' of those affected with insanity as well as on the interest of the other parties affected by the acts of the insane, be it civil or criminal. For instance, in Nabil's definition it is clearly stated that an 'act' or 'word' uttered by an insane person is considered void. In other words, the legal consequences of insanity are to be looked at first in order to give a correct definition, irrespective of the 'cause' of the insanity itself. It is to be noted that, the definition of insanity is not to be found in judicial ruling, the court being content with what has been given by the jurists in this matter. However, the court reserves the right to adapt the meaning of 'insanity'. In one ruling, for example, the EgCC held that a medical doctor has no authority to adapt the meaning of impediment (*ᶜāriḍ*) or the definition of 'insanity'; rather the task of giving a legal definition is left to the jurists, while the court has the right to adapt the meaning of impediment[15]

In my opinion, the implications of this ruling from the EgCC should be clearly comprehended. This is because the role of medicine in determining insanity cannot be ignored since – as previously mentioned - insanity is a question of medical perspective in the first place. Perhaps the meaning of this ruling is that the medical view (in spite of its

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[12] Al-Sharafī, *Ḥukm al-Taṣarrufāt al-Qānūniyyah li Fāqid al-Ahliyyah*, p.109
[13] Quoted from *Madā Ahliyyat al-Ṣabī, p.172*
[14] Saᶜad, Nabīl Ibrāhīm, *al-Madkhal ilā al-Qānūn, Munsha'at al-Maᶜārif, Alexandria, 2001* p.177
[15] EgCC, cas.no 1290, dated 13/6/1979

importance) will not bind the judge in any decision he may take; thus the cooperation between the legal and medical role is demonstrated. Some jurists maintain that the role of the medical practitioner is confined to determining the existence of mental illness and its effect on 'a person', not to determine its effect on legal capacity which is the concern of the law not medicine.[16] On the other hand, there are jurists who see that the collaboration between judge and doctor is vital. In this respect Husayn states:

> "A number of jurists hold that there should be corroboration between judges and doctors in determining legal capacity; this corroboration has to take place at a very early stage...the judges should involve themselves in researching the conditions of mental illness in order for them to be rightly guided when delivering a verdict relating to the existence of legal capacity. They are not bound to follow medical views as this latter represents only advice not evidence... This corroboration between judges and doctors is vital in order to avoid confusion between them in matters relating to legal capacity"[17]

3.2.3 Medical Perspectives

At the outset it should be noted that it is not the purpose here to give a detailed account of the subject of insanity as it is studied within the ambit of medical science, as to do so a special knowledge of medical science is essential. Rather, the following discussion is designed and intended to give a very brief account regarding insanity, inasmuch as it differs from the previous two meanings of the concept; from ECC and Islamic perspectives. In other words, the purpose of including a discussion of the concept of insanity here, is to explore what the differences exist between the three views (Islamic, legal and medical). This is because - as previously mentioned - jurists and medical experts each approach the subject from a different point of view; for this reason the jurist

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[16] Riḍā ,Husayn Tawfīq, *Ahliyyat al-ᶜUqūbah Fī al-Sharīʿat al-Islāmiyyah wa al-Qānūn al-Muqāran, Maṭābiᶜ Āmūn,* Cairo, 2000, 2nd edition, p.172

[17] *Ibid*,p. 173

is no more entitled to assert that the medical test of insanity is impracticable than the medical men is justified in stating that the legal test is inadequate.[18]

3.2.3.1 Medical Definition of Insanity

In fact, 'insanity' is not the single term used to denote illness arising from mental problem as it may be interchangeably used with other terminologies such as 'madness', 'lunacy', 'craziness' etc. Even as an umbrella term for mental illness interpretation are numerous as sometimes this refers to 'mental disorder' and in other occasions it refers to 'mental deficiency'. According to Tony Whitehead there is another term called 'mental handicap' now used to describe what used to be referred to as mental sub normality and before that to mental deficiency [19].However, his view seems to be challenged by another scholar; in this regards Bernard Ineichen states:

> "It is necessary to distinguish mental illness from mental handicap. Mental illness can be treated and often cured; sometime the symptoms simply disappear in time. Mental handicap (or its old name, mental deficiency) refers to the inability do develop intellectually beyond certain limits, and is usually characterized by brain defect or injury. In many cases mental handicap is present from birth; it often accompanied certain physical condition such as spasticity or hydrocephalus, though those suffering from such conditions are not necessarily mentally handicapped"[20]

If anything can be concluded from these two scholarly statements, it is the difficulty in determining mental illness - including insanity - even among medical experts; as in the words of Agnes Mile, there is no consensus opinion on the subject, in spite of voluminous literature.[21]

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[18] William, Insanity and Mental Deficiency,pp.1-2
[19] Tony Whitehead, Mental Illness and the Law, Basil Blackwell, Oxford, 1982, 1st edition, p. 5
[20]Ineichen, Bernard, Mental Illness, Longman, London and New York, 1979, 1st edition, p. 2
[21] The Mentally Ill in Contemporary Society, A Sociological Introduction, Oxford Robertson, 1981 p. 1

In spite of this, some medical experts have attempted to put a definition to insanity as for example has Henry Maudley, who states that "insanity is disorder of brain producing disorder of mind"; in other words it is a disorder of the supreme nerve centre of the brain producing derangement of thought, feeling and action, together or separately, of such degree or kind as to incapacitate the individual for the relation of live.[22]

Having said this, there are different categories of insanity known to medical practitioners; while in some of these categories the mind is completely and permanently disordered, in others the mind is only partially or intermittently disordered.[23] According to one classification insanity is divided according to it causes in which it is in turn divided into two; organic insanity and functional insanity. The former concerns kinds of insanity arising from physical illness such as congenital insanity and delirium tremens, whereas the latter involves no physical illnesses. This latter can be further divided into several categories as follows;

1-Amentia where there is absence or weakness of mind; falling within this category are;

a. **Idiocy**: a defect of mind which is either congenital, or due to causes operating during the first few years of life before there has been a development of the mental faculties. Idiots are not only incapable of earning their own living but they are also incapable of preserving themselves from the risk of the physical harm which is present in their ordinary physical environment.[24]

b. **Imbecility:** this exists where the defect of mind is so great that the sufferer is unable to own his living. Imbecile are unable, without assistance to adapt

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[22] Insanity and Mental Deficiency, p.2
[23] *Ibid*
[24] *Ibid,p.3*

themselves to their general environment because their intellectual powers are not sufficiently developed

c. **Morons**:They are the highest grade of feebleminded person as they are mentally defective adults whose intelligence is equal to that of a normal child between the ages of seven and twelve years.[25]

2- Dementia, where the mind which once was normal becomes deranged; falling within this category are:

a-**Ideational insanity**: This comprises cases in which there is insanity of thought or insanity with delusion

b:**Affective insanity**-This comprises cases in which without delusion or incoherence there is derangement of feeling or of the emotion.

c- **Insanity of the Will**: This comprises cases in which there is derangement of the will.[26]

In fact, these divisions are further subdivided, however it is not the intention here to explain in detail the medical perspective on insanity due to the fact that these classifications do not greatly concern jurists. This is because as far as jurists are concerned - as previously mentioned - their perception on insanity is limited only to how the existence of such insanity will affect the ability of the person affected in such a manner that the condition will be taken into account by the law in order to relate acts issuing from that person in the sense that if a person's ability is removed, then the law will consider him as insane even if his health condition does not fall within any of the abovementioned medical classifications. Medical experts, on the other hand have attributed insanity to these classifications for the purpose of seeking treatment, which

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[25] *Ibid*
[26] *Ibid*,p.6

varies from one situation to another. In other words, the medical experts have looked at insanity as 'illness', as such; they have attempted to diagnose this illness and tried to find the causes in order to ascertain a cure.

This has led some jurists to conclude that in order to determine a legal meaning of insanity, its medical meaning should not be heavily relied upon, or as put by Palero :" It is hard to deduce from medical terminologies any element which may suit the definition of insanity". This said, despite the fact that medicine has shed light on the concept of insanity, it has not made an effective contribution towards determining the legal meaning of such concept, a matter which should be referred to the law itself for definition.[27]

3.3 Classification of Insanity

3.3.1 Islamic law

According to Islamic law, insanity can be classified into several categories as follows;

3.3.1.1 Regular insanity(*jun ūn aṣlī*) and irregular insanity(*jun ūn ṭārī'*)

Regular insanity is associated with a person from his birth until he attains the age of majority. The cause of this insanity is a defective physical condition of the brain resulting in unfitness to receive what it is intended to receive. Thus, although the brain is physically existent it cannot function, as in the case of a blind person or a mute whereby both are not able to see or speak respectively in spite of the physical existence of eye and tongue.[28]This kind of insanity cannot be cured and any attempt to do so would be meaningless. Irregular insanity on the other hand appears after a person has attained

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[27] *Al-Mas'ūliyyat al-Madaniyyah*,pp.60-61
[28] *Sharh al-Talwīh ᶜAlā al-Tawḍīḥ*, vol 2, p.167, *Kashf al-Asrār*, vol 4, p.264

majority and sanity with mature understanding. According to the jurists, irregular insanity is of two kinds, the first of which occurs when the function of the brain is interrupted, and as a result cannot work properly. Nevertheless, there is hope that this type of insanity can be cured.[29] The second type occurs as a result of the 'Devil's control' over human beings, whereby Satan would affect a person's mind in such a manner that he would imagine something unreal. In this situation such a person's mind is abnormal, in spite of the normality of his physical brain condition. This kind of insanity, which is also known as "the satanic touch", can be cured through some kind of prayer in the eyes of the *Sharīʿah*.[30]

Looking at these classifications some observations should be made. Firstly, in regard to regular insanity, it seems that the jurists have presumed that its existence starts at the time of birth, and that this will continue until a person reaches the age of majority. However, such a definition implies that there is no possibility for a child to be affected by insanity after birth, and before the age of majority. In other words, if the period between birth and the age of majority is fifteen years, for example, then there will be no possibility that a child is born sane, but becomes insane before attaining majority. The jurists do not address this question, as can be understood from their definition of regular insanity. In my view, this is because - as previously stated - the purpose of classifying insanity is to look at the legal consequences of an act carried out by the insane. Thus, if an act carried out by an insane person is void, the same is true with regard to that of a child.[31] Secondly, the distinction between 'regular' and 'irregular' insanity is only

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[29] *Al-Taqrīr wa-al-Taḥbīr*, vol 2,p. 231,*Sharḥ al-Talwīḥ*, vol 2, 167,

[30] *Ibid*

[31] Since both insanity (*junūn*)and minority (*ṣighar*) are impediments to legal capacity the existence of one of them is sufficient to annul legal acts carried out. However there could be a possibility that a person is affected with more than one impediment such as in the case of an insane child.

significant in matters involving worship (*ʿibādah*), while within the ambit of a civil transaction it has no significance.[32] The effect of a contract carried out by an insane person for instance, is the same whether his insanity is classified as 'regular' or otherwise. On the other hand, in worship, such as fasting, its outcomes will depend on the types of insanity; regular or irregular.

3.3.1.2Full insanity'(*junūn kullī*) and 'partial insanity'(*juz'ī*)

In respect of 'partial insanity', those affected are lacking in 'discernment' and 'reason' in certain issues, but they remain sane and of sound mind in other matters, as in a person whose brain does function in certain topics, but not in every area. In contrast, in the case of 'full insanity' a person affected fully lacks reason and the ability to use his brain.

3.3.1.3 Continuous insanity (*junūn muṭbiq*) and intermittent insanity(*junūn ghayr muṭbiq*)

'Continuous insanity' occurs when there is no intervening period of sanity. In other words, a person affected with this kind of insanity will fully lose his reason, regardless of time factors, but if he recovers, he will fully gain his reason. As for 'intermittent insanity', this is a situation in which an insane person will regain his capacity to reason from time to time, meaning that the period of insanity will be interrupted by a period of sanity. For instance, there might be a person who is 'sane' in the morning but becomes insane in the afternoon. It should be noted that the period of 'insanity' after which a person becomes a continuous insane is not agreed upon by the

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[32] *Al-Mas'ūliyyat al-Madaniyyah* , p.120, *Kashf al-Asrār* , vol 4,pp.265-266

jurists. According to Abū Yusūf, continuous insanity occurs when the period roughly approximates one year while Muhammad bin Hasan is of the opinion that a complete year is a pre-condition for classification as continuous insanity. Meanwhile, Abu Hanīfah, whose opinion is preferred by his followers, seems to have shortened the period to only one month.[33] It is not quite clear on what basis these jurists have based their argument, after having admitted that there is no evidence in the Qur'ān or the *Ḥadīth* to support their views. The only possible argument is perhaps by resorting to custom, since this is regarded as a source by which to establish legal rules in Islamic law. If this is the case, this means these jurists could have experienced different customs resulting in differences of opinion. At the same time, the question still arises as to how custom could differ greatly since the jurists concerned were contemporaries. While it is not the purpose here to enter into a detailed discussion of custom, it does seem that these jurists may have given their views under specific circumstances which differ from one to another.

Regardless of these juristic discrepancies, the fact remains that in determining the period of 'insanity', no conclusive evidence can be found, therefore it is accepted that this matter may vary from time to time and should thus be referred to those concerned, i.e., judge and medical experts.

3.3.2 The ECC

Unlike Islamic law, the ECC does not provide any classification for insanity; thus terms such as regular insanity, irregular insanity and the like are absent in legislature as well as in the works of jurists. Indeed the Preliminary Draft of the Code has even preferred not to use the term insanity; instead the term mental illness (*ᶜāhat al-ᶜaql*) is

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[33] *Sharḥ Fatḥ al-Qadīr*, vol 3, p.285, Ibn Nujaym, Zayn bin Ibrāhīm, *al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq*, *Dār al-Maᶜrifah*, Beirut, n.d, vol 3, p.132

used. However, this stance of the Code in not classifying insanity is acceptable if there is no significance therein, since the Code is concerned only with the legal effect of an act carried out by the insane person irrespective of the actual kind of insanity.

3.4 The Effect of Insanity on Contract

3.4.1 Islamic law

By and large, the legal capacity of an insane person is held to be defective, so that he is not capable of entering into any contract of whatever kind as is agreed upon by the jurists.[34] This view is understood as reasonable if a contract is concluded when a state of insanity exists, since it is hard to imagine how such a person may conclude a contract if he is unaware of what he is doing. It thus seems that legal opinion in this matter is more theoretical than practical. However, if one of the contracting parties suffered from intermittent insanity, what then would be the situation? In other words, would the effect of the contract of the insane party be similar to that of the sane if concluded during a period of intermittence? Similarly, while admitting that the insane person is legally incapacitated, a few questions must be addressed such as procedures that should be taken in order to prevent the insane person from entering into a contract, and who is responsible for him in terms of contractual obligations. As such, the following discussions will examine certain rules which apply to insanity, such as the rules of interdiction (*hajr*)and guardianship(*wilāyah*.

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[34] Bāz, Salīm Rustum, *Sharḥ al-Majallah*, *Dār al-Kutub al-ᶜIlmiyyah*, Beirut, n.d, p.549, al-Ramlī,Muḥammad bin Abu al-ᶜAbbās, *Nihāyat al-Muhtāj Ilā sharḥ al-Minhāj*, *Dār al-Kutub al-ᶜIlmiyyah,* n.p, 1993, vol 3, p.385, Ibn Juzay, al-*Qawānīn al-Fiqhiyyah*, n.p, n.d, vol 1, p.163 , Ibn Ḍāwīyān, Ībrāhīm bin Muḥammad, edited by, ᶜIṣām al-Qalᶜajī, *Manār al-Sabīl ,Maktabat al-Maᶜārif,* Riyad, 1405 H, 2nd edition , vol 1, p.288

3.4.1.1 Interdiction (*ḥajr*) on an insane person

3.4.1.1.1 Definition

The Arabic term *ḥajr* from a literal point of view -as suggested by lexicographers- carries more than one meaning which *inter alia* is 'prevention'(*manᶜ*). It is said for example, *hajara al- qāḍī alayh* meaning that the judge has prevented a person from dealing with his property.[35] Reason is also called *ḥajr* as appears in the Qur'ān (89:5) which reads: "Is there not in these adjuration for those who have reason" because its existence will prevent its owner from committing wrong actions.[36] The word also connotes something unlawful as in the Qur'ān (25:22) wherein Allah says; "They (angels) will say this is a barrier forbidden to you".

Inasmuch as there are a variety of literal meanings of the word *ḥājr*, its juristic meaning is also a matter for disagreement among jurists, as every school of legal thought tends to ascribe to it differing meanings. It is thus useful to explore all the definitions and to analyse them accordingly, so that we can reach a single definition which befits the present study. To begin with, Hanafī scholars such as al-Zaylāᶜī define interdiction as a prevention of verbal disposal *(taṣarruf qawlī)* due to minority, slavery or insanity.[37] In this definition the key word verbal (*qawlī)* is purposely used to indicate that actual disposal (*taṣaruf filī)* is not subject to interdiction as a deed is 'unpreventable' after it has taken place. However this definition has been criticized because the actual causes of interdiction are specified, which in turn raises doubt as to whether there other causes

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[35] *Tartīb Mukhtār al-Ṣiḥaḥ*, p.163
[36] *al-Qāmūs al-Muhīṭ*, pp.370-371
[37] Al-Zaylāᶜī, *Tabyīn al-Ḥaqā'iq* , *Dār al-Maᶜrifah*, Beirut 1315 H, 2nd edition, vol 5, p. 190

which remain unstated. This realization has perhaps led Ibn ᶜĀbidīn another Hanafī scholar to propose that interdiction is the prevention of verbal disposal from being enforced (without specifying) the causes of interdiction.

As for the Mālikī, it seems that while various meanings of interdiction can be found in their work, the most prevalent one (as quoted by Ibn ᶜArafah)is " a legal characteristic that prevents the dealings of the characterized individual from being executed beyond obtaining sustenance, or that prevents him from giving his property in charity beyond the first one third."[38]

With regard to the Shāfiᶜī and the Hanbalī, their definitions of interdiction are almost identical. For instance, al-Sharbinī defines interdiction as prevention from committing pecuniary disposal[39] a definition which is virtually the same as that of the Hanbalī[40]

This said, deeper analysis of the above definition raises the following points.

1-The Ḥanafī have confined "prevention" to verbal (*taṣarruf qawlī*) only where the other definitions cover both 'action' and 'word' in spite of their limitations on pecuniary disposal (*taṣarruf mālī*) . Moreover, the Hanafis, (as in Zaylai's definition) prefer to state the cause of interdiction; other jurists did not adopt this.

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[38] Al-Dusūqī, Muḥammad ᶜArafah, *Ḥāshiyat al-Dusūqī ᶜAlā al-Sharḥ al-Kabīr*, *Dār al-Fikr*, Beirut, n.d, vol 3,p.292, *al-Ḥaṭṭāb, Mawāḥib al-Jalīl*, vol 5, p.57

[39] *Mughnī al-Muḥtāj*, vol 2, p. 165, al-Bujayrimī, Sulaymān bin ᶜ Umar, *Hāshiyat al-Bujayrimī* , *Maktabah Islāmiyyah*, Turkey, n.d, vol 2,p.430

[40] *Kashshāf al-Qinā ᶜ*, vol 3, p. 416 ,al-Buhūtī, *al-Rawḍ al-Murbiᶜ* , *Maktabat al-Riyāḍ al-Ḥadīthah*, Riyad, 1390 H, vol 2, p.214 ,note that the Shāfiᶜī's definition in Arabic is (المنع من التصرفات المالية) and the Hanbalī's is (منع الإنسان عن التصرف فى ماله)

2-All definitions have taken into account the literal meaning of interdiction as jurists agree that interdiction is some kind of prevention. This can be seen clearly in the definitions of the three schools (with the exception of the Mālikī) in starting their definition with the word prevention *(manᶜ)* However this latter's definition is distinct in stating what an interdicted person (*maḥjūr)* is allowed to do.

3-None of the definitions is sufficiently comprehensive to depict the definition of interdiction, as each of them has weaknesses which might be open to criticism, which in turn might be used as a loophole in legal dispute. Thus, it is suggested that these meanings be combined to give an accurate definition. Therefore interdiction should be defined as prevention from carrying out verbal disposal or prevention from being enforced in certain matters relating to finance due to lawful reasons in the interest of the parties concerned.[41] This definition is preferred due to the fact that it covers only one kind of verbal disposal and directs that interdiction may carry legal effect, whereas this is not the case as regards 'actual disposal' ; that is to say, a deed such as causing damage to other's property cannot be prevented after that action has taken place. Moreover, not every kind of verbal act should be prevented, as implied in the key word 'certain matters'. In addition, the purpose of interdiction must be lawful and in the interest of either the interdicted person or the other parties.

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[41] Abū al- Rīsh,Ismāᶜīl , *al-Ḥajr wa Asbābuhu fi al-Fiqh al-Islāmī* , *Maṭbaᶜat al- Amānah*. Cairo,n.d, p.18

3.4.1.1.2 The legality of interdiction

Generally speaking, there is a considerable amount of textual evidence frequently quoted by jurists to establish the legality of interdiction. Perhaps the most reliable proof lies in the following verses;

1-"To those weak of understanding, make not over your property which Allah has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice" (4:5) It is thus clear that the Qur'ān forbade guardians from allowing mentally incompetent individuals to take control of their properties, to prevent them from squandering such properties.

2-"Make trial of orphans until they reach puberty, if then you find them of sound judgment, release their properties to them" (4:6) In this verse the Qur'ān has ordered the guardian to test the orphan's abilities in dealing with property; thus if the orphan is found to be capable of such a task, he may be given control over his property. This implies that before their capability is proven the orphans are to be put under interdiction.

3-" If the liable party is mentally deficient or weak, or unable to dictate himself, let his guardian dictate himself, let his guardian dictate faithfully" (2:282). According to al-Shāfiʿī the 'mentally deficient' refers to the spendthrift, the weak refers to children and the one who cannot dictate refers to the insane[42]

It is to be noted that in the above verses the word *ḥajr per se* does not appear, neither does it appear in the remaining verses of the Qur'ān; nonetheless, the meaning of these

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[42] Al-Zuhaylī, Wahbah, *al- Fiqh al-Islāmī* , English edition, translated by Mahmoud A. El-Gamal, Dār al-Fikr, Damascus, 2003, 1st edition, vol 2 ,p. 347

verses as interpreted by commentators such as al-Qurtubī[43] and al-Tabarī [44]quite clearly refers to the general doctrine of interdiction. However, the term interdiction is clearly employed in a Ḥadith narrated from Kaᶜab bin Mālik, where the Prophet had P B U H interdicted Muᶜaz and forced him to sell his property to repay his debt.[45] It is also reported that ᶜUthman the Caliph had interdicted Abdullah Ibn Jafar for overspending[46]

3.4.1.1.3 Insanity as a cause for interdiction

It is worth noting that the causes for interdiction in Islamic law are disputed amongst the jurists to the extent that some such as al- Ansāri, have collected more than seventy causes for interdiction. It is not the purpose of this study to examine in detail all these causes, however; as far as insanity is concerned there is no dispute that this is considered by all jurists as a cause for interdiction.[47]This is based on a *ḥadīth* in which the Prophet PBUH was reported to have said: ' the pen is lifted for three persons; a sleeping person until he wakes up, a minor until he reaches puberty and an insane person until he recovers'. Commenting on the *Ḥādīth* al- Hawārī argues that the meaning of lifting the pen is to withhold *taklīf*(imposing injunction) on the insane person; as such, all

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[43] *Al-Jāmiᶜ li Aḥkām al-Qur'ān*, vol 5, p.28

[44] Al-Ṭabarī, Muḥammad bin Jarīr, *Tafsīr al-Ṭabarī, Dār al-Fikr* , Beirut, 1405 H, vol 4, p.246

[45] Narrated by *Dār al- Qutnī* in his *Sunan*

[46] Narrated by *al-Shafi* in his *Musnad*

[47] See *Badā'iᶜ al-Ṣanā'iᶜ*, vol 7,p.169, al-ᶜAbdarī, Muḥammad bin Yūsuf, *al-Tāj wa al-Iklīl*, Dār al-Fikr, Beirut, 1398 H, 2nd edition, vol 5,p.57, *Mughnī al-Muhtāj*, vol 2,p. 165, *al-Mughnī*,vol 4,p.295. Besides insanity the jurists are agreed on the inclusion of infancy as a cause for interdiction. As for other causes according to the majority of jurist like Māliki, Shafii and Hanbalī the causes are: prodigality, bankruptcy, sickness, marital ties, and pledge. The Hanbalī and Shafi ᶜī have also considered apostasy as a cause for interdiction and the Hanbalī alone regarded ageing as a cause for interdiction. *SeeAbu Rīsh, al-Ḥajr Asbābuhu,* pp.24-25

his actions including contract will be of no legal effect, which is achieved through interdiction.[48]

Interdiction on the insane signifies that they no longer posses active legal capacity, as 'reason' which is the basis of such capacity, is absent in the case of insanity. Consequently, any acts including contract issuing from an insane person are considered null and void according to juristic consensus be they purely beneficial, purely harmful or a mixture of these two. Some jurists liken the act carried out by the insane to that issuing from a discerning child in that both carry no effect whatsoever. To this effect the *Majallah* states that 'the legal rules relating to the disposal of a continuous insane are similar to that of a non discerning child and for the intermittent insane his disposal during the period of recovery is considered valid'[49]. This is despite the fact that a non-discerning child is in better condition than the insane since the former still enjoys some sort of reason whereas this is not the case in the latter.

Having said this, it should be noted that, according to the majority of jurists, the interdiction on insanity is automatic (by force of law) in nature. This means that an insane person is automatically interdicted without having to secure a judicial order. In other words, the permission of the *Sharī ᶜah* alone as embodied in its principles is sufficient to nullify a contract entered into by the insane person. However, the Mālikī[50] are of the opinion that any interdiction on the insane person must be consented to by his father, his guardian or a judge. This rule applies to all kind of insanity, be it continuous or intermittent provided that in the case of the latter the state of insanity does in fact

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[48] *Bahth fi al-Ḥajr fī al-Sharī at al-Islāmiyyah*, p. 134
[49] Article 979, 980
[50] *Hāshiyah al-Dusūqī*, vol 3, p.292

exist. During the period of recovery- in the case of intermittent insanity- such a person enjoys full legal capacity, meaning that his contracts will be legally valid. Similar to its imposition, the interdiction will be lifted on recovery without having to request a court order.[51]Ibn Qudāmah has pointed out to this effect that :

> " the interdiction is removed once its cause no longer exists; when an insane person regains his reason in the consensus of the jurists the interdiction is lifted without depending on a judge's order. The same is true with regard to the infant when he reaches puberty. This is because such interdiction does not require a judicial order; neither does it require one for its termination"[52]

3.4.1.2 Guardianship over the insane

As previously stated, the insane person has no legal capacity whatsoever to enable him to enter into a contract and he is therefore placed under legal interdiction to protect his property. The question of how an insane person could have a property should not be raised due to the fact that his receptive legal capacity is not affected by the presence of insanity. Possessing this kind of capacity alone renders the person fit to receive certain rights such as inheritance. If we suppose that an insane person is an heir to a deceased person, then he is legally entitled to inherit the property left to him according to his portion. However, with regard to other matters an insane person will require a guardian to take care of his affairs, be they financial or personal.

Jurists are of different opinions as to what order guardianship of the insane person should follow[53] . According to the majority the guardian shall be the insane's father provided that he is of a good character, while in the absence of the father the grandfather will take over. In a case where both the father and grandfather are not living then the

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[51] *Bahth fi al-Ḥajr*, p. 153
[52] Al-*Mughnī* , vol 4,p. 295
[53] See pp. 27-28 of chapter one for the meaning of guardianship

guardianship will move to their curator *(waṣi.)* The Mālikī, concurring with the majority in considering the father as a guardian, differ however in giving priority to his curator before the grandfather. They further maintain that in a case where the insanity occurs after the age of puberty the guardianship will rest on a judge.[54]

3.4.2 The ECC

The Code provides in article 45/1 that "a person devoid of discretion owing to youth... or insanity is incapable of exercising his civil rights". This article clearly spells out that the insane person is therefore not entitled to exercise these rights including entering into a contract. However, the question then arises as to whether or not the existence of insanity renders a contract automatically null and void. In other words, is there any condition for an invalidation of contract by reason of insanity to take effect? Article 114 of the Code here states that " a disposal by the insane and the imbecile shall be invalid, if such disposal takes place after registration of the interdiction ruling; however if such disposal takes place before registration of the interdiction ruling, it shall not be invalid unless the status of insanity or imbecility is commonly known while concluding the contract or the other party is aware thereof". Thus it can be seen that the Code has differentiated between two situations, the first of which is prior to the registration of interdiction ruling and the other is after registration.

Article 114 thus impliedly recognizes the doctrine of interdiction [55]imposed on an insane person; although the Code does not clearly spell out the types of interdiction

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[54] *Hāshiyat al-Dusūqī*, vol, 3,p.292 „ *Bahth fi al- Ḥajr*, p. 150

[55] The treatment of Interdiction in the Code is almost identical to that of Islamic law, thus, there is no need to discuss it here unless there is significance in doing so.

falling within its jurisdiction, it can be inferred that there are two types; automatic and judicial. This is because in providing legal rules of a disposal carried out by a child the Code states merely states that " a minor under the age of discretion shall not have the right to dispose of his property and all disposals thereby shall be null and void"[56] ; thus, since there is no reference here to the need to obtain a 'court order to obtain interdiction 'then one conclude that this kind of interdiction is automatic in nature. On the other hand, article 113 concerning insanity reads: " a person who is insane, idiot, prodigal or weak minded shall be subject to a court interdiction according to the rules and provisions proscribed by the law" thus, clearly defining interdiction of a judicial type. In other words, in order to impose interdiction on an insane person a court order must first be sought; if this obtained the said ruling should be registered in accordance with article 65-66 of the Law of Guardianship over Property of 1952 (LGP)[57].

3.4.2.1 Effect of insanity prior to the registration of interdiction ruling

According to some jurists (amongst them ᶜAbd al-Bāqī and and Shanab), by virtue of article 114, prior to the registration of interdiction ruling an insane person is deemed to possess legal capacity, thus, all contracts issuing from him are valid unless the state of insanity is either widely known, or the other contracting party is aware of the existence of such insanity. To this effect Shanab asserts: " In the case of a contract being entered into before the registration of interdiction ruling, according to general principal,

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[56] Article 110

[57] Ṭulbah, Anwar, *al-Taᶜlīq ᶜala Nuṣūṣ al-Qānūn al-Madanī, Dār al-Maṭbūᶜāṭ āl-Jāmiᶜīyyāḥ*, Alexandria, n.d, vol 1, p.96

such a contract is valid even if it is purely harmful. This is because an insane person is said to have possessed full legal capacity until the ruling is registered"[58]

On the other hand, there are jurists who maintain that article 114 does not by implication convey full legal capacity to the insane person prior to the registration; this is due to the absence of 'will' in an insane person which is in turn considered to be the basis of disposal . Therefore, once it is proven that a person entering into a contract is in a state of insanity, then his contract would be null and void irrespective of this insanity being registered or otherwise, even if his insanity is either not commonly known to the public at the time of concluding the contract or the other contracting party is not aware of such insanity.[59] The EgCC seems to have supported this view when it held that the absence of registration does not necessarily mean that the disposal carried out by the insane person or imbecile is valid; thus, that the other contracting party is aware of the existence of insanity or imbecility is sufficient to nullify a contract issuing before the registration.[60]

It should be noted that according to those jurists who uphold the nullity of disposal, this is not based on the absence of legal capacity itself; rather it is due to the absence of 'will'. Although they advance a number of arguments and justifications in distinguishing between the absence of legal capacity as against the absence of sound 'will', it seems in the context of contract this differentiation is not significant since in either case the contract will be voided.

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[58] Shanab, Labib, *Nazariyyat al-Haq*, p. 148
[59] *Madā Ahliyyat al-Ṣabī* 177
[60] EgCC dated 16/1/1971

In my opinion, the disagreement among jurists on this issue would not have arisen had the Code adopted the same approach as Islamic law in categorizing insanity into continuous and intermittent. This is because those who validate a contract made by an insane person perhaps refer it to a contract concluded while the insane regains his reason, otherwise it is not conceivable for an insane person to enter into a contract while he is not aware of it, as suggested by Ahmad Salamah :

"... the insane person lacks 'will' whether from a legal point of view or reality; however, is it possible to abandon this principle so that we can depend on the apparent wording of article 114? We are inclined to reject this interpretation.... It can be said that when spelling out that if such disposal takes place before registration of the interdiction ruling, the second paragraph of article 114 states that a contract shall not be invalid unless the status of insanity or imbecility is commonly known at the time of concluding the contract or the other party is aware thereof" intended disposal out at the time of consciousness. This means that this article is taken from Islamic law which is considered as its historical source. Therefore the article should be explained as follows: If the interdiction ruling is registered, it is commonly assumed that an insane person is lacking in both legal capacity and 'will' rendering all his disposal null and void....[61]

In addition, the stance of the Code has led to criticism in that it validates a disposal made by the insane person-other than these two conditions- before the ruling is registered. It seems therefore that the Code has made a link between the completeness of legal capacity and what is procedural in nature; namely the registration of interdiction ruling. Thus, since the basis for legal capacity is 'discernment', it is more reasonable to link legal capacity and its basis in the sense that any disposal issuing from a person is valid if he is discerning or *vice versa* irrespective of whether an interdiction ruling has been registered or not.[62] Perhaps, this linkage was established in order to provide stability of transaction where a *bonafide* person could possibly enter into a contract with an insane person without being aware of such insanity, and thence be surprised to learn that the said contract is null and void owing to insanity. This would undoubtedly cause

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[61] Ahmad Salamah, *al-Madkhal p*.63
[62] *Ibid* , p.62

chaos and uncertainty, which the law would wish to avoid. By the same token it can be argued that in the case of the insanity being unknown to the *bona fide* party, according to article 114 his contract will remain valid, which contradicts the main principle that invalidates a contract issuing from a non discerning person. Furthermore, the perception of validating a contract made by an insane person contains the element of penalty for which an insane person is not liable. [63]

3.4.2.2 After the registration of the interdiction ruling

An insane person is legally interdicted after the registration has been approved with immediate effect after which the court will have to appoint an assistant for him. Upon registration, the insane person will be considered as lacking legal capacity, thus all his disposal including contract would be null and void even if purely beneficial such as accepting a gift. It is worth noting that the period of recovery (in the case of intermittent insanity) makes no difference after the ruling has been registered meaning that even if a contract issues during a period of sanity, it is still deemed to be null and void as understood from article 114/1 of the ECC.[64]

It is observed that a contract made by an insane person after registration of the ruling is absolutely void whether the insanity is widely known or not because the registration alone is sufficient in itself to invalidate such a contract. Therefore, the interdiction ruling legally presumes the absence of legal capacity in an insane person, and by registering that ruling the other contracting party is legally presumed to have been

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[63] *Ibid* , 62
[64] *Madā Ahliyyat al-Ṣabī,* p. 180

aware of the existence of such a ruling. However, the question arises as to whether this legal presumption is conclusive or not. Some jurists are of the opinion that the presumption in this case is conclusive and as such it is not rebuttable whereas others assert that the presumption is not conclusive, in which case the other party is allowed to rebut this presumption on the basis that the contract is made during a state of recovery (in intermittent insanity).It seems that this last view is preferable due to the fact that legal capacity in nature is regarded as a public order which cannot be established through legal process.[65]

This said, important to note that in dealing with disposal by an insane person , the ECC has taken into account two kinds of interest; the insane himself and the *bona fide* contracting party. In other words the Code attempts to balance both kinds of interest. With regard to the insane, his contract is considered valid as long as no interdiction ruling is imposed. Similarly, the *bonafide* person is protected by validating a contract entered into by him if the state of insanity is not common and he is not aware of the existence of such insanity.

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[65] *Ibid*

3.5 The effects of imbecility (*ᶜatah*) on contract

3.5.1 Islamic law

3.5.1.1 Definition

Apart from insanity there is another closely related impediment to it known as imbecility(*ᶜatah*). In fact, juristic discussion on imbecility (especially that of classical jurists) is somewhat confusing, as some refer to imbecility as insanity itself. Some authors such as al-Hawarī and Khallāf claim that jurists are too inconsistent and disorganized in their attempts to address the concept of imbecility .For instance, the author of *al-Bināyah* clearly states that the imbecile is the one who sporadically loses and gains reason (*al-shakhṣ alladhī yajinnu wayufīqu*).[66]This means that this scholar has equated imbecility and intermittent insanity. In order to get a clear picture of what has been said about imbecility, and to verify the above claim, it is useful to examine the various meanings of imbecility as suggested by the jurists.

Literally, imbecility denotes the deficiency of reason (*nuqṣān al-ʻaql*)[67], a meaning which has a close connection to its legal term .

Terminologically, jurists are divided in determining the precise meaning of imbecility or the imbecile *(maᶜtūh)* According to al-Bazdawī , imbecility is harmful affliction in a person, necessarily occasioning a defect in his intellect so that his speech sometimes resembles that of the intelligent person and sometimes that of the

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[66] *Al-Bināyah ala- al-Nihāyah* , vol 8,pp.214-215, cited from *al-Ḥajr wa Asbābuhu*,p. 72
[67] *Tartīb Mukhtār al-Ṣiḥāḥ*, p.501

possessed[68]Ibn Amīr seems to agree with this definition; however he stipulates that such harm must be of essential origin, thus if it is affected by -for instance- taking drugs, then it cannot be considered as imbecility.[69]On the other hand, Ibn Nujaym has shortened Bazdawi's definition by stating that imbecility is a state when a person's speech sometime resembles that of the 'sound mind' and sometimes resembles that of 'the mad'.[70] In addition, there is another meaning of imbecility based on the personal character of the imbecile . In this respect, imbecile is defined as a person whose understanding and thought are defective; however, he does not attack and swear at others as is done by the insane.[71]

Looking at these meanings, there are two issues that are quite important to address. Firstly, are these definitions satisfactory enough to depict the exact meaning of imbecility? In other words, is anyone of these definitions beyond criticism, so that it can be preferred to others? The second issue is, were these jurists really inconsistent in their treatment of this subject (imbecility)

As far as the firsts issue is concerned, having studied the definitions given, it seems that none of them is beyond criticism and as such, cannot be totally relied upon. In Bazdawi's definition for instance, the assertion that the speech of the imbecile resembles that of the insane and the sane intermittently will not prevent the insane from being included in this category as there might be an insane person whose speech sometime resembles that of a person of sound mind. Similarly, in the definition given by Ibn Nujaym, there might be a category of the insane whose characters are tranquil and do not

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[68] *Kashf al-Asrār*, vol 4,p.274
[69] Al-*Ṭaqrīr wa al- Ṭaḥbīr*, vol 2, p.235
[70] *Sharh al-Manār*, p.341,
[71] Al-*Bahr al-Rā'iq*, vol 8, p.89, *al Mas'ūliyyat al-Madaniyyah* p.122

create problem for others. The same is true for the remaining definitions. In my view, the difficulty of giving a precise meaning to imbecility is no less –as previously discussed- than the difficulty in giving an accurate meaning to insanity itself. However, if it is almost impossible to define imbecility or the imbecile accurately enough to render it beyond criticism, it is still possible to combine the various definitions in order to suggest a closer meaning to the concept of imbecility it self. Thus, as suggested by some, imbecility can be categorized as a mental disease inferior to insanity, which prevents a person from enjoying full discernment.[72]

With regard to the claim that jurists were unclear and inconsistent in interpreting imbecility , Khallaf comments on conflicting perceptions in the following analysis.

> "It appears that the distinction between a contract carried out by the insaneand the imbecile is valid if we can first distinguish between the two; however, the opinion of jurists in determining who the imbecile is, is confusing as some jurists opine that if a mentally ill person's condition is accompanied by physical disorder, then he is considered as insane, otherwise- where there is no physical disorder- he is imbecile. Nevertheless, according to some medical experts, there might be circumstances in which an insane person is not accompanied by physical disorder and a calm is not necessarily a sign of sanity. Some jurists hold that the imbecile is a person whose understanding and thinking is disordered. However these criteria could also apply to the insane. Some other jurists are of the opinion that the imbecile is a person who is not good at selling and buying…"[73]

Khallaf's statement thus seems to conclude that jurists are unclear due to the sheer variety of definitions of imbecility, since there is no agreement among them as to its actual meaning. However, his conclusion would only hold water if all the definitions issued from the same scholar, rather than issuing from differing subjective perceptions. Furthermore, if this criterion (variety of definition) were to be taken as a reason for this confusion, it will lead to the conclusion that jurists are confused by the abundance of

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[72] *Bahth fī al-Ḥajr*, p. 154
[73] *Al-Ahliyyah wa-ᶜAwāriḍuhā*, p.37

juristic discussion as they are not agreed upon many more definitions other than those discussed here.

In my view, the most that can be said is that aside from insanity, jurists have acknowledged another kind of mental illness, the effect of which is less serious than that of insanity, and they have utilized all possible means to define that illness, although this may vary from one jurist to another. In this respect Jalāl Muhammad states;

> "In fact, we believe that Muslim scholars like early Roman jurists, when they were not able to classify the many kinds of mental illnesses in a proper manner due to restricted development in medicine at their time, they resorted to classifying mental illness into two only; insanity and imbecility with the intention that the term insanity will cover insanity as it was widely known at their time. As for other mental diseases, the term imbecility is used to denote them" [74]

This said, regardless of this juristic debate, the fact remains that there is another mental illness other than that insanity called imbecility; however accepting that there is a difference between this condition and insanity in terms of meaning and definition, will imbecility have a different effect on legal capacity, and accordingly on a contract carried out by the imbecile ?

3.5.1.2 The effects of imbecility on contract

Before looking at the effects of imbecility on legal capacity and subsequently on a contract carried out by the imbecile, it is worth mentioning that such an impediment only belongs to one category in the view of the classical jurists. As such, they were not concerned to divide imbecility into further sub categories; however there are jurists[75] who tend to include imbecility under the sub-category of insanity where, it can no longer

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[74] Al-*Mas'ūliyyat al-Madaniyyah*, p.124
[75] *Hāshiyah Ibn ᶜĀbidīn*, vol 2,p.527, *Madā Āhliyyat al-Ṣabī*, p. 188

in my view be termed as imbecility. On the other hand, some modern scholars such as Abu Zahrah have differed from the early jurists by classifying imbecility into two categories namely; the discerning imbecile (*maᶜtūh mumayyiz)* and non –discerning imbecile (*maᶜtūh ghayr mumayyiz)*. [76]According to this view, the condition of the discerning imbecile in terms of legal capacity is similar to that of a discerning child, meaning that such an imbecile person still enjoys incomplete legal capacity. As regards a non-discerning imbecile his situation is likened to an insane person; hence, he is deprived of legal capacity.

This categorization-in my view-, in spite of its rationality with regard to the discerning imbecile appears to be of no use as far as the non- discerning imbecile is concerned due to the fact that it carries the same effect as insanity; as such, the need to give it a different nomenclature is not justifiable . In this respect Mirghinānī stresses that "an imbecile person is he who inevitably, has the ability to discern without which he is considered to be insane".[77]

Having said this, with regard to a contract entered into by the imbecile, jurists are not agreed on this particular issue. The majority of jurists[78] such as the Mālikī, Shāfiᶜī and Hanbalī hold that such a contract is null and void, hence, equating it to that issuing from an insane person. The Hanafī on the other hand, relate a contract carried out by the imbecile to that issuing from a discerning child.[79] Therefore, if the contract is purely beneficial it will be valid even without the consent of the guardian. Likewise, for purely harmful contracts such as giving a gift, such contracts are considered void regardless of

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[76] *Al-Milkiyyah wa Nazariyyat al-ᶜAqd*, p. 276
[77] *Al-Hidāyah Sharh Bidāyat al-Mubtadī*, vol 3,p.280,
[78] *Al--Sharḥ al-Kabīr,* vol 3.p. 292, *Mughnī al-Muhtāj*, vol 2.p.166
[79] *Kashf al-Asrār*, vol 4, pp.274-275

the consent of the guardian. If the contract has potential to be both beneficial and harmful, then its validity will depend on the ratification of the guardian. From the foregoing discussion regarding the classification of the imbecile, I am inclined to prefer the view of the Hanafī jurists for the very reason given when refuting the kind of the non discerning imbecile) Otherwise, it would be unfair to differentiate between the imbecile and the insane in terms of nomenclature but give the same rules for their action because such a differentiation will be of no significance in any juristic discussion.

3.5.2 The ECC

The treatment of imbecility in the ECC is not substantially different in term of its meaning and effect on legal capacity from its counterpart in Islamic law. Jurists are to a great extent influenced by their counterpart in Islamic law in the sense that inasmuch as there are differences of opinion among Muslim jurists, the same is true with regard to those of the Civil Code. It should be pointed out that the Code itself is silent pertaining to the legal meaning of imbecility, leaving the matter to be dealt with by the jurists. According to al- Badrawī[80] imbecility is the incompleteness of reason-not the disappearance- which make one person's speech resembles those of sound mind and some others resemble that of the insane, a definition that is clearly copied from Islamic law. Al-Sanhūrī ,[81] in addition, has opted to follow modern jurists by dividing imbecility into discerning and non discerning. These are examples of the meaning of imbecility as given by the jurist; the remaining definitions of this term are almost identical to those just discussed.

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[80] *Al-Naẓariyyāt al-ᶜĀmmah li al-Iltizāmāt, 142, Madā Ahliyyat al-Ṣabī*, p.193
[81] Al-*Wasīt*, vol 1,p. 300

This said, as far as legal rules relating to the contract of imbecility are concerned, it seems that the Code prefers to adopt the view of the majority of Muslim jurists. This means that a contract carried out by the imbecile is similar to that carried out by the insane as clearly spelt out in article 114/1 which reads: " a disposal by the insane and the imbecile shall be invalid, if such disposal takes place after registration of the interdiction ruling"

This stance taken by the Code has been criticized by a number of jurists due to the fact that it would be meaningless to give the same rule for two different things, which led some jurists to avoid using the terms insanity and imbecility separately; instead, the term mental illness is preferred. To this effect Abu al-Khair further argues:

> "I have preferred to use the term mental illnesses instead of al insanity and imbecility because of the similarities of their legal effect, in the sense that being affected by either of them will remove a person's the ability to discern. On top of this, those affected are to be interdicted resulting in the voidance of their legal acts after such interdiction has been registered"[82]

In fact, the Preliminary Draft of the Code had opted to use the same terminology before being changed during Senate discussion without any valid reason[83].Article 76 of the Draft stipulates that a person devoid of legal capacity due to infancy or mental illness is not fit to exercise his civil rights. Perhaps what prompted the review committee to amend the wording -as in the existing code- is because they were influenced by Islamic law; yet the motive remains questionable since Muslim jurists (especially those of the Hanafī), apart from distinguishing between insanity and imbecility in terms of their meaning have also given different legal rules to both, whereas this is not the case in the

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[82] Abū al-Khayr, *al-Ta ᶜwīd ᶜan Ḍarar al-Fiᶜli al-Shakhṣī li ᶜAdīm al-Tamyīz*, *Dār al-Nahḍat al-ᶜArabiyyah*, Cairo, 1994, p. 5

[83] See *Majmūᶜat al-Aᶜmāl al-Tahdīriyyah li al-Qānūn al-Madanī*, vol 1, p 357.

approach of the ECC. It seems that the Review Committee has adopted the view of the majority, which is not practical enough to address matters arising from the state of imbecility.

This said, having admitted that the Code does not differentiate between insanity and imbecility concerning their legal effect, needless to say the effect of a contract carried out by the imbecile would be similar to that of the insane; thus, what applies to insanity will also apply to imbecility.[84] In the light of the present discussion, it is suggested that article of 114/1 be amended and that the Code should adopt the view of Islamic law or to be exact, the Hanafī's view in order to make the ruling both more practical and enforceable and the view of medical experts should at the same time be consulted for this purpose.

3.6 Summary

Although insanity is considered to be one of the impediments to legal capacity, the concept is not definite as it is treated differently from three perspectives: Islamic law, the ECC and medicine. Islamic law recognizes several kinds of insanity namely; regular, irregular, and continuous as well as intermittent insanity. Jurists are unanimously agreed that the existence of continuous insanity will remove a person's legal capacity and consequently all his disposal will be interdicted. However in the case of intermittent insanity, if a contract is concluded during a period of recovery it will be valid as if it issued from a sane person. In the ECC, apart from similarities to Islamic law there are also differences between the two in that the Code does not divide insanity into categories, which has led to confusion in giving legal rules of an act carried out by the insane. In

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[84] See pp.108-113

addition, the Code is more concerned with procedures to determine whether a person should be considered insane or not. Imbecility, another impediment is treated along with insanity; however, the effect of it existence is similar to that of insanity in the view of Muslim jurists with the exception of the Hanafī. . The ECC, on the other hand, has differentiated between insanity and imbecility in terms of terminology but has unjustifiably given the same rules to both of them.

CHAPTER FOUR: THE CONCEPT OF PRODIGALITY(*SAFAH*) AND ITS EFFECTS ON CONTRACT

4.1 Introduction

Much space has been devoted to differing legal perspectives as to the concept of prodigality(*safah*)[1]; while prodigality itself is generally regarded as one of the impediments to legal capacity, there are certain aspects involving 'human rights' to be considered. In the same way, scholars in elaborating this concept of prodigality have frequently related it to the doctrine of 'preserving property' in Islamic law[2]. In addition, although the word *sufahā'* (plr *safīh*) is clearly mentioned in the Qur'ān as in (2:5) whereby Allah says: "To the s*ufahā'(*the prodigals*),* make not over your property which God hath made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice", the exact meaning of the word remains disputable. Therefore, questions such as interdiction on the prodigal especially in financial affairs are considered to be the crux and core of the present study. This chapter is thus devoted to the thorough examination of this concept from both Islamic law and the ECC perspectives. In so doing, the investigation will centre on every aspect of the

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[1] It is important to note that as far as financial matters are concerned the nearest English equivalent to the Arabic word *safah* is prodigality which is literally defined by Oxford Advanced Learner's Dictionary as spending money or resources too freely. p.923, However, since the word *safah* from literal point of view does not necessarily mean prodigality, for the purpose of linguistic discussion the Arabic term *safah* and its derivatives will be maintained in this chapter. The English equivalent 'prodigality' and it derivatives will be used when no literal discussion is involved.

[2] Needless to say that the rules relating to ' property' in Islamic law are so important that the Qur'ān and the *Sunnah* as well as the work of jurists have emphasized how property should be administered. Among others Islamic law has classified property into several categories such as movable property and immovable property, public property and private property an so on. The relationship between human beings and wealth has been the concern of Islamic law in the sense that it provides modes by which property is acquired. These modes of acquisition include : I-claiming commonly accessible property ii-contracts iii-succession iv- derivation from owned property. Similarly, Islamic law has governed the means by which a person can legally dispose of his property. For detail see, Abū Zahrah, *al-Milkiyyah*, p 47 onwards, Al-Zuḥaylī, *al-Fiqh al-Islāmi* (English edition) vol 2, p.433 onwards.

concept; issues will then be extracted as worthy of discussion. The notion of prodigality will be examined together with its effect on legal capacity and consequently on contract, but above all, the concept of interdiction on spendthrift will be fully analysed.

4.2 The notion of prodigality

4.2.1 Definition

4.2.1.1 Islamic law

Unlike other impediments, in terms of literal meaning, the Arabic word *safah* requires quite lengthy elucidation, for its legal meaning depends very much on how the word is linguistically understood. As will be seen later, this linguistic unease has contributed to the disagreement among jurists in interpreting the term *safīh* (prodigal) This is evident from Oussama's statement when he insists that " examination of the Qur'ān served to correct my initial surprise at the sharp difference between the meaning of the term *safīh* in its traditional Arabic and technical legal contexts"[3]

Lexically, the word *safah* which has a primarily moral and spiritual connotation is used in the Arabic language with various meanings; *inter alia* it means shallowness *(khiffah*), motion *(ḥarakah*) ignorance *(jahl*) and lack of deep understanding[4]. It is said for example, *safaha al-rīḥ al ghuṣn* (the wind put the branches in motion)[5].According to some lexicographers the word has also the apparent meaning of improper language

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[3] Oussama Arabi, Studies in Modern Islamic law and Jurisprudence, Kluwer Law International, The Hague/ London/ Newyork , 2001 ,p.101

[4] *Al-Qāmūs al-Muḥīṭ*, p. 1247, *Lisān al-ᶜArab*, vol 6, p. 87

[5] Lane, Edward William, Arabic English Lexicon, William and Norgate, London/ Edinburgh, 1863, p.1376

(*badhā'ah)* and infidelity *(kufr*). All these meanings indicate that *safah* is a common word used for -*jahl* , *khiffah* and *naqṣ* (incompleteness*)*

When it comes to legal meaning it seems that the vast majority of jurists have not related these literal meanings to their own definitions, rather for them the term *safah* seems to be more related to wastefulness *(isrāf*) and extravagance(*tabdhīr*). In other words as put by Oussama , it was this sense of the word that came to prevail in mainstream classical *Sunni* jurisprudence, where a semantic equivalent was established between the *safīh* and the *mubadhdhir* (wastrel)[6]. To verify how these two become synonymous, it is worth looking at the literal meaning of *safah* and *safīh* so that we may find whether there is justification in relating *safah* to extravagance.

Broadly speaking *safah* is 'shallowness' in human beings causing them to act against reason in spite of its existence. This implies that all unlawful deeds, be they in religious or worldly matters are considered as *safah* because they are against reason, based on the maxim that all legal rules in Islamic law are in line with reason. The relationship between the literal meaning of *safah* and the above mentioned is quite clear in the sense that there is shallowness *(khiffah*) in the mind of the *safīh*.[7] Thus, according to this meaning, those who commit adultery, drink alcohol and squander wealth can be termed as *safīh*.

Nonetheless, the meaning of *safah* from a jurisprudential point of view has later been narrowed down to cover only financial aspects as can be seen from the following

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[6] Studies in Modern Islamic law and Jurisprudence, p.101

[7] Ṣālih, Su^{c}ād Ibrāhīm, *Ahkām Taṣarrufāt al-Safīh fī al-Sharī'at al-Islāmiyyah, Tihāmah,* Jeddah, 1984, 1st edition,, p. 19

definitions. Al- Zaylaᶜī of the Ḥanafī for example defines 'prodigal' as a person who is extravagant and spendthrift in spending, disposes of property aimlessly, and is unable to manage trading.[8] The same meaning can be found in the *Majallah* where it is stated that " the prodigal is a person who spends his wealth on what he is not supposed to, and is extravagant in spending and wasteful in property; those who are easily cheated and exploited in their buying and selling in such a way as to demonstrate that they do not have sufficient knowledge in trading due to their shallowness are also considered as *sufahā*".[9] The Shāfiᶜī[10] define prodigal as he who wastes his wealth while the Malikī[11] put it as non-protection of wealth, together with and spending on unlawful things, while the Hanbalī[12] have pinpointed the act of extravagance itself as their specific definition.

Having agreed that *safah* is only confined to financial matters which are based on the Qur'ān (4:5) which reads; "To those who are weak of understanding make not over your property which Allah hath made a means of support for you" in which the word *amwāl*(property) is clearly stated, jurists still differ in determining who exactly is meant by the word *safīh,* as some attribute this term to the insane and the minor and some others to prodigal adults and women as well as the orphan. While (4:5) of the Qur'ān is conclusive in forbidding the handover of property to the *safīh*, the term *safīh* itself as used in this verse is not conclusive; attempts to interpret it have thus given risen to a diversity of views. The majority of jurists hold that *safīh* is a weak minded adult whereas Abū Hanīfah maintains that *safīh* is in fact a minor. Thus, failing an exact definition,

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[8] Cited from *Aḥkām Taṣarrufāt al-Safīh*, p. 21
[9] Art 946
[10] *Mughnī al-Muḥtāj*, vol 2, p. 165
[11] *Mawāhib al-Jalīl*, vol 5,p. 64
[12] *Al-Mughnī*, vol 4 p. 295

in order to reach the nearest meaning of the word, reference should be made to a number of sources in which the word appears. Referring to the Qur'ān, the word *safah* and its derivatives appear in eleven places, nine of which concern *ᶜaqīdah* (beliefs) carrying the connotation of stupidity, ignorance and shallowness of mind such as in (2:13) where Allah says: " Nay of surety they are the fools (*sufahā'*) but they do not know". As for worldly matters these are referred to in the Qur'ān (2:282) wherein Allah says: " If the party liable is mentally deficient (*safīhan*) or weak or unable to dictate, let his guardian dictate faithfully", here exegesis have differed in expositions of the intended meaning, as some refer to the term *safīh* as signifying a minor. Al- Qurtubī however, states that such an interpretation is incorrect since the *safīh* could be an adult. He further argues that minority is not possible here due to the fact that *safah* is kind of reprimand to which a minor would not be exposed.[13] This is also the case in (4:5) where exegesis as reported by al-Jaṣṣāṣ differ as regard the *safīh;* some take this term to refer to women while others take it to denote orphans [14]

Al-Jaṣṣās on the other hand, has attempted to reconcile these differing meanings by reverting to the literal sense of this term. He argues that "the Qur'ān uses the word *safah* in several places some of which relate to religious matters while others relate to worldly matters[...] however, all usage of *safah* encompasses ignorance, for example a *safīh* in religious matters is he who is ignorant of such matters, Likewise *safīh* in property *(amwāl)* is he who is ignorant of how to protect his property"[15]

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[13] *Tafsīr al-Qurṭubī,* vol 5,p30

[14] Al-Jaṣṣāṣ, Aḥmad bin ᶜ Alī, edited by Muḥammad Ṣādiq Qamḥāwī, *Aḥkām al-Qur'ān* . Dār Ihyā' al-Turāth al-ᶜArabī, Beirut, 1405 H, vol 2, p. 213

[15] *Ahkām al-Qur'ān,* vol 2, p.214

In other words, al-Jaṣṣās suggests that among the various literal meanings of *safah* , ignorance *(jahl)*is commonly shared by the Qur'ān. Nevertheless, his theory can still be rebutted if we accept that the word *safīh* is also used for the infidel due to a quality of stubbornness rather than ignorance. Another jurist, Ibn Ḥazm has offered another solution for this semantic problem whereby he holds that *safah* in Arab usage has only three meanings, not four, as follows: the user of bad language, the obstinate infidel, and the minor or insane.[16]According to him the word *safah* in terms of financial matters will be always referred to the minor or insane. Nevertheless, a further examination of Ibn Ḥazm's view has shown his arguments to be untenable for his claim that there is consensus that the meaning of *safīh* in the Qur'ān (4:5) is the insane and the minor seems to be invalid. This is because, the companions and the early exegeses were not agreed on this matter. Furthermore the claim that the word *safah* is only confined to the three meanings stated appears to be weak since lexicographers have also given other meanings to *safah* such as ignorance *(jahl)* and deception(*inkhidāᶜ*)[17]

Moving to the usage of the word *safah* in the *Sunn*ah, there is no doubt that the word has been used to denote different meanings. For instance, the Prophet PBUH was reported to have said "*walākin al-kibr man safiha al-ḥaqq*" , where the word is used here to denote ignorance[18] In addition , when the Prophet P B U H died, ᶜĀishah was reported as saying " Because of my *safah* and my age, I inflicted damage on my face.."[19]Undoubtedly what is meant by *safah* here is not a state of minority, because this

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[16]Ibn Ḥazm,ᶜAlī bin Aḥmad, *al-Muḥallā,Dār al-Āfāq al-Jadīdah,* Beirut, n.d, vol 8,p.287
[17] *Al-Qāmūs al-Muḥīṭ,* p. 1247
[18] *Mabda' al-Riḍā,* vol 1,p.336
[19] *Musnad Ahmad,*edited by Aḥmad Muhammad Shākir, *Dār al-Maᶜārif li al-Nashr wa al-Ṭibāᶜah*, 1949 3rd edition, vol 6,p. 274

latter term was used together with *safah* in this *Ḥadīth*. Moreover, ᶜĀ'ishah was no longer a child at the time of the death Prophet's P B U H death.

From the preceding discussion, it can be concluded that as far as the Quranic verse (4:5) is concerned, the word *safīh* is used to denote he who has shallowness of reason (*khafīf al-ᶜaql)*, that is to say 'a prodigal adult' as is the view held by the majority of jurists. Although, it may be argued that a minor is also categorised as possessed of incomplete reason *(nāqiṣ al ᶜaql)*, the rules relating to others who lack of reason such as the minor and the insane are mentioned elsewhere in the Qur'ān and *Sunnah* and also in the work of jurists including those who maintain that *safīh* carries the meaning of minor. As such, to provide another rule would be redundant and meaningless. In spite of this, there are scholars such as al-Rāzī who seem to reconcile the different meanings of *safah*. According to him, the *safīh* is a prodigal person; hence any one who is not good at preserving wealth is considered to be *safīh* . This includes women, children, orphans and the like.[20] Nevertheless, this suggestion is still somewhat unconvincing as it only gives the criteria of *safah,* i.e overspending not the *safīh* himself.

This said, in the light of the above discussion *safah* may be safely defined as shallowness of reason *(khiffah*) causing a person to dispose of his property in unreasonable manner; this definition indicates that *safah* is shallowness rather than defect of reason, and as such both the insane and the minor are excluded. Similarly, *safah* is confined to dealing with property, hence, other matters cannot be legally considered as *safīh* from a jurisprudential point of view although from a literal point of view the term

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[20] *Tafsīr al-Rāzī,* vol 9, p.185

safah is used for both financial and non financial matters. Furthermore, the disposal of property must be against reason, otherwise it cannot be regarded as the act of *safah.*

4.2.1.2 The ECC

While there is no provision in the ECC for defining the meaning of *safah*, , it can however be found in the work of jurists and judicial rulings. In their attempt to put a legal definition to the term the Civil law jurists seem to follow what has been done by their counterparts in Islamic law, although unlike Islamic law the concept in the ECC is only concerned with financial affairs. Albeit there are a variety of definitions advanced by the jurists,[21] there is nevertheless a common sense that the prodigal (*safīh*) is a person who wastes his wealth again reason, whether such waste is on good or bad things[22]Apart from the ECC, the Explanatory Memorandum of the Law of Guardianship Over Property of 1952 has defined *safah* as shallowness in a person which causes him to do something again reason and law, [23]a definition which is *in toto* copied from Bazdawī's definition. In addition the EgCC has given a slightly different meaning to *safah* when it held that *safah* is a condition causing a person to squander his property and destroy it in a manner

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[21] For instance, Ahmad Salamah defines prodigality as squandering property in unreasonable manner, see *al-Madkhal* p. 65, Jamīl Sharqawi defines it as an ignorance of how to protect and manage one's property which leads to squandering and wasting against reason, *Durūs fī Ūṣūl al-Qānūn*, p.337, *Hukm al-tasarrufāt al-Qānūniyya*h,p.123, Abd Wadūd defines it as a person who wastes his wealth in unacceptable manner according to reason and law even in good things, *Mabādi al-Qānūn*, p.272

[22] Abd al-Bāqī, *Nazariyyat al-Haqq*, p.119, *al-Safah wa al-ghaflah*,p.92. The Memorandum further elaborates " The concept of prodigality is not systematic (*mundabitah*) , rather it depends on a certain approach (*mi ᶜyari*) which is judged by societal experiment and the custom of the people. This concept is generally based on abuse of rights; prodigality may be a result of a person's act contradicting the *Sharīah* such as gambling, as it may also result from desires (*hawā*) even in a lawful way such as overspending in donation, see, *Madā Ahliyyatt al-Ṣabī*, p. 273

[23] As quoted from Marqus, *al-Madkhal li al-ᶜUlūm al-Qanūnīyyāḥ*, p.572

against reason and law(*Shar*^{c}) .[24] This is reinforced in a later ruling when the Court maintains that prodigal is a person who wastes his wealth aimlessly in the opinion of the expert[25]

Despite the clarity of the above definition, the word *Shar*^{c} as appears therein does not refer specifically to Islamic law or Civil law or indeed to either. However, I am inclined to interpret *Shar*^{c} in these definitions as referring to Islamic law (*Sharīʿah Islāmiyyah*), the reason being that if the Civil law is meant, then the jurists tend to use the term law (*qānūn*) instead of the word *Shar*^{c}.[26] This leads in turn to the conclusion that the treatment of the ECC regarding the meaning of prodigality is taken completely from that of Islamic law with slight modification of the wording.[27] It can also be concluded that prodigality does not affect a person's mind in a manner comparable with insanity, but its existence will affect that person's judgment in managing and administering his wealth.[28]

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[24] EgCC,cas.no 2, dated 7/4/1955

[25] EgCC cas.no.2, dated 20/6/1957. It is to be noted that in this later ruling the criterion by which a person is judged to be prodigal depends on the perception of experts, there is no contradiction to the earlier ruling in which the criteria depends on reason and law, as expert opinions *(ahl al-dirāyah)* are always supposed to follow these two (reason and *shar*)

[26] Although it may be argued that the term reason (*ʿaql)* impliedly includes *shar*^{c} since there should be no contradiction between two, thus, the word *shar*^{c} is needless, the same is true if we interpret that *shar*^{c} is the law as it also should not be a contradiction between reason and law.

[27] Perhaps the only difference is the concept of *safah* in Islamic law also covers non financial matters such as *safah* in religion whereas in the Civil Code the term is only confined to matters relating to property and finance.

[28] Ahmad Salamah, *al-Madkhal, p. 66*

4.2.2 Phenomena of prodigality

4.2.2.1 Islamic law

Throughout evidence from the Qur'ān and the *Sunnah*, jurists have concluded that there exist certain criteria which when applied will determine whether a person may be deemed to be prodigal. These criteria are also known as phenomena of prodigality(*maẓāhir al-safah*), encompass three aspects namely; wastefulness *(tabdhīr*), favouritism *(muḥābāh*), and sinfulness (*fisq)*

4.2.2.1.1. Wastefulness *(tabdhīr)*

Tabdhīr and *isrāf* in normal usage are interchangeable terms; the former means transgressing the limit in every human act especially when that act involves spending as in the Qur'ān(17:26) " But squander not your wealth in the manner of a spendthrift". while *isrāf* refers to the distribution of wealth unwisely as in(25:67) which reads: "Those who when they spend are not extravagant and not niggardly but hold a just balance between those extremes". Technically, ignorance of the place of rights and ignorance of quantity of right refer to *tabdhīr* and *isrāf* respectively. In this respect al-Māwardī explains "*tabdhīr* is spending unwisely where it is not merited, while *isrāf* is spending excessively i.e more that necessary"[29]

Jurists are not agreed on the kind and degree of spending by which a person is regarded as wastrel *(mubadhdhir*)or extravagant (*musrif),* and subsequently as prodigal. While some such as the Hanafī and the Mālikī opine that every form of spending which goes against reason whether in permissible areas or not is wastefulness , thus causing

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[29] *Nihāyat al-Muḥtāj,* vol 4, p.361

the spender to be interdicted , others such as the Shāfiᶜī specify only spending on impermissible things in order for wastefulness to be demonstrated. For instance, spending money on gambling and drinking wine is wastefulness regardless of the amount spent, as al-Jamal of the Shāfiᶜī further elucidates:

> " the act of throwing property into the sea no matter how trivial that property may be, or spending on unlawful things is considered to be act of prodigality, The same is true if a person borrows money to spend on permissible things in spite of his awareness that he will be unable to repay the debt. However, it is not considered prodigality if the spending involves lawful things such as buying clothes, food or presents even if such spending does not match one's status, this is because the purpose of wealth is to be utilised as long as this is in permissible areas."[30]

From this statement, it appears that the fundamental criteria for judging whether wastefulness can be said to exist is when spending involves unlawful aspects. This view is also shared by Ibn Ḥazm except where he adds that if spending on lawful items will lead to poverty then the state of prodigality exists. In this regard he states:

> " Every sale for the purpose of eating, clothing, and riding and every donation for the manumission of slaves is permissible provided that wealth is maintained, and every spending causing poverty is extravagance and wastefulness, as such it is void and illegal. The same rules apply to every act of spending involving things such as wine"[31]

Interestingly, each school has come up with textual evidence to support their views. The Shāfiᶜī jurists for example have quoted the Qur'ān (2:261) which reads "the parable of those who spend their substance in the way of God is that of a grain of corn; it growths seven ears and each ears hath a hundred grains" They argue that this Quranic verse has called for spending in the way of Allah and has encouraged people to give charity.

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[30] *Hāshiyat al-Jamal,* vol 3,p.339 quoted from *al-Safah wa al-Ghaflah,* p. 129
[31] *Al-Muḥallā,* vol 8,p.290

However, while accepting this argument, the verse neither implies nor states the quantity one should spend, nor does it indicate approval or refusal if spending in the way of Allah should lead to poverty. The Hanafī who hold that the term prodigality encompasses all kind of extravagance including that which is permissible, even for example, for building a mosque have invoked several Quranic verses to support their view. *inter alia*, in (17:29) the Qur'ān commands: " Make not your hand tied(like a niggard) to your neck, nor stretch it forth to its utmost reach so that that you become blameworthy and destitute" while in (25:67) the Qur'ān says: " Those who when they spend, are not extravagant and not niggardly, but hold a just (balance) between those (extremes)

It appears that the Hanafī view is preferable in this regard where every type of overspending is considered a kind of prodigality irrespective of the nature of such spending be it lawful or unlawful. The reason for preferring this view is that, the verse from which the Shāfiᶜī argue is very general in contrast with the two very specific verses on which the Hanafī base their reasoning. Further weight is given to this latter argument by the narration from the prophet concerning Saᶜad bin Abī Waqqāṣ in which the Prophet PBUH said: It is better for you to leave your heirs in richness rather than poverty begging people to feed them.[32]

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[32] Narrated by Mālik in his *Muwaṭṭa'*, *Ḥadīth* no.735

4.2.2.1.2 Does favouritism(*nuḥābāh*) constitute prodigality*?*

The term means to prefer one person to another in financial dealing . This occurs in a sale for instance when a person sells his property to another at a price lower than the market price, or if such a person buys something from another at a price higher than that of the market. Here the jurists have concluded that such an act would not constitute prodigality provided that the seller (in the first example) or the buyer (in the second) is aware of the market price. The argument is that if such an act is considered act of prodigality, it is more worthy to give contracts such as gift *(hibah*) the rules of prodigality since they involve no exchanges of property. To this effect al-Jaṣṣā says: " ….the same applies as regards a sale in a way of favouritism (*muhābah)* whereby no wastefulness is incurred. This is because if favouritism is considered as wastefulness such favouritism should be prohibited to everyone; similarly the same rule applies to gift"[33]

However, in the event that the person who favours one to another (*muḥābī*) is ignorant of the market price , then there exists a state of deception *(ghubn)* a recurrence of which will constitute prodigality. It is thus clear from the aforesaid statement that the deciding factor as to whether prodigality exists or not is determined by the awareness of the contracting parties or to be precise the one who prefers one person to another. Nevertheless, in my view, since the purpose of conducting such a sale is to give preference to one buyer rather than another for whatever reason , the question of wastefulness and subsequently favouritism should not arise in this context regardless of the pricing factors. To put it differently, whether or not the *muḥābī* is aware of the market

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[33] *Aḥkām al-Qur'ān*, vol,2. p.220

price makes no difference in determining the existence of prodigality. As such the sale by way of favouritism is not an element of prodigality, because if we allow a gift from the *muhābī*, the same also should be allowed in the sale .

4.2.2.1 .3- Does miserliness (*shuḥḥ*), cupidity *(bukhl)* and meanness *(taqtīr)*, constitute prodigality ?

All these terms denote the opposite meaning of wastefulness; generally they mean to refrain from spending wealth, even though some jurists have made a distinction between *bukhl* and *shuḥḥ* in the sense that the latter is more mean as it is a quality which if it exists in a person would prevent him from spending even in his interest. This has been touched on by the Qur'ān in (25:67).

Commenting on this verse al-Zamakhsharī states:

> "This is the likening (of two opposite attributes) between the restraint of the miserly and the spending of the extravagant. The Qur'ān has commanded the faithful to a take the middle way between extravagance and miserliness.... this is because in the case of the extravagant those in need (but who did not receive of the profligacy from the extravagant person) would complain by saying that this extravagant person gives to such and such but not to me..."[34]

Having admitted that these are opposite qualities from which a Muslim is prohibited the question arises as to whether the *Sharīʿah* has provided certain measures to be taken when dealing with the miser as it has with regard to the spendthrift. In other words, does miserly (*shaḥīḥ)* consist of elements which may be regarded as prodigal and which are subject to interdiction? To answer this question, at first glance it may sound strange to label those who do not spend their wealth as prodigal, since-as previously defined- the words *safah* and its derivatives as far as financial matters are concerned are

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[34] *Al-Kashshāf* ,vol 1, p. 663, from *al-Safah wa al-Ghaflah*, p.131

more confined to a state of extravagance or overspending. However, interestingly this issue has been a matter of disagreement among jurists. To be exact they have differed as to whether miserliness is to be treated equally with wastefulness in terms of imposing interdiction. Some jurists such as al-Jaṣṣās are of the opinion that no interdiction can be imposed on a miserly person; as such, according to him, if a person leaves his plant without water or leaves his house without maintenance the authorities have no right to force him to spend his wealth for that purpose.[35]Some Hanbalī[36] on the other hand such as al-Azjī opine that a miserly person should be interdicted , thus equating wastefulness to miserliness. However this view seems to have no convincing evidence as it contradicts the literal meaning of prodigality (*safah)* and interdiction themselves.

4.2.2.1 .4. Does sinfulness*(fisq)* in religion constitute prodigality and interdiction*?*

If a person is sinful *(fāsiq)*, would that affect his financial disposal? In other words, will sinfulness in religion necessarily signify prodigality ? Al-Shīrāzī, a Shāfi^{c}ī scholar, states that if a person attains puberty with good management of his wealth, but is demonstrating sinfulness (*fisq)* in his religion then interdiction shall continue until he shows good conduct in both finance and religion.[37] This in turn means that al-Shīrāzī has imposed a strict condition for the lifting of interdiction from the prodigal as can be deduced from his statement, although a person is good at dealing with his property in such a way that no extravagance is incurred, such a person still can be nevertheless considered as prodigal if his religious character is reprehensible. In my view, it appears that there is something of a contradiction in this judgment with regard to the purpose of

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[35] *Aḥkām al-Qur'ān,* vol 2, p.220

[36] Al- Murdāwī, ^{c}Alī bin Sulaymān, *al-Inṣāf, Dār Ihyā' al-Turāth al-^{c}Arabī,* Beirut, n.d, vol 5. p. 272

[37] Al-Shīrāzī, Ibrāhīm bin ^{c}Alī, *al-Muhadhdhab, Dār al-Fikr*, Beirut, n.d, vol 1, p. 332

interdiction. On the one hand, al-Shīrāzī implies that there are those who are good at managing their wealth irrespective of their religious status, while on the other he renders this of no account if *fisq* is present in religion. Perhaps realising this discrepancy, has led some other Shāfiʿī scholars to take a middle way in giving legal rules as regards a sinful person in religious matters, as for example, al-Ramlī argues; "If a person should become sinful in religion but not in terms of property after he attains puberty he shall not be interdicted...This is because the companions were not reported doing this, however in the case of a person who attains puberty in a state of sinfulness the interdiction continues as if he has committed wastefulness..."[38] Nonetheless, this differentiation is still not convincing except on the basis that the existence of sinfulness (*fisq)* in religious matters will eventually cause prodigality in financial areas which in turn means imposing precautionary legal rules. Nevertheless, although there are conditions in which legal rules (*ḥukm)* are based on precaution this doctrine does not apply here. Perhaps this therefore has led the majority of jurists to conclude that sinfulness in the matter of religion cannot be considered to be an element of prodigality as is evident from Sarakhsī's statement; " If he is sinfulness in religion.... but he protects his wealth no interdiction can be imposed because the purpose of interdiction is for property..."[39]

4.2.2.2 The ECC

So long as the ECC confines prodigality(*safah*) only to financial matters, the only criterion used to determine whether prodigality exists is how wealth is spent. Similar to Islamic law the ECC considers prodigality every act of overspending and extravagance whether it involves good things or bad things. In order to determine this, the matter

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[38] *Nihāyat al-Muḥtāj,* vol 4, p. 365
[39] *Al-Mabṣūṭ,* vol 24, p. 183

should the be referred to societal experiences and people custom provided that such custom does not contravene either reason or S*harī*ʿ*ah*.[40] It is observed that the religious status of the prodigal carries no effect as to the state of prodigality, thus, if a person is good at managing his wealth but not good in other respects then the term prodigal does not apply to him. It thus seems that the Code has adopted the view of the majority of Muslim jurists in not regarding bad characters in religious matter as a criterion for determining prodigality.

It should be noted that the financial status of a person will have no effect on determining prodigality if his wealth is wasted in desires *(shahawāt)*, [41]meaning that if a rich person should spends a small portion of his wealth in desires, such an act is considered prodigality even though his financial status is not affected. This is what was held by the EgCC when it stressed that the purpose of interdiction is to protect the property of the prodigal.[42] In addition, the EgCC has also held that " a person who prefers his small children to his other children as well as one of his wives to the others, in terms of property, cannot be called prodigal, since this preference does not contravene either reason or *Sharᶜ*.. (in this case) the disposal made by such a person is valid with or without exchange. This is because his act is based on his concern to guarantee the future of his small children and their mother, and not to waste his wealth; rather such an act is more seen to protect property…the *Sharīʿāḥ* does not forbid a person from disposing of

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[40] *Al-Safah wa al Ghaflah*, p. 98

[41] The term *shahawāt* means unbearable inclination toward something , this includes material desires and sexual desires. See al-Munāwī, Muḥammad ᶜAbd al-Ra'ūf, *al-Taᶜārīf*, edited by Muḥammad Riḍwān al-Dāyah, Dār al-Fikr, Beirut, 1410 H, 1st edition, vol 1, p.441

[42] Madkūr, *Mabāḥith al-Hukm*, p. 308, This is in accordance with the view of the majority of Muslim jurists whereas the Shāfiᶜī are of the opinion that the purpose of interdiction is to punish the prodigal.

his property ,either all or some , to one of his heirs for legal purposes even if this will lead to denying this property to another of his heirs."[43]

It appears that what was decided here to a great extent concurs with the doctrine of *Muḥābāh* in Islamic law which I have preferred not to count it as element of prodigality, although it is not recommendable to do this based on factors other than prodigality. As such this ruling from the EgCC in my view should not be widely interpreted as giving the green light to prefer some heirs to others; rather the ruling should only be looked at from prodigality point of view in that such disposition of property is not prodigality, since prodigality is one factor while preference is quite another.

Furthermore, it is clear that the term prodigal applies only to the prodigal adult, since the Code has separately governed rules relating to the minor and the insane. As such, a person under twenty one year old cannot be interdicted on the grounds of prodigality since this age has been fixed as the age of majority in the Code itself. It seems that the Code has thus followed the majority of Muslim jurists in confining the meaning of prodigal as that of prodigal adult.

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[43] EgCC, cas.no.2, dated 20/6/1957

4.3. Interdiction[44] on the prodigal (*safīh*)

4.3.1. Islamic law

Inasmuch as there are different views regarding the meaning of prodigality, the legal rules concerning whether the prodigal is subject to interdiction are also a matter of juristic debate between those who legalise interdiction and those who oppose it. The diversity of opinion in this is obvious even among jurists who belong to the same school of thought. When discussing matters relating to interdiction on the prodigal the jurists generally divide them into two categories; namely, prodigality accompanying puberty and prodigality occurring after the age of prudence details of which are in the following headings.

4.3.1.1 Reaching puberty in a state of prodigality

Before continuing any further, it is noteworthy that apart from elaborating aspects of interdiction on the prodigal, the jurists have also *en passant* touched on legal rules concerning the 'handover of property' to the prodigal which stems from their understanding of the Qur'ān (4:5) which reads: " If then ye find sound judgment in them release their property to them".The relationship between interdiction and prevention of handing over property is so close that some jurists have combined their arguments in advancing both concepts as can be seen from the following discussion.

To begin with, based on the Qur'ān (4:5), jurists are unanimously agreed that when a person attains the age of puberty in a state of prodigality, it is not permissible to

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[44] On the meaning of interdiction see chapter three, p.101 onwards

hand over his wealth. However, differences of opinion arise as to when such a prohibition ends; or in other words, will the existence of prodigality prevent the property from being surrendered to the prodigal permanently as long as the state of prodigality remains? The affirmative answer to this question is held by the majority of jurists[45], hence, according to them, a prodigal adult would not be allowed to take over his property until he becomes prudent (*rashīd*) irrespective of his age. Abu Hanīfah[46] on the other hand, has fixed upon a period after which the handover of property to the prodigal is permissible. In his opinion, when a person reaches the age of twenty five, he can no longer be prevented from taking over his property whether he is prudent or prodigal. It is not clear on what basis Abu Hanīfah has fixed upon this age, except for the claim that in attaining the age of twenty five one would have reached the final stage of maturity and completeness. Furthermore, the following statement is attributed to ᶜUmar ؓ a person will attain maturity when he reaches twenty five years of his age.[47]

This said, with regard to the interdiction of the prodigal, jurists are divided inasmuch as differences of opinion on handing over property exist, thus- as stated elsewhere- some of the arguments which apply to the former will also apply to the latter. Having followed juristic discussion, we can conclude however that jurists are not agreed as regards the interdiction of the prodigal adult. According to some, interdiction is permissible on such a prodigal until he becomes prudent. Amongst the jurists who belong to this group are the Malikī, Shāfiᶜī, Hanbalī and most of the Hanafī.[48] On the other hand, Abu Hanīfah opines that no interdiction could be imposed on a prodigal adult; as

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[45] Ibn Rusd, Muḥammad bin Aḥmad, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, *Dār al-Fikr* ,Beirut,n.d, vol 2,p. 210

[46] *Badāʾiᶜ al-Ṣanāʾiᶜ*, vol 7, p.171

[47] *Mabdaʾ al-Riḍā* , vol 1, p. 320

[48] *Hāshiyat al-Dusūqī*, vol 3, p.292,*Mughnī al-Muḥtāj*, vol 2,p.166, *al-Mughnī*, vol 4, pp.295-296

such he is free to dispose of his property. The same view is reported from jurists such as Ibn Sīrīn and Ibrāhīm al-Nakha^{c}ī.[49]

In asserting their views each group have invoked a number of arguments from the Qur'ān and the *Sunnah* as well as reason. The majority of jurists for their part have cited the following evidence to support their view;

1- The Qur'ān (2:282) says: " If the party liable is mentally deficient, or weak or unable to dictate, let his guardian dictate faithfully" The verse thus indicates that Allah has imposed a kind of guardianship over the prodigal and the weak who are not able to dictate; the legality of guardianship connotes that the prodigal is interdicted and not free in his acts including contract, otherwise, the imposition of guardianship would be senseless. However, Abu Hanīfah and his likes did not accept the interpretation of prodigal advanced by his opponent, as according to him the term prodigal that appears in this verse should refer either to the minor or the insane. Moreover, invoking the same verse, Abu Hanīfah argued that the beginning of verse which reads "O ye who believe, when ye deal with each other, in transaction involving future obligations in a fixed period of time, reduce them to writing" clearly indicates that the prodigal is allowed to enter into transactions without any interdiction and at the same time the claim that the word guardian refers to " guardian of the prodigal" *(walī al-safīh)* was also refuted ; as it should be referred to "guardian of rights" (*walī al-haqq*), or in the context of this verse creditors *(wali al-dayn)*.[50]

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[49] *Badā'i^{c} al-Ṣanā'i^{c}*, vol 7 , pp. 171-172
[50] *Aḥkām al-Qur'ān,*, vol 2, p. 213

In response to Abu Hanīfah , the majority of jurists have concluded that he has mistakenly interpreted the verse on two points. Firstly, his interpretation of the word prodigal (*safīh*) as the insane or the minor is not pertinent in the context of the verse due to the fact that these two groups of people have been covered in the word *ḍa^{c}īf* (the weak). Furthermore, as argued by al- Khattābi,[51] the word *safah* connotes the meaning of blame and rebuke for which the minor is not liable because he has not yet attained puberty, at which point a person is responsible for his acts. As such, the word prodigal should more pertinently cover the prodigal adult. Secondly, with regard to Abu Hanifah preference's of the meaning of *walī al-haq* (creditors) rather than *walī al-safīh(guardian)*, it has been rebut that such a usage is not common in the Arabic language. To this effect Ibn ^{c}Arabī stresses " It can be constructed *walī al-safīh* or *walī al-ḍa^{c}īf* , not *walīal-haqq*, instead we say *sāhib al-haqq*"[52]

2-Another Quranic verse relating to interdiction on the prodigal can also be found in (4:5). The Qur'ān reads " To those who are weak of understanding make not over your property which God hath made a means of support for you, but feed and clothe them therewith, and speak to them the words of kindness and justice". The meaning of this verse in the view of the majority of jurists is that the guardians should not deliver up wealth to the prodigal because this latter would be extravagant in spending it. Instead, it is incumbent upon the guardian to manage such wealth to the advantage of their wards in matters relating to clothing, food, shelter and the like.[53] To put it simply the doctrine of interdiction

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[51] *Tafsīr al-Qurṭubī*,, vol 5, p. 30
[52] *Ahkām al-Qur'ān*, , vol 1, p. 251
[53] *Bahth fī al- Ḥajr* p. 170

is manifested here. Nonetheless, as in the previous verse, Abu Hanīfah was not convinced by this interpretation and his argument here is two fold; one strand of which regards the meaning of the word prodigal itself and the other how his opponents interpret the word property *(amwāl)* in this verse. As the first of these has been previously dealt with, the discussion will therefore be limited to the second aspect. According to Abu Hanīfah, even though this verse shows the non-delivery of property to the prodigal, this does not necessarily mean they are interdicted with regard to contracts such as sale. In addition, the pronoun (*kum*) in the phrase *amwālakum* (your property) refers to the guardian not to the prodigal due to the fact that this verse is addressed to the guardian. He further argues that it is not possible that the commandment *(khiṭāb*) is meant for the prodigal because this latter is not fit to receive it. In reply to this criticism, the majority hold that the Qur'ān has metaphorically related the property of the prodigal to the guardian because they have the right to administer this property, not that they are the real owner since there are differences between the two, as in the Quranic phrase (4:29): "*walā taqtulū anfusakum"*(do not kill yourselves)[54]. Furthermore, if we were to accept Abu Hanīfah's argument that property refers to the guardian, then the property of the prodigal should not be handed over to him in the first place.[55]

3-It is narrated by Anas bin Malik that during the time of the Prophet PBUH there was a man whose mind was weak involved in selling. His relative came to the Prophet PBUH and said: O Messenger of Allah, interdict on such and such

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[54] (4:29) Admittedly, a person does not kill himself, but can kill another as if they were one person. The *Sharīah* has always considered the believers as one person ; as such it addresses every person as it addresses all and *vice versa*. There are numerous example of this

[55] *Ahkam Taṣarrufāt al-Safīh*, p. 41

person because he is selling things in a state of mental weakness, whereupon the Prophet PBUH then prohibited the man from selling. The man said I can help that, then the Prophet PBUH said: If you are buying say to the seller. No cheating"[56] . The *Ḥadīth* shows that the Prophet P B U H had first wanted to interdict the man due to his prodigality. However, Abu Hanīfah insists that this *Ḥadīth* does not imply the legality of interdiction since the Prophet PBUH eventually allowed the man to be involved in selling and buying. At most, the Prophet PBUH has given guidance to the man on how to avoid being cheated[57]. In response, the majority of jurists argue that the retraction of the Prophet PBUH on interdiction is proof to the legality of interdiction itself, He would otherwise have refused the request from the man's relative at the outset to interdict him.

4-It is narrated from al- Mughīrah that the Prophet PBUH had forbidden the wasting of wealth.[58] Since the prodigal squander hisr property, which is forbidden by virtue of this *Ḥadīth*, there is thus no way to conserve his property except by interdicting him. Nevertheless, the deduction that this *Ḥadīth* justifies the imposition of interdiction is not conclusive in the view of some jurists. This is because the *hadīth* merely indicates that wasting property is unlawful and there are other unlawful things which do not lead to interdiction.[59]

5-It is also reported that ᶜAlī bin Abī Ṭālīb came to ᶜUthmān bin ᶜAffān and said to him: Abdullah bin Jaᶜfar had purchased such and such, I ask you to interdict him . (Upon knowing this) Zubayr interfered and told ᶜUthmān : I was his partner in that purchase. ᶜUthmān then replied: How would I impose interdiction on a

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[56] Narrated by al-Tirmidhī, *Kitāb al-Buyūᶜ* , *Ḥadīth* no 1268
[57] *Al-Mabṣūṭ*, vol 24, p. 161,
[58] Narrated by Bukhārī, *Kitāb al-Zakāh*
[59] *Mabda' al-Riḍā*, vol 1 pp.324-325

person whose partner is Zubayr?[60] From this narration it is argued that the practice of interdiction was both permissible and prevalent among the Companions; this would not have been the case had they not heard it from the Prophet PBUH himself. Moreover, in this case ᶜAli's request would have been approved by ᶜUthmān if Zubayr had not been a partner of Abdullah, meaning that interdiction was recognised by the Companions without anyone opposing it ,which constitutes 'silent consensus' *(ijmāᶜ sukūtī)* in the terminology of jurisprudence.

Apart from this textual evidence the majority have also argued that the purpose of interdiction on the prodigal, is not only to protect his property, but also to preserve the right of the community as a whole in that by leaving the prodigal to squander his wealth freely without limitation, will eventually make him destitute, and thus the burden will be upon society to manage his affairs. Therefore, by interdicting him any possible harm that he may inflict upon society would be removed.[61]

This said, it is interesting to note that those who oppose interdiction (such as Abu Hanīfah) have also invoked the Qur'ān and *Sunnah* in their argument. Before preferring any one view however, it is fair to examine supporting evidence put forward by Abu Hanīfah and his like. In (5:1) the Qur'ān reads : "O those who believe fulfil your covenant". The general sense of the verse is to fulfil contract obligation, which Abu Hanīfah argues does not here distinguish between the prodigal and others; thus ,although the prodigal is extravagant, he is still sane and as such, is fit to receive the legal

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[60] Narrated by al- Bayhaqī in *Sunan Kubrā, Kitāb al-Ḥajr, Ḥadīth* no 11336
[61] *Ahkām Taṣarrufāt,al-Safīh*, p. 50

commandment(*khiṭāb)*.[62]It seems, however that this verse is either wrongly understood or it is taken out of context, for there is no dispute that the verse refers -in general- to fulfilling obligation; however this generality has been made more specific in other verses to exclude the like of the prodigal. In addition, Abu Hanīfah has also relied on the same *Ḥadīth* regarding interdiction used by the majority of jurists but he interprets differently saying that the Prophet PBUH did not interdict the man albeit his mental weakness , which connotes that interdiction was not legal in spite of the request from the man's relatives.[63]

Apart from this evidence, in defending his view Abu Hanīfah has engaged in what is presently known as 'a human right debate'. He sees that the prodigal adult may not be interdicted because the denial of his legal autonomy causes a loss of humanity and equating him to animal; this is a greater harm than squandering wealth; but a greater harm may not be admitted to alleviate a lesser harm.[64] In this respect Oussama remarks " the substantial restriction of legal capacity would exclude the spendthrift adult from true membership in the human community, making it impossible for him to participate fully in what is genuinely human, the legally sanctified human act. This constitutes an injury to his soul, an injury so grave in Abu Ḥanīfah's opinion that it overshadows the material benefits occasioned by his interdiction"[65]

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[62] *Al-Hidāyah*, vol 3, p.281
[63] *Al-Mabsūṭ*, vol 24, p. 161,
[64] *Al-Hidāyah*, vol 3,p.281
[65] Studies in Modern Islamic law and Jurisprudence, p. 113

More interestingly, perhaps, the argument used by Abu Ḥanīfah is that the prodigal is not interdicted in marriage –as accepted by all jurists [66]- it is therefore illogical to interdict him in financial matters in the sense that marriage which is more important than contract and should thus be interdicted as such[67]In addition, if a prodigal person admits of committing a crime punishable with prescribed punishment *(ḥad)* or retaliation *(qisās)* this admission is valid, and consequently, he is liable for bodily punishment. By analogy, Abu Hanīfah argues that if the prodigal is free to act in matters relating to his body why then should we restrict him in financial affairs[68] as according to the goal of *Sharīᶜāḥ* life (*nafs)* takes priority over property*(māl)*

Following Abu Hanīfah in not imposing interdiction on the prodigal was Ibn Hazm; however he differs from the former in not fixing a specific age beyond which a

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[66] There is no dispute amongst the jurists that marriage is permissible for the prodigal; however before such a contract takes place is it necessary to obtain the consent of the guardian. In this case, would a marriage without the consent of the guardian be legally valid and enforceable? Jurists are not agreed on this point as according to the Hanafī, the Mālikī and Hanbalī, the contract of marriage is valid regardless of the consent of the guardian. They argue that marriage is not a financial contract in nature, and that as such the presence of prodigality in a person carries no effect. The Shāfiᶜī, on the other hand maintain that a marriage without the consent of the guardian is null and void due to the fact that the contract itself involves dowry which is thus considered to be a financial matter. In response to this argument however the majority argue that even though a marriage contract involves property , the primary purpose of marriage is to protect oneself from committing a sin not to obtain a dowry. For this reason, they stress that if a prodigal person advances an excessive amount of dowry, the dowry should be reduced to an acceptable sum while the contract itself nevertheless remains valid.

In my view, what has been upheld by the majority seems to be in accordance with a *Ḥadīth* in which the Prophet P B U H was reported to have said " O Young people whoever among you has the ability to bear marriage costs he should marry as it will protect his eyes (from seeing unlawful things) and protect him from committing a sin" This *Ḥadīth* clearly stresses that the purpose of marriage is to protect one self from committing a sin not to obtain financial benefit. Further the Shāfiᶜī seem inconsistent when they do not allow a contract of sale even with the ratification of the guardian while in the case of a marriage contract this consent is regarded as necessary. See *Badā'iᶜ al-Ṣanā'iᶜ*,7, p. 171, *Hāshiyat al-Dusūqī*, vol 3, p. 297, *Al-Mughni*, vol 4,p. 523, *Nihāyat al-Muḥtāj*, vol 4,p. 367, *Al-Hidāyah*, vol 3, p.283, Al-Shawkānī, Muḥammad bin ᶜAlī, *Nayl al-Awṭār, Dār al-Jīl,* Beirut, 1973, vol 6, p.225

[67] Abu Zahrah, *al-Milkiyyah*, p. 291
[68] *Mabda' al-Ridā*, vol 1, p.319

person should not be interdicted. According to Ibn Hazm the prodigal is not subject to interdiction should he attain puberty with no mental disorder; regardless of his age.[69] As mentioned elsewhere, Ibn Hazm interprets the word prodigal to be the insane or the minor as summarised in the following statement: "The interdiction of anyone's financial acts is not legally permissible-except those of the minor, and the insane, so long he suffers insanity... thus if a minor attain puberty or an insane person recovers, his freedom to dispose of his wealth is lawful, like that of any other person; no distinction in this regard is allowed between the freeman and the slave, or the male and the female"[70]

This said, having weighed all the arguments put forward by the jurists concerned in support of their view, I am inclined to prefer the view of the majority of jurists which allows the prodigal to be interdicted as long as the elements of prodigality exist, the reason being their strong argument, be it from the Qur'ān or the *Sunnah*. On the other hand, the arguments advanced by Abu Hanīfah lack strength and are in my view untenable. For example, apart from the above discussion, when Abu Hanīfah draws an analogy between confession of criminality in court by the prodigal and acceptance of his right to engage in financial acts, it seems that this analogy itself is invalid known as 'analogy between different things' *(qiyās maᶜ al-fāriq)* This is because in prescribed punishment (*ḥudud)* and retaliation (*qiṣāṣ)* the implementation of punishment depends on evidence which is obtained through admission whereas this is not the case in matters of property as it is subsistence *(qiwām)*to society and no one therefore enjoys absolute right to dispose of it. Likewise, financial matters cannot be related to marriage, due to the fact that marriage is proscribed to protect life *(nafs*) and dignity. With regard to the argument relating to human rights it should be noted that there is no absolute right in the *Sharīᶜaḥ*,

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[69] *Al-Muḥallā*, vol 8, p.278,
[70] *Al-Muḥallā* vol 8,p.pp.278-279

meaning that if one wishes to exercise one's right which causes harm to others ,then one is not permitted to do so.

As for the opinion of Ibn Hazm's , it seems that he mostly bases his arguments on a literal point of view without taking into consideration either the effect of prodigality on the prodigal himself or upon society, thus, if we were to follow his view there would be an unbalanced situation in the society which in contravention to the goal of the *Sharīʿah* itself.

In short, the difference between views on interdiction is mainly because jurists have looked at this concept from different angles. For Abu Hanīfah and Ibn Hazm, their focus is on human dignity which is considered to be the most valuable to human asset followed next by wealth itself. However, the majority of jurists see wealth as societal task *(waẓīfah ijtimāʿīyyāḥ)* in the sense that the owner of a property cannot dissociate himself from the society in which he lives. As such he has no absolute right to dispose of property; rather its management must be in line with the interest of the community in which he lives, as is evident from the Quranic injunction which makes the property of the prodigal as if it belonged to his guardian. Furthermore the Qur'ān considers such property as subsistence to society. Thus, the view of the majority, especially in modern society should prevail; this is not to suggest however that by preferring this view the dignity of man is sidelined; on the contrary, by interdicting the prodigal this is also a means of preserving his dignity rather than circumventing it.

4.3.1.2 The emergence of prodigality after puberty and prudence

The preceding discussions concern the state of prodigality if it occurs together with the attainment of puberty. There is no dispute amongst jurists that upon attaining majority (if in a state of prudence) a minor is no longer interdicted, in compliance with the Quranic saying (4:6): " If then ye find sound judgement in them release their property to them" However the case is quite different if prodigality appears after a period of apparent prudence since jurists differ as to whether or not interdiction should be imposed inasmuch as they also differ on the question of prodigality at the time of puberty. According to the vast majority such as the Shāfiᶜī, Malikī and some Hanafī, interdiction in this situation is permissible due to the existence of prodigality as its justification . This means that there is no difference in the view of the majority between the two situations of prodigality (prodigality accompanied by puberty and prodigality after prudence).On the other hand, Abu Hanīfah departs from his view regarding a prodigal pubescent (*safīh bāligh*) in that he holds that the occurrence of prodigality after a period of apparent prudence has no effect whatsoever on legal capacity of person involved.[71] In such a case the prodigal is not subject to interdiction and is therefore free to dispose of his property. This stance taken is quite understandable if prodigality appears after the age of twenty five; nevertheless if prodigality emerges before that age it is hard to reconcile this view with that held by him previously. This means that on the one hand Abu Hanīfah holds that there should be interdiction on the prodigal before the age of twenty five, while on the other hand he seems to deny this. Whatever justification he may have for this contradiction, it seems to me that the view of the majority is preferable since they base their argument on a definite cause (ᶜ*illah*). Hence, if there is prodigality

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[71] *Al-Hidāyah*, vol 3, p.281

the interdiction is permissible and *vice versa* no matter how often this occurs and irrespective of age factors. It should be noted that the arguments invoked here are identical to those in the previous discussion; thus, these arguments will not be repeated.

4.3.1.3 The nature of interdiction on the prodigal

Having accepted that interdiction on the prodigal is permissible -as viewed by the majority of jurists, the question arises as to the nature of this interdiction that is whether it is automatic(by force of law) or otherwise. In other words, is a court order essential in order for interdiction on the prodigal to take effect? The majority of jurists[72] such as the Malikī, the Shāfiᶜī, and the Hanbalī as well as Abu Yūsuf of the Hanafī hold that the power to interdict is solely vested in the discretion of the judge; as such before judicial order is obtained all acts of a prodigal person are valid. It is argued that the ruling is necessary because the legality of interdiction itself has been disputed by some jurists; thus a court ruling is needed to resolve this dispute in accordance with the maxim "the ruling by a judge removes the disagreements" *(ḥukm al-hākim yarfaᶜ al-khilāf)* . In addition, the prodigal combines two harmful elements namely, disrespect of personal dignity and squandering his property, hence a court ruling will determine which harm should be uppermost.[73]

On the other hand, some jurists such as Muhammad bin Hasan of the Hanafi[74] maintain that a person should be automatically interdicted the moment his prodigality exists. This argument focuses on the cause for interdiction itself; that is, since the cause

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[72] *Bidāyat al-Mujtahid*, vol 2, p.210, *Nihāyat al-Muḥtāj*, vol 4,pp.364-365,*al- Mughnī*, vol 4, p. 296

[73] *Baḥth fī al-Ḥajr*,, p. 178

[74] *Al-Hidāyah*, vol 3, p.282,

for interdiction is wastefulness and destruction of wealth, whenever there is a cause there will be an effect. Muḥammad also likens a interdiction caused by prodigality to that caused by imbecility in the sense that since all jurists agree that imbecility does not need a court order, the same is true with regard to prodigality.

In my view, the interdiction on the prodigal does need a court ruling, as this is more appropriate in dealing with financial matters; otherwise, it is possible that chaos in such matters may ensue. Furthermore, to equate prodigality with imbecility is not accurate since there is no dispute in the latter whereas this is not the case in the former. However, I prefer to harmonize these two views so that in the event of the court being unable to give an interdiction ruling as expected, the ruling can be retrospective. This means that the judge can annul all transactions taking effect from the time prodigality occurs rather than from the time when the ruling is issued.

4.3.2. Interdiction on the prodigal in the ECC

The legality of interdiction on the prodigal is recognised by virtue of article 113 of the ECC in which the insane, the imbecile and the unaware person are also interdicted. In order for interdiction to take effect, a court order is essential which means that the interdiction on the prodigal is judicial in nature. It appears that the ECC has adopted the view of the majority of Muslim jurists in requiring a court order before the interdiction can be imposed. It is to be noted that the Code makes no difference between prodigality accompanied by puberty or prodigality occurring after puberty in that both need to obtain

judicial order. However, contrary to Islamic law, there are circumstances in which a prodigal is interdicted even before obtaining a court order. These circumstances are:

i- If a disposal *(tassaruf)* issuing is due to the exploitation of the situation of prodigality effected by the party who is aware of the existence of such prodigality.

ii- If the disposal is carried out resulting from an agreement between the prodigal and the other contracting party.

The EgCC has confirmed these exemptions in a case brought to it when it held that " the interdiction ruling on the prodigal would only take effect at the time when such ruling is issued , with no retrospective effect on previous act unless there are secret arrangement(*tawāṭu')* and deception *(ghish)*"[75] The grounds on which the law bases these exemptions have been explained by al-Sanhūrī where he argues:

> " It frequently occurs that the prodigal who is to be interdicted would waste his wealth by conspiracy with other party or that this latter would take advantage in order to exploit the property... In these two circumstances the disposal is void if it involves no exchange of property such as donation, and is voidable if the disposal concerns the exchange of property"[76]

From this argument, it seems that the purpose of giving specific rules to these circumstances is to protect the property of the prodigal, however, it is still somewhat vague as to why exemptions are restricted to these circumstances only since there could be a situation where a prodigal may waste his property. Perhaps the reason for this restriction (as in the case of insanity) is to protect other *bonafide* contracting party who may not be aware of the existence of prodigality at the time of concluding the contract.

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[75] EgCC, cas.no 6,dated 25/10/1956
[76] *Al- Wasīṭ*, vol 1 p. 304

Moreover, the Civil Procedure Code (CPC) has stipulated an exemption in which a prodigal person is considered as interdicted even before a court ruling is granted on the basis that such a prodigal person might dispose of his property during proceeding by a secret agreement with another person. Article 1028 of the CPC states " the ruling stated in article 1026 shall not affect the other *bona fide* person except from the date the request is filed, in the absence of this request the date shall start from the time when the order is registered"

In fact, the registration of such a request cannot be completed unless the judge approves it, and there from the first injunction has been secured in order to protect the property of the prodigal. ᶜAbd al-Bāqī remarks that if the interdiction request is filed to the court upon which the interdiction is granted and registered, this ruling shall have retrospective effect on the day the request is filed"[77]

However, there is a possibility that the court will not immediately grant interdiction ,in this case the period between the request and the approval might then be used by the prodigal to waste his property. Although the interdiction ruling is retrospective if successful it would nevertheless be in the interest of the prodigal, if the court were to grant a legal injunction immediately in that all disposals from the prodigal would then be null and void.

It should be noted that by virtue of article 89 and 998 [78]of the CPC , the power to file interdiction requests is bestowed on the attorney general and those responsible for

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[77] *Nazariyyat al-Ḥaqq*, p.122

[78] 89 reads: Other than summary proceedings the attorney general may interfere in the following, i. Lawsuit relating to the incapacitate and lacking in legal capacity and the absentees" while

the prodigal*(dhawī sha'n)*. As such, the guardian of the prodigal and his heirs have the right to file such a request because they are regarded as *dhawī sha'n*. Likewise, *dhawī sha'n* also have the interest to ascertain that their prodigal relatives would not squander property. In this it can be concluded that the system of public prosecution in Egyptian law is approximate to *ḥisbah* (soliciting good and advising against evil) in Islamic law, as Madkūr argues that" the *ḥisbah* in Islamic law in general resembles the public prosecution office in the present day"[79]

4.4 The effects of prodigality on contract

4.4.1 Islamic law

In determining the legal rules relating to acts issuing from the prodigal jurists are concerned to divide such acts into several categories such as financial and non- financial contracts. Although the focus of the present study is on financial contracts, reference will also be made when necessary to contracts which bear less financial significance. The purpose in so doing is to examine more closely how financial contracts in certain circumstances are inextricably related to a mixture of both financial and non- financial criteria.

Before further detail it is worth reminding ourselves that we have seen how the jurists are agreed on the prohibition of 'handing over property' to a child if he attains puberty in a state of prodigality. This raises the question as to whether there is any

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article 998 reads: request of interdiction is to be filled by attorney general or those responsible *(dhawī sha'n)*

[79] *Al-Madkhal li al fiqh al-Islami*, p. 414,

difference between ' handing over property' and 'entering into a contract' as far as financial affairs are concerned. In other words, if handing over property to the prodigal, for example, is not permissible then would the prodigal be permitted to conclude a contract that involves his wealth? To answer this question whether in the affirmative or the negative will not be straightforward unless we first examine the words of jurists as regards contract entered into by a prodigal person, after which we can asses whether there is justification for assigning different rules to handing over property or concluding a contract.

Broadly speaking, jurists have taken different stances when discussing the effect of prodigality on contract, notwithstanding their agreement that prodigality itself has no effect on legal capacity as for them the prodigal may nevertheless be addressed by legal injunction(*khitāb shar^{c}ī*). The majority of jurists such as the Hanafī, the Malikī and the Hanbalī hold that a sale contract carried out by the prodigal should be suspended pending the ratification of his guardian; if the guardian's consent is obtained then the sale will be valid and enforceable, otherwise it will be null and void. The Hanafī have further explained that the relation to a contract enacted by the prodigal is similar to that of a discerning child.[80] As such if, a contract is purely beneficial such as receiving a gift it would be valid regardless of the guardian's consent. Likewise, if a contract is purely detrimental such as giving a gift the consent would have no effect in validating such a contract. However in contractual matters such as sale, which has the potentiality either to be beneficial or harmful, consent of ratification then assumes its role. Nonetheless,

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[80] Muḥammad bin al-Hasan of the Hanafī concluded that with the exception of the following cases , disposal made by an interdicted person because of prodigality is similar to that made by a child These cases are; (1) It is permissible for the guardian to dispose of the child's property whereas this is not the case in the prodigal (2) Divorce and manumission initiated by the prodigal are valid whereas the child is not allowed to do so (3) Bequest from the prodigal is valid not but the child (4)Claim to lineage is permissible for the prodigal not the child , see, Abu Zahrah, *al-Aḥwāl al-Shakhṣiyyah, Dār al-Fikr al-^{c}Arabī*, Cairo, n.d, p.452, *Baḥth fi al-Ḥajr*, p. 191

contrary to a discerning child, the contract made by the prodigal would only be valid if the consent issued from a judge instead of the guardian. [81]. The Malikī [82] although they concur with the Hanafī in this respect, have differed from the latter as for them the ratification of a contract made by the prodigal will depend on the guardian rather than the judge; this also seems to be the Hanbalī's[83] view. Thus, it seems that both the Malikī and the Hanbalī have recognized that the prodigal is still fit to enter into this kind of contract; however this fitness is either not absolute , or it is too weak to conclude a contract, and is thus strengthened by ratification required of either the guardian or the judge.

On the other hand, the Shāfi^{c}ī[84] have taken a strict view regarding a contract carried out by the prodigal. [85]According to them any financial contract issuing from a prodigal person would be null and void irrespective of the ratification, be this from the judge or the guardian. Indeed they maintain that such a contract will remain null and void even if it is in the advantage of the prodigal as they argue that validating a contract concluded by the prodigal is contradictory to the rationale and wisdom of interdiction itself. The stance taken by the Shāf^{c}ī is not surprising if we look back at their view on other interdicted persons, such as the insane and the minor, which lead us to conclude that the Shāfi^{c}ī are consistent in invalidating financial contracts entered into by an interdicted person. Although they accept the role of guardian regarding the prodigal, their view on such a concept differs from that of the Hanafī and the Mālikī in that the guardian upon interdiction will be fully responsible for concluding a contract in the interest of the

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[81] *Hāshiyah Ibn ^{c} Ābidīn*, vol 6, p. 148
[82] *Mawāhib al-Jalīl*, vol 5,p.62
[83] *Al-Mughnī*, vol 4, p.297
[84] Al-Nawawī, *Minhāj al-Ṭālibīn, Dār al-Ma^{c}rifah, Beirut*, n,d, vol 1, p.59,
[85] This rule is the same with regard the child whether he is discerning or not.

prodigal. For them this power to supervise should not be compromised by the so called ratification *(ijāzah)* as it would go against the meaning of interdiction itself.

In a complete contradiction to the Shāfi^{c}ī, however Abu Hanīfah[86] opines that a contract of the prodigal is valid whether it is ratified by the judge or not. This view stems from his stance in not imposing interdiction on the prodigal [87]as previously discussed.

Having examined the view of the jurists, before deciding which view is preferable it is to be noted that with regard to the previous question, i.e., whether there is any relationship between the handing over of property to the prodigal and his contracts, it is quite clear that both issues concern the protection of the prodigal's wealth. This correlation is reasonable in the view of the majority of jurists in which they give either the same or reasonable rules for both handing over of property and concluding a contract. The Shāfi^{c}ī for example, apart from ruling that handing over of property is prohibited as long as the prodigality exists, have also extended this prohibition to contract in such a way that the prodigal is legally not allowed to conclude a contract. The same is true with regard to the view of both the Hanafī and the Māliki in this matter. As such, it is not surprising that we find the Quranic verse (4:5) has been invoked as evidence to nullify a contract concluded by a prodigal person.

However, moving to Abu Hanīfah's view, as mentioned elsewhere a prodigal person is of two categories; those who have attained the age of twenty five and those who

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[86] *Bidāyat al-Mubtadī*, vol 1, p.201

[87] In some cases, disposals issuing from an interdicted prodigal is valid such as in a case where a person reaches puberty in a state of prodigality but has yet to attain twenty five years old.

have not.The first category is not our concern here as the same ruling is to be found with regard to handing over of property and concluding a contract. As regards the second category Abu Hanifah's stance is questionable. This is because on the one hand he agrees with other jurists in imposing interdiction on the prodigal who has yet to attain the age of twenty five, while on the other he validates a contract entered into by that prodigal. His argument is that the purpose of the prohibition of handing over property is to protect it until the prodigal reaches the age of twenty five. Should this be the case, it is more appropriate for Abu Hanifah to concur with his disciple in relating a contract made by a prodigal person to that of a discerning child in that if a contract is purely detrimental to the prodigal such as giving a gift, then it would not be valid, hence his property can be protected through interdiction in accordance with Abu Ḥanifah's view. It thus seems that the distinction between 'handing over property' and concluding a contract is untenable. In my view what led Abū Ḥanīfah to lay down different rules in this respect was perhaps to create a balance between the rights of the individual and the rights of society; that is by not handing over the property the right of society is protected, while the right of the prodigal is preserved by allowing his contract to be valid. However, Abū Hanīfah was not prepared to uphold this balance permanently as when the prodigal reaches twenty five years old, his right prevails at the expense of that of others. This is in line with the principle which states that " humanity takes priority over property". However it seems that later Ḥanafī jurists were not prepared to concur with their founder's view in their preference for the view of Abū Yūsuf and Muhammad.

In line with the view of the majority which places a restriction on the contract made by the prodigal, the question arises as to the gravity or degree of this restriction as far as financial issues are concerned. In other words apart from the extravagance of the

prodigal himself what kind of financial values should exist in order to invalidate or suspend a contract concluded by the prodigal? To answer this question it seems that the jurists especially those of the Mālikī and the Hanbalī have divided the contract carried out by the prodigal into two categories ; those which involve his necessity and those which do not. Falling within the first category are requisites such as food, clothes and the like. It appears that this kind of contract is permissible as can be concluded from the following statement:

> " The disposal by the prodigal is valid if it involves trivial matters[88] such as (buying something) worth one *dirham,* the guardian has no right to reject this buying and the sale is therefore enforceable, the *prodigal* is not subject to interdiction for spending involving his food, his family's ..... This is because these matters are necessities and trivial"[89]

To the same effect the Ḥanbalī maintain that the disposal carried out by the prodigal is valid in trivial matters even without the consent of his guardian since the underlying wisdom of interdiction (that of wasting wealth) is here not significant.[90] The Shāfiᶜī, however, do not seem to take into consideration the amount involved; for them as long as there is a monetary element a contract should not be valid.

This said, it appears that the view of the majority is more moderate; hence it is preferable. This is because if we were to follow the Shāfiᶜī ,his would cause hardship in that the guardian would have to act for the sake of his ward in all things even in trivial matters. This hardship should be avoided as much as possible in Islamic law. From a contrary standpoint recourse to Abu Ḥanifah's view may put the interests of the prodigal as well as society at risk, which also needs to be avoided according to the *Sharīᶜāḥ.*

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[88] Whether a matter is trivial or not depends on custom; if there are differences the authorities may intervene to decide in the interest of the prodigal in accordance with the maxim " The act of the ruler depends on public interest"(*taṣarruf al-ɨmām manūṭ bi al-maṣlaḥah*)

[89]Mālik bin Anas,*al-Mudawwanat al-Kubrā, Dār Ṣādir*, Beirut, n.d, vol 5, p.222

[90] *Kashshāf al-Qinā'*, vol 3, p. 151

.4.4.2 The ECC

Before progressing further, it is worth noting that the jurists are unanimous in counting prodigality as one of the impediments on legal capacity, however, its existence does not remove such capacity completely such as in the case of insanity, rather legal capacity of the prodigal is restricted. Although the ECC does stipulate that prodigality is considered as lack of capacity (*nāqiṣ al-ahliyyah)*, the extent of effect to which such impediment may have on the prodigal is not an area of agreement among the jurists, For instance, some jurists such as Jamaluddin Zakī maintain that the mental capacity of the prodigal is perfect (*kāmil al-quwā al ᶜaqliyyah*),and hence he is fit to carry out a contract if it is reasonable, an excess of which would lead to the restriction of legal capacity, although this is somewhat obvious since any impediment would be regarded as such if it has legal effect. Therefore if there is no possibility for instance for an insane person to conclude a contract the interdiction would be meaningless. The same is true with regard to the prodigal in the sense that in normal conditions his legal capacity is untouched. In other words, to verify whether a person is prodigal or not it is necessary to investigate whenever his spending or contract is carried out at the time of concluding of contract. It thus is suggested that the meaning of impediment (*ᶜarid)* should be looked at from this perspective as held by the majority of Muslim jurists .[91] This is perhaps the reason why no ruling as to whether prodigality is impediment or not is found since judicial interpretation of the law is more practical than that given by the jurists.

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[91] See the meaning of *ᶜarid* in chapter one,p.31 onwards

Having said this ,similar to a disposal made by of the insane person , the ECC has divided the contract carried out by the prodigal into two categories namely, prior to the registration of interdiction ruling, and that after such a ruling has been registered. It is important to note however, that having secure a court ruling to interdict a prodigal person is not sufficient for the said ruling to take since it must first be registered.

4.4.2.1 Prior to registration of interdiction ruling

A contract entered into by a prodigal person before registration of an interdiction ruling is valid and enforceable regardless of the nature of contracts, be they purely beneficial, purely harmful or a mixture of beneficial and harmful. Thus article 115/2 of the ECC stipulates that " a disposal issuing from a prodigal person before the registration of interdiction ruling is not void or voidable unless such disposal is a result of exploitation or conspiracy". It is clear therefore that this article has laid down a principle by virtue of which the prodigal before being interdicted enjoys full legal capacity , and thus any disposal issuing from him is valid and produces its full legal effect. For instance, in the case of a contract of sale the ownership would transfer from the seller to the buyer as soon as the contract takes place, nor can such a disposal be contested on the grounds of lack of "will" as in the case of an insane person and an imbecile.[92] This is because these latter cases the "will" is absent, where as in the prodigal his will is valid due to the fact that his reason is intact.[93]

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[92] As mentioned elsewhere a contract concluded by the insane before regisrration is valid. however, the validity of such contract may be contested on other question of law that the insane lacks of will.

[93] *Madā Ahliyyat al-Ṣabī*, p.275

In asserting this rule the EgCC held that " a disposal issuing from a prodigal person before the registration of the ruling is not void or voidable"[94]while in another ruling it was held that the interdiction ruling has no effect as regards disposal before the date of the registration of the ruling.[95]This stance adopted by the Code is in accordance with the view of the majority of Muslim jurists who hold that an act issuing from the prodigal is valid if no interdiction proceeds from the judge. Apart from this, it seems that the Code as well as the judiciary have emphasized procedures rather than substance in determining the legal effect of a contract made by a prodigal person. However, can it be said that the Code totally bases on this principle while overlooking reality? In other words, if the implementation of procedures will undermine the purpose and spirit of the law then would that be reasonable and therefore have to be maintained ? The following exceptions do demonstrate that the Code has also taken into consideration if the implementation of the textual provision would cause harm, other options should be resorted to. These exceptions are:

i- In the case of exploitation-meaning that if a person exploits the state of prodigality and accordingly carries out a contract involving the prodigal , such a contract would be void or voidable. The EgCC has interpreted the word exploitation *(istighlāl)* as taking advantage of the state of prodigality so as to conclude a contract in order to exploit and enrich oneself from the property of the prodigal. In a case brought to the Court the appellant argued that the defendant had taken advantage of the said prodigality in order to buy a piece of land belonging to the appellant at a lower price. The court held that such transaction was carried out under exploitation *(istighlāl)*, as such it is void even though the interdiction ruling has yet to

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[94] EgCC,cas.no 397, dated 28/5/1970
[95] EgCC, cas.no 397,dated 13/12/1985

be registered.[96] Therefore, it is not sufficient to establish exploitation by mere awareness of extravagance of the prodigal, rather,it must be established that the other contracting party has exploited the prodigal's weakness. However, it should be noted that there is no clear cut measure to create a balance between what the prodigal can give and take, as such it is left to the discretion of the trial judge to determine the measure of prodigality, and the Court of Cassation has therefore no right to interfere as long as the judgement is based on reasonable grounds.[97]

ii- In the case of secret agreement-whereby a prodigal person has agreed with the other contracting party to conclude a contract. To illustrate, if a person feels he will be interdicted due to his prodigality, then he agreed with another person to dispose of his property so as to escape the law. Such a disposal is void or voidable.[98]

4.4.2.2. After registration of interdiction ruling

Article 115/ 1 of the ECC stipulates that " an act entered into by a person placed under interdiction for imbecility or prodigality after the registration of the ruling of interdiction will be governed by the provisions regarding acts performed by discerning minors". This means that if a contract is beneficial to the prodigal it will be valid regardless of the consent of the guardian. Likewise if the contract is detrimental in nature then the prodigal is not legally allowed to enter into it even with the consent of the

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[96] EgCC, cas.no 446, dated 14/11/1968
[97] *Madā Ahliyyat al-Ṣabī*, p. 276
[98] Abd Baqi, *Nazariyyat al-ᶜAqd*, p. 284

guardian. However, for a contract which has the potentiality to be beneficial or harmful then the consent of the guardian is required, meaning that the guardian may choose to either ratify or nullify such a contract. [99]It can be concluded that in terms of legal capacity the prodigal is classified by the ECC as possessing incomplete active legal capacity (*ahliyyat al-ada' al-nāqiṣah)* after the ruling of interdiction is registered

4.5. Summary

Prodigality as an impediment to legal capacity has been recognised by both Islamic law and the ECC since both systems use the same terminology ie. *ᶜawārid al-ahliyyah*. However the concept especially that related to how to determine prodigality and its scope is wider in Islamic law, while on the other hand the meaning of prodigality in the ECC is restricted to financial matters only. To govern matters relating to prodigality the doctrine of interdiction has been introduced in both Islamic law and the ECC where such interdiction has to obtain judicial order before it can take effect. As for a contract entered into by the prodigal it seems that the ECC is more concerned with procedure rather than substance as it depends on the registration of interdiction ruling in order to ratify or nullify such a contract whereas this is not the case in Islamic law.

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[99] Al-Suddah, *Maṣādir al-Iltizām*, pp. 176-178

CHAPTER FIVE :THE THEORY OF DURESS *(IKRĀH)* IN CONTRACT

5.1 Introduction

The subject of duress (*ikrāh)* has been studied from various perspectives in both Islamic law and in the ECC. Under Islamic law, duress seems to be treated by classical jurists within their works on impediments to legal capacity. Hanafī jurists especially devote a specific chapter to this subject alone[1] while other jurists study duress along with various juridical acts. Modern scholars such as al-Zarqā'[2] and Abū Zahrah,[3]on the other hand, tend to discuss duress under 'defects of consent' as treated by Civil law jurists.[4] Whatever the case may be, whether duress is an impediment to legal capacity or whether it constitutes a defect of consent, its effect on contract is significant to the extent that some judges throughout Islamic history would reject any contractual document unless the 'absence of duress' is clearly stated therein [5] This is despite the fact that there is a general maxim which states that the apparent situation in a contract is voluntary. As for the ECC, besides treating duress as a defect of consent, it has also recognized its presence as a basis for compensation. This chapter will thus be devoted to studying the effect of duress on contract in both Islamic law and the ECC and will to this end include the definitions of duress, its elements and conditions as well as its effect on contracts.

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[1] See al-Sarakhsī, *al-Mabsūṭ*, vol 24,p. 38 , al-Kāsānī, *al-Badāᶜ* , vol 7, p. 175, al-Bukhārī, *Kashf al-Asrār*, vol 4, p. 383. It is narrated that Muhammad bin al-Ḥasan, a disciple of Abū Hanīfah had written a magnificent book on duress which caused him some conflict among rulers.

[2] *Al-Madkhal al-Fiqh al-ᶜĀmm*, vol 1, p. 366

[3] *Al-Milkiyyah*, p.410

[4] See for instance al-Sanhurī, *al-Wasīṭ* , vol 1, p.334

[5] It is reported that al-Nasafī the judge rejected admission *(iqrār)* document because the wording " admitted voluntarily" was not stated. See *Mabda' al-Ridā fi al-ᶜUqūd*, vol 1, p.411

5.2 The meaning of duress

5.2.1 Islamic law

As a matter of fact, there is not much evidence from the primary sources expounding the meaning and concept of duress. Perhaps the most frequently quoted Quranic verse concerning duress can be found in (2:256) which reads: " No compulsion in religion". However, this verse is not clearly directed at the effect of duress on contract. Similarly the Arabic word for duress i.e. *ikrāh* and its derivatives are also to be found in (16: 107) and (24:33). In addition, the *Ḥadīth* " liability is exempted from a duressed person" is regarded as the most reliable source concerning the legal rules of duress. Apart from this textual evidence however, there is no conclusive text on this concept. This is in turn has prompted the jurists to discuss the subject mostly from their own perspectives.

Literally, *ikrāh* is derived from the root word *ka ra ha* which is constructed as *akrahahu* meaning 'to force someone to do something against his wishes'.[6] The word *kurh* is also the antonym of *ḥubb* (love), [7]as such, these two terms are used in an opposite sense, as in for example in the Qur'ān (2:216) which reads: "But it is possible that ye dislike a thing which is good for you and that ye love a thing which is bad for you"

Technically, jurists have offered various definitions of duress. Al-Sarakhsi for example, defines this as follows: " by duress one designates the action of one person

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[6] *Al-Qāmūs al-Muḥīt*, p. 1252, *Mukhtār al-Ṣiḥāh*, p. 683

[77] Al-Bardisī,Zakariyya *al-Ikrāh bayn al-Sharīah wa al-Qānūn*, *Majallat al-Qānūn wa al-Iqtiṣād*, 1960, vol 2,p. 2

against another suppressing the consent of this latter person or vitiating his free will"[8] Al-Zaylāᶜī on the other hand considers duress as an action directed against a person which suppresses his consent while al- Bukhārī defines it as forcing a person to perform an act against his wishes by way of any threat of which the person exerting duress *(mukrih)* is capable, so that the duressed person (*mukrah*) is intimidated and deprived of free consent.[9] A more precise definition is given by Ibn Hajr by stating that duress is to force another person to do what he does not wish[10]while other definitions are found to be almost identical to those previously given. Contemporary jurists for their part give no differing definition of duress , except by either modifying or accepting those offered by their predecessors. For instance, Abu Zahrah states that duress is an order from one person to another to commit an act or utter words under threat of the infliction of evil in the case of non-compliance[11]. Al-Zarqā' refers to duress as a physical or moral constraint directed against a person in order to compel him to ratify or not ratify a juridical act, while Madkūr sees it as to force a person to do something, be it verbal or in deed without his consent other than by way of the S*harīᶜāḥ* .[12]

It is observed that jurists emphasize through these definitions the important elements of duress according to their own priority. Al- Sarakhsī, for instance, identifies the elements of duress, i.e the person exerting duress and the duressed person. In the same way, al- Zarqā's definition to some extent highlights the act to be done under duress *(mukrah ᶜalayh)*. Nonetheless, none of these definitions are sufficiently comprehensive to connote the actual meaning of duress regarding contract; hence as

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[8] *Al-Mabsūṭ* vol 24, p.38.
[9] *Kashf al-Asrār*, vol 4, p. 382
[10] Al-ᶜAsqalānī, Ibn Ḥajar Aḥmad bin ᶜAlī, *Fatḥ al-Bārī bi Sharḥ Ṣaḥīḥ al-Bukhārī*, , *Dār al-Maᶜrifah*, Beirut, 1379 H, vol 12, p. 311
[11] *Al-Milkiyyah wa-Nazariyyat al-ᶜAqd*, p.11
[12] *Nazariyyat al-ᶜAqd, Dār al-Nahḍat al-ᶜArabiyyah*, Cairo, n.d, p. 133

suggested by some authors, duress should be defined as the exercise of an unlawful pressure on a person to create in him the kind of fear which causes him to enter into a contract.[13]

5.2.2 The ECC

The Code is silent regarding the definition of duress; however, article 127 has inspired jurists to give this concept a definition. Article 127 /1 states that a contract may be annulled for reason of duress, or if a contracting person concludes that contract under the influence of fear unjustifiably implanted in him by the other contracting party, when such fear is based on founded grounds. In the light of this, al-Sanhūrī [14]defines duress as a pressure that affects a person's will forcing him to enter into a contract. Another definition given by ᶜAbd al-Bāqī is almost identical to that of al-Sanhūrī in which he states: "duress is a pressure directed upon a person in an unjustified manner which engenders fear in him resulting in the act of concluding a contract in order to avoid harm".[15]

Nevertheless, neither definition is accurate enough to clarify the notion of duress. This is because the word 'pressure'(*ḍaghṭun*) contained in these definitions covers everything irrespective of the source of duress; that is, this term covers both duress and the state of necessity.(*ḍarūrah*) caused by its presence. For instance, those who sell their property to pay their debts may have done so under pressure, and this pressure may come from human beings as well as from other sources such as economical factors. In addition,

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[13] Abd Wahhab Ahmed El-Hasan, The Doctrine of Duress in Sharia, Sudan and English Law. Arab Law Quarterly, Feb, 1986,p. 231

[14] *Maṣādir al-Ḥaqq,* vol2, p.189, *al-Waṣīṭ,* vol 1, p.334

[15] Quoted from, Mu'min, ᶜUmar al-Sayyid, *al-Ikrāh al-Mufsid li al-Riḍā fi Qānūn al-Muᶜāmalāt al-Madaniyyat al-Imārātī, Dirāsah Muqāranah bi al-Qānūn al-Madani al-Misrī wa al-Fiqh al-Islāmī, Dār al-Nahḍat al-ᶜArabiyyah,* Cairo, 1998, p.12

it is argued that not every pressure will engender fear, as there may be situations in which a person is forced to sell his property where no suggestion of fear is present. In spite of this, the EgCC has to some extent agreed with those legal and jurisprudential definitions given as indicated in one of its rulings : "According to the judicial ruling of this court duress which negates consent is constituted by threatening the contracting party with massive danger to him or his property, or by invoking other means which for him are intolerable or of which he cannot rid himself. As a result, a state of fear is established forcing him to admit acceptance of that which is against his wishes".[16]

Another jurist, Jamil al- Sharqāwī, has offered a closer definition to the nature of duress; according to him duress is a fear forcing a person to conclude a legal act.[17]According to this definition it seems that in order to establish duress the source of fear should come from within human beings themselves. This interpretation in fact differs from the vast majority of juristic opinion, where the preference is to use the word "pressure" (*daghtūn*) instead of fear (*rahbah*) which makes possible the inclusion of a situation other than duress. It is the writer's opinion that according to article 127-129 of the ECC duress is confined only to that issuing from human beings whether they are contracting parties or not. As for other kinds of pressure, while acknowledging that the said articles are not conclusive, there are other provisions in the Code which are more related to "external pressure," such as that concerning exploitation (*istighlāl)* and the like.

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[16] EgCC, cas.no 96, dated 8/2/1951
[17] *Maṣādir al-Iltizām*, p. 143

5.3 Duress and necessity *(ḍarūrah)*

5.3.1 Islamic law

Some jurists do not differentiate between duress and necessity;[18] this is somewhat misleading since necessity is a state in which a person will suffer severely (or may even die) if he fails to carry out an act which is forbidden under normal circumstances.[19] Thus,in this sense, necessity includes duress and also additional factors. To put it simply necessity is a wider concept than duress, since every form of duress is necessity but not *vice versa.* For this reason, relationship between duress and necessity should be looked at from two aspects; namely legal consequences arising and actual sources. That is in the case of duress the source consistently issues from human beings, whereas this is not the case in necessity, which may be exerted by either a situation or a human being, and the consequence may be the same or it may differ. If the source is human then the term duress is identical to necessity, although the former is used in preference. In the same way the legal consequences may not be the same for some jurists such as the Shāfiʿī [20]. for whom for example sale under necessity is valid but void if made under duress.

5.3.2 The ECC

According to most jurists duress in the ECC seems to have a wider sense than that of Islamic law, since it includes situations other than duress exerted by a human being, as can be understood from the using of the word pressure. This term 'pressure' which

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[18] *Al-Jāmiʿ li Aḥkām al-Qur'ān*, vol 2, p. 225
[19] Qāsim, Yusuf, *Nazariyyat al-Ḍarūrah, Dār al-Nahḍat al-ʿArabiyyah*, Cairo, n.d, p.89,
[20] *Nihāyat al-Muḥtāj*, vol 3, pp. 374-375

discussed earlier in the view of most jurists such as al-Sanhūrī and Abd Baqi includes both duress and necessity Hence, unlike Islamic law necessity in the ECC is considered as a part or a branch of duress.

5.4 Types of duress

5.4.1 Islamic law

Generally speaking, the jurists have classified duress into two categories; just duress and unjust duress the latter of which can be divided into several categories:

5.4.1.1 Unjust duress (*ikrāh bi ghayr ḥaqq)*

Jurists are not agreed in classifying the types of duress falling within this area. According to the Hanafī, duress can be divided into constraining *(mulji')* and (non-constraining *(ghayr mulji')* which are also known as a complete duress and incomplete duress respectively. Both types nullify consent(*riḍā),* but only the former vitiates choice. These kinds of duress are established when the threat is either directed against the person under duress himself or against his properties. Here, al-Bazdawī, one of the Hanafī jurists has added another type of duress known as 'moral duress'(*ikrāh adabī*)in which a threat is not directed against the person under duress but rather against to his relatives, such as a threat to imprison his father or his son.[21] However this kind of duress is included under non constraining duress by most Hanafī scholars, due to the fact that it negates only consent but does not in their opinion negate choice.

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[21] *Sharḥ al-Manār* p.369, *al-Badā'ī'* , vol 7, p.175

On the other hand, the majority of the jurist amongst them the Shāfiᶜī,[22] the Hanbalī [23]and the Mālikī [24] although concurring with Hanafī in classifying duress into constraining and non constraining, nevertheless differ in other aspects of interpretation. This is because according to them, 'constraining duress' is so called when a person under duress has no power or choice, such as in the case of a person being thrown onto another person resulting in the killing of that person. In this example, the person thrown has no power to avoid such an act, as if he is in effect a tool of a person exerting duress. As for non constraining duress this occurs when the situation does not amount to the constraining one[25] and this may include some aspects of duress as understood by the Hanafi.

Apart from this, the Ẓāhirī have divided unjust duress into duress on utterances and duress on deeds, thus the former causes no effect unless it is accompanied by the consent of the *Sharīʿah* done intentionally, such as forcing to pronounce cause to abandon Islam (*kalimat al kufr*)As for deeds their effect very much depends on the types of act to be done under duress (*mukrāh ᶜalayh))* as to whether this act is permissible in a state of necessity or not. Thus, what is permissible under the rule of necessity such as drinking wine, will also be permissible under duress. Likewise, if a thing is not allowed under the rules of necessity such as the act of killing, this will also be forbidden under duress.[26]

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[22] Al-Ghazālī, al-Wasīṭ, vol 5, p. 389
[23] *Al-Inṣāf,* vol 8, p.439
[24] *Mawāhib al-Jalīl*, vol 4, p. 248
[25] Al-Ghazālī, Abū Ḥāmid, *al-Wasīṭ*, edited by Muḥammad Tāmir, *Dār al-Salām*, Cairo, 1417 h, 1st edition, vol 5, p.389, Ibn Qayyim, *Iʿlām al-Muwaqqiᶜīn*, *Dār al-Jīl*, Beirut, 1973, vol 4, p. 88
[26] Ibn Hazm, *al-Muḥallā,* vol 8, pp. 329-330

A deeper study of these various classifications has led to the following conclusion. Firstly, concerning the Hanafī's classification, as far as contract is concerned, there is no significance in dividing duress into constraining and non constraining as evident from the works of jurists when they discuss the law relating to a contract made under duress.[27] Furthermore, the impression of the word constraining (*mulji'*) used by the majority of jurists such as throwing a person a high place does not support Hanafi's classification. Secondly, with regard to the Ẓahirī their classification is more concerned with the acts to be done under duress not duress itself. It seems that the classification of the majority of jurists is preferable since it clearly puts a limitation on what is considered to be duress and what is not. Furthermore this classification is more concerned with the field of contract.

5.4.1.2 Justified duress *(ikrāh bi haqq)*

Justified duress also known as 'legal compulsion' (*ijbār shar^{c}ī*), is an action taken by the authorities to force a person to carry out a valid act relating either to another person or to public interest such as forcing a debtor to repay his debt.[28] The jurists are unanimously agreed that in order for duress to be justified, the acts to be done under duress must be in conformity with *Sharīah* rules. Thus, when this requirement is fulfilled, then duress is enforceable despite the absence of the consent of the person under duress.

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[27] Madkūr, Muhammad Salam, *Nazariyyat al-^{c}aqd*, p.136, He says "The differentiation between constraining and non constraining duress with regard to contract brings no real effect other than a mere classification of duress. This is because the jurists while discussing contract made under duress do not distinguish between the numerous types of duress"

[28] Muḥammad Shaqrah, ^{c}Īsa Zakī, *al-Ikrāh wa Atharuhu fī al-Taṣarrufāt, Maktabat al-Manār al-Islāmiyyah*, Kuwait, 1986, 1st edition, p.59

This is because in the case of contradiction between his consent and the consent of *Sharīʿah*, the latter will prevail.

According to the *Sharīʿah* 'legal compulsion' can take several forms; namely compulsion to avoid harm or enforce special rights and compulsion for the sake of public interest. With regard to the first, this refers to a person who has been asked to fulfil certain obligations towards others but who has refused to do so resulting in the need to invoke the authority of the *Sharīʿah*. For example, the judge has the power to compel a debtor to sell his properties in order to repay his creditors. The same is true in the case of tax collectors appointed by the ruler (*ʿummāl sultan)* whereby they are forced to return what has been collected unjustly from the people. However, the inclusion of legal compulsion under the category of duress is not accurate (as maintained by the Hanafī)since the most important factor in determining duress is not regarded. The reason behind its inclusion by most jurists is perhaps the apparent similarity between the two types of duress. Despite this, it should be noted that in the case of legal compulsion there are two conflicting kinds of consent, one is that given by the person under duress while the other is granted by the *Sharīʿah*, but the consent of *Sharīʿah* must prevails by necessity. Thus, gravity of compulsion used in this regard should not be excessive in conformity with the maxim " necessity is judged on its degree"(*al-ḍarūrah tuqaddaru bi qadariha*). Therefore, for example, the judge cannot impose the selling of the most valuable properties of a debtor (in order to settle his debts) if there is a lesser property whose value is sufficient to repay the debt.

The second type of legal compulsion concerning public interest is utilized to protect the public in a case where there is conflict of interest between the individual and

the public interest that cannot be harmonized as for instance, to force land owner to sell his land in order to build a mosque.[29] Another example cited by Mālik is that if the price of a particular food is artificially very high, then the ruler may ask whoever is responsible to bring it to the open market. Likewise, the ruler is permitted to make personal property public property, with reasonable compensation; he is also allowed to force his subjects to carry out certain actions in order to preserve public interest. In imposing this policy, the doctrine of committing the lesser of two evils (*irtikāb akhaf al -ḍararayn*)has to be carefully observed, so both individual and public interest are balanced and not at the expense of one another in compliance with the *Ḥadīth " lā ḍarar wa lā ḍirār"*

From above discussion, it is quite clear that legal compulsion cannot be classified under duress except on the basis of apparent similarity i.e. the use of force by the authorities for instance to sell a debtor's property in order to settle the debt. However, this force should not amount to causing injury to the debtor as it would have been in the case of unjust duress. Realizing this perhaps has led some jurist to prefer the term *ijbār* rather than *ikrāh* although this preference is still not convincing enough since both terms are synonymous from a literal point of view.

5.4.2 The ECC

Similar to Islamic law duress in the ECC are of two categories; just duress and unjust duress. The former normally refers to situation in which a legitimate means is used to obtain a legitimate goal such as a creditor's threat to file a bankruptcy notice if the debtor fails to settle his debt[30]. In regard to unjust duress however ,which is the primary concern of the code, its existence may either nullify both consent and choice (such as in

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[29] *Hāshiyat al-Dusūqī*, vol 3, p. 6

[30] Al-Ṣuddah, *Maṣādir al-Iltizām*, p.212, Shanab, *Durūs fī Naẓariyyat al-Iltizām*, p.177

the case of a person seizing someone's hand to force him to sign a contract of sale), or may simply negate the consent but not the choice; in this latter case the person under duress is left to commit the lesser evil in order to avoid harm. Duress can further be divided into physical (*mādīi)* where this involves physical harm to the duressed person, and spiritual (*nafsi)* where there is a threat to cause harm to him or his property as well as his reputation provided that it is proven that such duress will cause fear and anxiety in the duressed person[31]

Apart from this, duress may be positive or negative; the above-cited examples are of positive duress when the threat issues directly from the person exerting duress. An example of negative duress is in the case of a person agreeing to carry out certain work, but who is under threat by another not to carry out that work. In such a case failing to do that work will cause great danger to the duressed person such as in the instance of a doctor who refuses to cure his patient unless the patient pays an exorbitant cost for treatment. [32]

It is to be noted that unlike Islamic law, the ECC does not classify duress into constraining and non constraining. This is because the deciding factor here in determining duress is the presence of fear in the duressed person that as a result causes him to conclude a contract. As such, duress may be established even if the threat is not grave provided that the fear exists.

5.5 Measurement(*Miʿyār*)of Duress

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[31] Al-Fiqī, Uthman, *Durūs fī Nazariyyat al-Iltizām*, p. 160
[32] *Ibid*

5.5.1 Islamic law

5.5.1.1 Subjectivity (*Nafsī*)

In Islamic law, the perspective of both 'subjectivity'[33](*nafsī* or *dhātī*) and 'objectivity'[34](*mauḍūʿī*) play an important role in determining the existence of duress.. With regard to subjectivity it is sufficient that the fear of a threat is the motive for the duressed person to carry out an act, be it a verbal or deed in view that by meeting the demand of the person exerting duress, the duress party will avoid immediate or future injury. Thus, the actions of the duressed person are caused by a psychological condition that is disrupted by the presence of fear and intimidation.

The existence of fear has been recognized by the *Sharīʿāḥ* as a means to test the faith of its followers. As for example, the Qur'ān (2: 155)says: be sure we shall test you with something of fear and hunger, some loss in goods, lives and fruits, but glad tiding to those who patiently persevere. Thus, duress is determined by the presence of fear itself regardless of its degree; indeed some jurists like the Hanafī even maintain that anything causing distress and sadness can be regarded as duress, as they also hold that the noble would be distressed by harsh words, or the vile by a severe beating.[35]

The actual degree of fear and distress is subjective in the sense that it varies from one person to another according to several factors such as age, sex, knowledge and others. Therefore, for instance, a threat could be duress for one person but not for others due to the above factors. It can thus be said that Islamic law mainly employs subjective

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[33] What results from a threat such as fear and anxiety
[34] Means used to constitute duress such as beating, imprisonment and so on
[35] *Al-Mabsūt,* vol 24 p.39

measurement in determining duress. However, as will be seen, objectivity is not totally neglected.

5.5.1.2 Objectivity (*Mawḍūʿī*)

It is clear that subjectivity is the basic factor in Islamic law in determining duress; however, the importance of objective measurement is nevertheless recognised . This can be observed in the classification of threats by jurists where these are divided it into 'severe threat' and 'less severe threat'.[36] An example of severe threat is the threat to kill or cause loss of limb, or long imprisonment, all of which constitute duress for most, irrespective of their status. In contrast, in the category of less severe threat subjectivity is of greater importance.

In short, it is concluded that Islamic law has taken into consideration both subjectivity and objectivity in determining the presence and validity of duress, which in turn refutes the claim that Islamic law recognizes only subjectivity in its doctrine. It is however noteworthy that the combination of subjectivity and objectivity cannot be found in the works of some jurists such as al-Ghazālī and Imam al- Haramayn; [37]in their opinion objectivity is thought to be the only measure to determine duress since its presence is constituted only if it involves a threat to kill.

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[36] *Kashf al-Asrār*, vol 4, p.383

[37] Al-Nawawī, *Rauḍat al-Ṭālibīn*, *al-Maktab al-Islāmī*, Beirut, 1405 H, 2nd edition , vol 8,pp. 58-59

5.5.2 The ECC

Most jurists are of the opinion that subjectivity is preferred in the Code as being similar to Islamic law. This is both because the fear caused by duress is subjective with regard to the victim of duress and because this fear varies from one person to another. Thus, when a threat is posed to a person, his property or his reputation, this will make him believe that great danger is about to occur even if the danger is not real; in other words, this is sufficient to constitute duress if the means used can cause immediate fear in the duressed person.[38] Article 127/3 clearly states that in determining duress, the sex of the duressed person, his age, societal status and health must be taken in consideration, as well as circumstances that may contribute to the gravity of duress. This article clearly confirms the adoption of subjective measurement by the Code, as supported by the majority of jurists in their works as Abu Satīt for example stresses : " We conclude that the New Code has in general confined the condition of duress to the same condition imposed by the Old Code after removing the flawed article 135 which contains both objective and subjective approaches. .which did not prevent it from being seen as subjective, However, the New Code consists only of subjective approach (article 127/3) which is considered as a valid approach"[39]

In addition, the judiciary has interpreted the phrase " reasonable grounds" (*qāimah ala asās*) contained in article 127/1 as subjective approach. In one ruling, for example, the EgCC held that since the appeal had denied the presence of duress exerted on the seller on grounds relating to her personality and to the circumstances leading to

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[38] *Masādir al-Haq*, vol 2, p. 195
[39] *Masādir al-Iltizām*, p.168

the conclusion of the contract, the judgement did not contravene the approach provided by law in assessing duress.[40]

However, despite the overwhelmingly supported view claiming 'subjectivity' in the New Code, according to some article 127 and 128 therein imply the adoption of 'objectivity' in addition to subjectivity. I am inclined to prefer this view for the following reasons:

1-It is not sufficient for a trial judge to accept that a contract is concluded under duress by a mere claim from the duressed person that he was in fear; rather the judge must to take into account objective circumstances . Otherwise, anyone who wishes to escape his obligations can easily do this on the pretext of fear especially when the degree of danger is determined only by the duressed person himself. However, by resorting to objective approach the duressed person cannot claim to be in fear if the threat thereto is not significant. Furthermore, part of one ruling of the EgCC indicates that " since the basis for the plaintiff to claim compensation is that his resignation was not willing, rather it was forced by the Minister of Justice threatening to detain him unless he resigned... and since article 127 states that in assessing the degree of duress, the sex of the person falling under its influence, his age, health conditions and other conditions that are bound to affect the gravity of duress, shall be taken into consideration, and since the plaintiff was an experienced judge he should not have been troubled by what had been said to him. Therefore the claim for compensation should be dismissed" .[41]

2-Article 128 of the ECC reads that if duress emanates from a source other than the contracting parties, the duressed party may not request the annulment of the contract

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[40]EgCC, cas.no 392, dated 25/1/1962
[41] EgCC, cas.no 44, dated 11/11/76

unless he proves that the other party was aware or was presumed to be aware of such duress. Indubitably, this demonstrate the use of objectivity rather than subjectivity since the rights of the other *bona fide* contracting party are considered in order to achieve the stability of the transaction.

3-The inclusion of the state of necessity into duress which occurs incidentally when another person takes advantage of a situation to obtain high payment combines subjectivity and objectivity such as in the case of a drowning person asking for help from another, or in the case of a surgeon demanding exorbitant payment in order to conduct an operation.

It is thus observed that the ECC has followed Islamic law in adopting both subjectivity and objectivity in order to determine the existence of duress although the use of subjectivity is more apparent in the legislation. In other words, the emphasis of subjectivity does not totally deny the adoption of objectivity.

5.6 Elements of duress

Four elements are required before a state of duress can be said to exist; a person exerting duress(*mukrih)*, a duressed person *(mukrah*), threat by duress *(mukrah bih)* and act to be executed under duress *(mukrah ᶜalayh))*

5.6.1 Conditions of a person exerting duress

5.6.1.1 Islamic law

The person who exerts duress must be able to execute the threat. This is because it is not conceivable that the duressed party will carry out the demand of the person exerting duress if he knows that the latter does not have the ability to realize his threat. In such a case the act carried out by the duressed party is considered to be voluntary thus has valid legal effect. In line with this according to Abu Hanīfah,[42] duress is not valid unless it comes from rulers who have the power to carry out the threat which constitutes that duress; thus, he excludes duress coming from sources other than the ruler(*sultān*) such as thieves for example. He argues that the duressed person can ask help from the ruler to remove the threat but not *vice versa*. Nevertheless the majority of jurists have broadened the meaning of duress to include that which issues from the rulers and elsewhere, according to which every act constituting a threat is considered as duress regardless of the source of that threat. Some jurists suggest that this difference between Abu Hanifah and his two disciples merely a difference of time, in the sense that during Abu Hanifah's time the power to threaten was vested only in the ruler whereas this situation had later changed during the time of Abū Yūsuf and Muhammad.[43]

The question is then raised as to whether moral influence (*nufūdh adabī*) fall within the realm of duress ,such as in the case of husband and wife, in which the former has authority over the latter, or between the ruler and his subject or the teacher and his pupils as well as between a lord and his servant. In such examples, if those concerned

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[42] *Al-Mabsūṭ*, vol 24. pp.43-44
[43] *Masādir al-Haqq*, vol 2, p.206

carry out an unjust act as directed by a person in authority because of feeling of fear, will this act be valid? Here the Hanafī hold that a command from the ruler will constitute duress even if this is without threat; the same is true if such a command comes from a husband to his wife a view which is followed by *Murshid al-Ḥayrān* as it states: "The husband shall have power over his wife but whomsoever forces his wife by beating her, or by preventing her from visiting her family so that she will waive her dowry for him, such an act from her- in a state of fear-will be null and void and thus he is still obliged to pay the dowry"[44] It thus seems that the source of duress is less significant whether it comes from ruler to his subject, from a father to his children . This is because as long as the duressed person fears something harmful may occur if the demand of the person exerting duress is not met then duress is said to exist.

5.6.1.2 The ECC

While the term 'power and ability' are not clearly stated in the Code, nonetheless their connotations are to be found in other term contained in article 127, such as the words *sultān* and grave danger. Here both words indicate that the person exerting duress as having the power and force, is able to inflict harm on the duress person if his demand is not met a meaning which is similarly found in the Penal Code. Thus ,the gravity of danger and the force are determined by the duressed person since the person exerting duress has psychologically led him to enter into a contract.[45]

In addition, moral influence too may constitute duress if used to reach an illegal goal as is obvious from the code. In line with this Jamaludin Zakī states:" as long as the

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[44] *Murshid al- Ḥayrān* article 293/2
[45] *Al-* Sanhuri, *al-Waṣīṭ*, 194

factor in determining duress which annuls a contract is the pursuit of an illegal goal even if the means is legal, the use of moral influence –such as a father on his son, ….. if this originally does not constitute duress, it will become duress if the goal is illicit"[46]

The Code does not recognize duress if it involves a third party other than the contracting parties. If this happens to be the case, the duressed party enjoys no right to nullify the contract provided that the other contracting party was not aware of the existence of such duress as spelled out in article 128. In the event of the duressed person insisting on the annulment of the contract, the *bona fide* party has the right to counter by claiming compensation; the best form of such compensation here would be to ask for the contract to remain valid.[47]

5.6.2 Conditions of a person under duress

5.6.2.1 Islamic law

The duressed party must have a strong belief that the threat exerted will be realized in the event of non-compliance with the demands of the person exerting duress.[48] In the absence of such belief then duress may not be claimed; rather there exists a mere threat bearing no consequences. This is because in order to comply with the demands of the person exerting duress, the duressed person has to be almost certain that the threat is serious. It is noticeable here that the Shariah does not require that the duressed person be completely certain (*yaqīn*); rather near certainty (*ghalabat al-ẓann*) is sufficient if certainty is hard to prove.

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[46] Jamaludin Zakī, *al-Wajīz fi al-Nazariyyat al ᶜAmmah li al-Iltizām*, n.p, 1978,p. 85, see EgCC, cas.no 23, dated 25/2/1943

[47] *Masādir al-Ḥaqq,* vol 2 ,p.197

[48] *Al-Mughnī,* vol 7, 292

Further more the duressed person is not able to defend himself, or to escape the threat by asking help from another;. in other words, the duressed person has no choice but to comply with the demand of the person exerting duress.

In the event that the duressed person is able to defend himself, he is allowed to do so provided that the degree of defence matches the extent of duress exerted ,meaning that the force used must be gradual; otherwise if unnecessary or excessive force is used, the duressed person is liable to pay compensation for whatever damages may have been caused. The jurists have based this principle upon this prophetic tradition :"A person came to the prophet P B U H and asked him. O Prophet what is your opinion if there is a person who wants to take my property. He replied. Do not give it to him, The man further asked, what if he fights me, the prophet PBUH replied fight him back, He then asked, what if I am killed, the prophet replied you will be a martyr, The man next asked, what If I kill him, the prophet p b uh replied that he would go to hell". Thus as Al-Shaukānī, comments, a person is permitted to fight those who want to seize his property unjustly regardless of the amount of such property- small or substantial; indeed some jurists even opine that such fighting is compulsory[49]

It is equally important to note that jurists are unanimous on the point that duress should involve the duressed person or his property. The example given is quite comprehensive in that such duress is here exerted on a person to sell his property, otherwise harm will either be inflicted upon him himself or his property. However what if the duress itself causes harm to the person exerting duress in physical terms but cause

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[49] *Nayl al-Awṭār*, vol 6 , p.75

harm to the duressed person in spiritual terms? As an example, if a child says to his father " If you do not sell such and such a property to such and such person I will kill myself, then in this situation the son is obviously a person who exerts pressure whereas the farther is the person under duress. To suggest that the rule of necessity applies here is to avoid the issue and is furthermore inaccurate, unless it is acknowledged that necessity covers acts issuing from human beings as well as other causative factors. So then, can the rule of duress apply here? To answer this question, reference must be made to measurement of duress; by then referring to proof from Qur'ān (2:155) it can be deduced that if the fear is present then a state of duress exists.

5.6.2.2 The ECC

In order to establish duress upon the duressed person, the Code requires the presence of a state of fear as a result of a threat, which then forces him to conclude a contract. The word fear (*rahbah)* here incorporates both immediate and future danger which will vary as discussed previously from one person to another[50]. This said, however, if the duressed person were able to escape a state of duress , what then is the position? Here as in Islamic law the Code also recognizes the doctrine of self defence which allows the duressed party to use force to protect himself from duress. Nevertheless, the right to defend oneself is not absolute, meaning that certain conditions have to be observed, such as non use of excessive force. In this regard, article 166 clearly states " whoever causes harm to others in order to defend himself , his property or a third party or his property he shall not be held responsible for his acts so long as he does not exceed the necessary limit in his defence, otherwise he shall be obliged to make reparation in observance of the principle of justice"

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[50] Shanab, *Durūs fī Naẓariyyat al-Iltizām*, pp.173-174.

5.6.3 Conditions of a threat used to exert duress *(mukrah bih)*

5.6.3.1.Islamic law

This is the means used by the person exerting duress in order to force the duressed person to carry out the demand. However, before further discussion it is important to determine whether the threat alone can constitute duress or whether this should be followed by other actions such as beating and so on. The majority of jurists, among them the Hanafī[51],the Malikī,[52] and the Shāfīcī[53] are of the opinion that the threat alone would be sufficient to establish duress. This is because the principle embodied in allowing a duressed person to carry out a demand is to avoid punishment or hurt; if the hurt has to occur first then the spirit of concession *(rukhsah*)will be meaningless. The Hanbalī, on the other hand have imposed the execution of threat as a condition for the validity of duress. They based their argument on a narration whereby non believers coerced cAmmār into renouncing Islam; having learned of this , the Prophet PBUH said : "The non believers had put you in the water and forced you to renounce Islam. If they do this again repeat what you have done". Thus, in this *hadith* the non believers had carried out the threat before cAmmār asked the Prophet PBUH .

Besides this, the threat must be imminent, as thus if the threat is in the future, duress is not established due to the fact that futurity gives the duressed party opportunity to escape duress by asking help from the authorities. However, while this condition is stipulated by the majority of jurist; the Mālikī on the other hand do not impose this

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[51] *Al-Bada'ic*, Vol 7, p. 176
[52] *Ḥāshiyat al-Dusūqī*, vol 2,p.370
[53] *Rawḍat al-Ṭālibīn*, vol 8,p.59

condition as for them duress may be imminent or in the future as long as the state of fear is found to be present[54]

5.6.3.2 The ECC

The code does not specify the means to be used; rather duress is constituted if there is great danger surrounding either the duressed person, his property or his honour . The deciding factor is how grave the degree of duress was for the duressed person not the actual means used. In line with this, fear may be created in a person by using means which might be perceived as ridiculous by others such as exerting threat by way of magic.(*sihr*) [55] The Code is also in conformity with the Malikī in not restricting danger to only that which is imminent, . as al-Sanhūrī affirms :"The determining factor is that which concerns the psychological status of the contracting party as he might be fearful of a future threat which is sufficient to nullify his consent. The deciding factor is therefore measured by the presence of fear in the duressed person and not the threat be it imminent or in the future"[56]

It should be noted too that the Preliminary draft of the ECC also proposes that in order to contitute duress presence of immediate danger/threat is necessary as stated in article 176 which read: " the fear is in effect present if the duressed person feels that a threat is imminent" However the wording was later changed to become as stated in the existing code state.[57]

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[54] *Ḥashiyat al-ᶜAdawī, Dār al-Fikr*, Beirut, 1412 H, vol 1, p. 152
[55] *Masādir al-Haqq*, vol 2,pp.207-209
[56] *Masādir al-Haqq*, vol 2, p.192
[57] *Al-Ikrāh bayn al-Sharīᶜah wa al-Qānūn*,p.12

5.6.4 Condition of an act to be done under duress (*nukrah ᶜalayh)*

5.6.4.1 Islamic law

This is the most important element of duress since it is the cause for the state of duress, without which the person exerting duress will not pose a threat to the duressed person. This act can be either in the form of an utterance such as offer and acceptance in contract or in the form of a deed such as delivery of a sold item. Certain conditions must then be identified in order for an act to be done under duress to be valid; that is only in the presence of these conditions, which must exist, will duress be established. Firstly, this act must be unjust; this has been agreed upon by jurists as previously discussed. The second condition is that the act must be specified in the sense that the duressed party has only one course of action and no alternative is offered. For instance, if the person exerting duress has specified that the duressed person should sell any given land , then this is sufficient to constitute duress.

However, if the acts are multiple and not specified, such as duress to force a person to divorce one of his wives, sell one of his cars or rent one of his premises then duress is still said to exist in such situations since the duressed person is fearful of the consequences if he does not comply with the demand .[58]

Thirdly, for a situation to constitute duress ,the duressed person must not act differently from that action which is specified by the person exerting duress . Therefore, if the person exerting duress demands that the duressed person sells his property, for

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[58] Mubārak, Ṣabrī al-Saᶜdawī, *al-Ikrāh wa Atharuhu ᶜalā al-Riḍā bi al-Iltizām fī al-Fiqh al-Islāmī,Dirāsah Muqāranah,* PhD Thesis, Cairo University , p.118

instance, but instead of selling, he donates the property, then duress is not established because he has not complied with the demands of the person exerting duress. However, this raises the question of what conditions constitute duress when non compliance revolves around settlement figures ? That is if the demand is that the duressed person should sell the property for a price of one thousand, but instead he sells it for either more or less than the stipulated figure. Jurists are not agreed on this point as some such as the the Shafi^{c}ī ,the Hanafī and the Hanbalī hold that such discrepancies have no effect on duress while others opine that duress is not established if the final sum is less.[59] It seems that the distinction between settlement figures is preferable. [60]

5.6.4.2. The ECC

The ECC does not stipulate the specific conditions detailed by Islamic law as to acts to be done under duress , aside from the condition of being unjust. If the purpose of duress is unjust then legally the state of duress is established, however if the purpose is just then this would not constitute duress in the eyes of the law, regardless of the means used be this legal or illegal, a principle which is clearly stated in article 127 of the ECC [61]

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[59] *Al-Mabsūt* - vol 24, p. 52
[60] *Al-Ikrāh wa Athāruhu ^{c}ala al Riḍā*,. p.120
[61] See al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol 2,p.194

5.7 The effects of duress on contract

5.7.1 Islamic law

Prior to a discussion of the effect of duress on contract some important points related to the presence of duress on a person should be noted To begin with, jurists are unanimously agreed that duress does not completely remove legal capacity. This holds true if reason (*ᶜaql*) is regarded as the basis for active legal capacity. As the duressed person is still capable of responding to legal commandment *(khiṭāb shar ᶜī*) since his acts will be judged by the *Sharīᶜāḥ* as sinful, deserving of reward, valid or void, this leads directly to a consideration of exactly what effect duress does in fact have on the duressed party. Jurists have attempted to addressed this question by focusing on two problems; namely the effect of duress on intention(*qaṣd*) and consent*(riḍa*), and on whether the person who exert duress or the duressed person should be held liable for an act carried out under duress.[62]

As far as the first issue is concerned, jurists have used the term choice(*ikhtiyār)* and intention *(qaṣd*) interchangeably, terms which imply the intention to carry out an act which wavers between realisation and non realisation which is within the doer's power to achieve by preferring one alternative to the other.[63] On the other hand, consent(*riḍa*) indicates feeling pleasure by someone at doing something in which his interest lies.[64] Although the majority of jurists maintain that both terms are identical, the Hanafī hold that there are nevertheless disparities between the two. This is due to the fact that choice refers only to the intent underlying the cause upon which the effect of the deed depends,

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[62] *Kashf al-Asrār*, vol 4, p.383, *al-Taqrīr wa al-Tahbīr*, vol 2,p.276

[63] Ahmad Hassan, The Principle of Islamic jurisprudence, p. 366, see also, *Sharḥ al-Talwīḥ ᶜ Alā al-Tawdīḥ*, vol 2,pp. 549-550

[64] *Ibid*

whereas consent is the desire to achieve that effect. Hence, according to the Hanafi, duress can influence either of these two elements, that is, its effect can either negate consent and will (*ikhtiyar*), negate consent but not will, or lastly, it may not negate either consent or will.[65] However, the majority of jurists opine that choice refers to intention, which in turn encompasses consent.[66]

With regard to an act carried out under duress as to whether liability should be related to the person exerting duress or the duressed party, originally any act whatsoever should be attributed to its doer in accordance with the Quranic verses (53: 38-41) which read: "That no bearer of burden can bear the burden of another, that man can have nothing but what he strives for, that the fruit of his striving will soon come in sight, then will he be rewarded with a reward complete". However, in a case where duress involves contract, liability for the act carried out will lie with to the person exerting duress ,as maintained by the Shāfi^{c}ī.[67]

This said, jurists are not agreed as to the validity of a contract of sale made under duress. According to the Maliki, and some Hanafi like Zufar, [68] a sale concluded by a person under duress is upheld valid, but its effect is suspended *(mawqūf)*. Al- Zufar argues that this kind of sale is valid because it resembles the sale made by an unauthorized agent(*fuḍūlī*) in the sense that both instances do not fulfil the requirement of a proper contract; therefore, if the sale made by an unauthorized agent is suspended, the effect of duress on the sale will accordingly be the same. In other words, al-Zufar,

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[65] *Al-Taqrīr wa al-Tahbīr*, vol 2, p. 276, *Kashf al-Asrār*, vol 4,p.383
[66] *Ibid*
[67] *Sharḥ al-Talwīh* , vol 2, p.196. On the contrary the Hanafi hold that acts done under duress can still be related to the duressed person. See,*al-Taqrīr wa al-Tahbīr*, vol 2,p.277
[68] *Al-Badā'i^{c}*, vol 7, p. 182, see also, Mubārak, *al-Ikrāhs wa Atharuhū ^{c}alā al-Riḍā*, p. 196

having no direct textual evidence to support his view, has resorted to analogy (*qiyās*) in his argument. However, this analogy between the unauthorised agent and the duressed person seems untenable, for a deeper analysis shows that there is 'disparity' between the two, terminologically known as analogy between two different things (*qiyās ma al-fāriq*). This is because in the case of an unauthorised agent the seller does not possesses the sold item (*mabī*) whereas this is not the case in the sale made by the duressed person. Thus the use of analogy itself is invalid.

On the other hand, the majority of jurists such as Shafi[69] and Hanbali[70] opine that the existence of duress in a sale contract renders it null and void (*bāṭil*),and thus carries no effect whatsoever. They base their opinion on the Qur'ān (4:29) .This verse clearly indicates that every kind of property exchange will not be lawful unless it is carried out by mutual consent of the parties concerned. The Qur'ān has considered void every act carried out without consent; as such, undoubtedly , consent is 'absent' if a contract is concluded under duress, rendering such a contract as void. In this regard, Ibn Arabi states: " this verse is evidence of the voidance of the sale carried out by a duressed person, due to the absence of consent "[71] Moreover, their view is also supported by a Prophetic tradition "Allah has lifted from my followers (the liability of) mistake, forgetfulness and duress,"[72] which shows that every act issuing from a person under duress is not considered lawful. Apart from this evidence, the majority of jurists also argue that a sale by a duressed person is similar to that of a jesting person *(hāzil)* in the sense that both of them in reality do not intend to conclude that contract. Therefore,

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[69] *Mughnī al-Muḥtāj*, vol 2,p.7
[70] Al- Murdāwī, *al-Inṣāf*, vol 4, p. 265
[71] *Aḥkām al-Quran* , vol 1 , p. 411
[72] Narrated by In Majah and Tabrani

accepting that the sale by a jesting person is void, in the same vein the sale made by the duressed person should also be void according to the rule of analogy (*qiyās*).[73]

In addition, according to the Qur'ān if a person is forced under duress to abandon Islam, this abandonment is regarded as void; he is still therefore a Muslim in the eyes of the *Sharī ah* . This is because his consent was not given. Similarly, if he is forced to enter into a contract under duress such a contract should in the same way be voided. In addition to these views, the majority of Hanafī[74] hold that a sale made under duress is irregular (*fāsid),* but can be ratified by the consent of the duressed person himself. They maintain that consent is a condition for a contract to be valid, and not a condition for its conclusion (*in ᶜiqād*). According to this, in the case of the absence of conditions for validity, such absence will not make the legal rule (*hukm)* absent similar to other kinds of irregular sales. The only difference between a sale carried out by a duressed person and other irregular sales is that in the former the doctrine of ratification *(ijāzah*) applies, whereas this is not the case in the latter. This is because the irregularity in other sales such as usurous sale (*bayᶜ ribawī)* is for the right of *Sharᶜ* that cannot be removed by the consent of the contracting parties. On the contrary, in a sale made by a duressed person, the right of the contracting parties prevails; hence duress can be removed through their consent.[75]

In other words duress in their view does not prevent the concluding of contract as along as its elements are fulfilled . However, duress will only make the sale unenforceable in the absence of 'complete consent'. Therefore, if the duressed person

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[73] Al-*Ikrāh bayn al-Sharīᶜah wa al-Qānūn* , p.32
[74] Al-*Mabṣūt* vol 24, p. 93
[75] *Hāshiyah Ibn ᶜĀbiḍīn*, vol 6, p.130, Rustum Bāz, *Sharḥ al-Majallah*,pp.559-560

gives his consent, the sale will be enforceable. If duress involves only concluding a sale(offer and acceptance) not delivery *(taslīm)*, and the duressed person delivers the sold item with full consent, this delivery can be considered as ratification. If duress is on the buyer alone, then both the buyer and the seller have the right to revoke a contract before taking possession; however, if duress involves the buyer and the seller, both of them have the right to revoke regardless of the fact of taking possession[76]

Having discussed the evidence put forward by the above jurists, it seems that the view which upheld that the contract made under duress is suspended is more preferable. This is because event though such a contract is concluded in the absence of consent of the duressed party, this consent can later be obtained through ratification.

5.7.2 The ECC

Article 127/1 of the ECC states that a contract may be annulled for reasons of 'duress'. In addition article 139 stipulates that the right to annul the contract shall be terminated with explicit or implicit approval and consent, and that consent shall be based on the date the contract is concluded without derogation to the rights of third parties. In the case of 'annulment' the contracting parties shall return to their pre contracting status. If this proves to be impossible, a court ruling may be passed for equivalent compensation. Article 140 further states that" the right to annul the contract shall be prescribed by limitation if the party holding that right does not adhere to it within three years, and the validity of this term shall begin in the case of incomplete legal capacity from the date this cause is terminated, and in the case of error or fraudulence from the

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[76] Al-*Badāi*ᶜ vol 7, p. 186

date of its detection, while in the case of duress it shall begin from the day it is eliminated. In all cases the right of nullification for error, fraud or duress shall not be upheld after the lapse of fifteen years from the time the contract is completed".

All these provisions clearly show that a voidable contract can be ratified because its existence is legally recognized and has legal effect; thus , there is little difference between a 'valid' and a 'voidable' contract [77]except as concerns the contracting party who may wish to annul the contract in his favour.

This means that a contract made under duress may be suspended pending either validation by the person under duress or invalidation. He is also required to be in a necessary state of capacity and his consent should be free from any influence.[78]

It can be said that the Code is in accordance with the view of Maliki and Zufar which considers the contract of the duressed person to be suspended where it differs as regards the period of validation. As stated, the period is three years from the removal of duress and fifteen years from the completion of the contract.

Despite this, some jurists such as Jamil Sharqāwī consider a contract made by a the duressed person to be null and void. As such, the concept of ratification does not in his view apply here on the basis that " the lack of 'will' caused by its defect renders it non-existent in the eyes of the law. This is because, the absence of the necessary condition has led to the non-existence of 'will' itself. Therefore, the will of the duressed

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[77] Al-Badrāwī, *al-Naẓariyyat*, p. 286

[78] Al-Suddah, *Maṣādir al-Iltizām* , p.286, Tulbah, *al-Taʿliq ala Nuṣūṣ al-Qānūn al-Madanī*, vol 1. p.129

person... is not of any legal effect'[79] Nevertheless , this view appears to be inconsistent with the provision of ECC itself in applying the doctrine of voidability to a contract made under duress.[80]

5.8 Revocation of a contract made under duress

5.8.1 Islamic law

In Islamic law, the concept of revocation applies only within the Hanafī and Malikī schools of law. Other schools, such as the Shāfiᶜī and the Hanbalī, -due to their views in invalidating a contract made under duress- did not discuss this problem in their works. For this reason, discussion of the rights of the contracting parties to revoke a contract made under duress will refer only to the Hanafī and Malikī. Generally, the Hanafi and Maliki are agreed that the right of revocation rests with the duressed person; however, the question then arises as to whether the person exerting duress also enjoys the same right. According to the Malikī, the duressed person has absolute right to revoke the contract; however, the person exerting duress may revoke it only with the approval of the duressed person. The Hanafī concur with the Maliki's view provided that taking possession is completed. Nevertheless , if 'possession' has yet to take place, both the duressed person and the person exerting duress have an equal right to revoke the contract. They contend that the legal force of a contract before taking possession is considered to be very weak. Thus, either party has the right to terminate a weak contract,

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[79] Al-Sharqāwī, Jamīl, *Maṣādir al-Iltizām*, p. 109
[80] See Article 127 of the ECC

whereas this is not the case after taking possession of property by which a contract has been confirmed. [81]

5.8.2 The ECC

In this respect the ECC seems to have adopted the Malikī's view; thus, it is not permissible for the person exerting duress to annul the contract without the consent of the duressed person, as may be understood from article 139, which reads " if the law vests either contracting party with the right to nullify the contract, the other party shall not claim that right. This is also supported by article 127 which gives the right for those under threat to revoke the contract.[82]

5.9. Summary

Not every form of duress will cause modification of rules relating to contract, rather in order for duress to legally exist certain conditions must be fulfilled. These conditions encompass the four elements of duress; namely the person exerting duress, the duressed person , the threat used to exert duress and the acts to be executed under duress which are to be judged according to both subjective and objective approaches in Islamic law. As for the ECC although the overwhelming number of jurists are of the opinion that duress applies a subjective approach, a number of judicial rulings imply the contrary; that is to say a combination of both approaches can be traced. The doctrine of interdiction is irrelevant with regard to duress, nevertheless duress is counted as an

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[81] *Al-Mabsūt*, vol 24, p. 94
[82] Al-Suddah, *Maṣādir al-Iltizām*, pp.214-215

impediment to legal capacity due to the fact that its existence modifies legal rules of contract from those concluded under normal circumstances.

CHAPTER SIX: THE DOCTRINE OF MISTAKE *(GHALAṬ)* AND ITS EFFECTS ON CONTRACT

6.1 Introduction

The basis of mistake (*ghalaṭ*) as an impediment to legal capacity is directly related to a prophetic tradition " liability is exempted from a mistaken person".[1] Although the ECC has stipulated that mistake is clearly regarded as impediment to consent, there are claims that as far as Islamic law is concerned the concept of mistake has not been developed or recognised by Muslim jurists. Some even wrongly opine that Muslim jurists are not aware of the existence of mistake as an impediment to consent, and in turn an impediment to legal capacity itself. To verify the above claims, this chapter is therefore devoted to expounding the theory of mistake in both Islamic law and the ECC. In doing so, it is vital to first investigate the meaning of mistake, the question as to whether this exists in Islamic law and its effect (if any) on contracts. In addition, the study will also examine the criteria, conditions and measurement necessary to establish mistake.

6.2 The notion of mistake

6.2.1 Islamic law

6.2.1.1 Definition

In the literal sense, the Arabic word *ghalaṭ* means to miss the correct part of something unintentionally. It is construed " *ghalaṭa fī al-ḥisāb*", that is to make a mistake

[1] Part of *Ḥadīth* narrated by Ibn Mājah in his *Sunan*

in calculation when the correct part is missing.[2] From these meanings it can be seen that *ghalaṭ* and *khaṭa'* are used interchangeably. It is also evident from the work of jurists that when they discuss the subject, they tend to use these terms synonymously. Abu Zahrah[3], for instance, has mentioned both the term *ghalaṭ* and *khaṭa'* without differentiating between them; and this is true in general with regard to the early Muslim jurists.

Nevertheless, for the purposes of technicality, the English term 'mistake' will be used throughout this chapter to cover both *ghalaṭ* and *khaṭa*'. However, if the use of the Arabic term is inevitable the word *ghalaṭ* is preferred in order to match Islamic law against the ECC. This is because although there is no difference between *ghalaṭ* and *khaṭa'* in the parlance of Muslim jurists, in the ECC it seems that the term *khaṭa*' is more frequently used to denote criminal or tortuous liability, whereas the word *ghalaṭ* on the other hand is more related to contract. This perhaps has justified the drafter of the ECC in using the terms differently. Rayner seems to be influenced by the Civil law approach when she asserts that the usual term for error (mistake) is usually only applied in a legal sense in criminal law to denote the absence of criminal intention;[4] she further argues that " it may yet be found within the *fiqh* to refer to the doctrine of mistake.[5] However, Rayner's opinion seems to contradict the view of classical jurists when they used the term *khaṭa*' to refer to what is known for Rayner as the doctrine of mistake.

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[2] *Al-_Qāmūs al-Muḥīṭ*, p.680
[3] *Al-Milkiyyah*, p. 416
[4] The Theory of Contract, p. 177
[5] *Ibid*

Legal meaning

Although there are generally quite a number of citations concerning 'mistake' that can be found in the Qur'ān and the *Sunnah*, there is no specific legal definition in these sources. The jurists for their part have thus attempted to define the concept of mistake. According to al-Bukhārī for example a mistake is an act or a word issuing from a person unintentionally.[6] This definition in fact encompasses another meaning of mistake which has been identified by later jurists as imagining a thing to be different to how it truly is. Similarly, this definition is taken to cover every kind of mistake be it in contractual transactions, criminal acts or others.

However in the realm of contract, it is the modern jurists who play an important role in formulating the concept of mistake to match their counterparts in the Civil law. Therefore it is not surprising to find that these jurists have specified a special heading under defects of consent(*ᶜuyūb al-riḍā*) to discuss the subject of mistake, a specification which is in total accord with what has been done by the Civil law jurists. In this regard, Abu Zahrah has proposed that mistake may be defined as an act of imagination where the perceptions of the contracting parties about subject matter are contrary to reality.[7] It is to be noted that Abu Zahrah in this definition has limited the occurrence of mistake to subject matter (*maᶜqūd ᶜalayh*). Interestingly, his approach is followed by a large number

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[6] *Kashf al-Asrār*, vol 4, p.380
[7] *Al-Milkiyyah*,p. 416

of modern jurists[8]which seems to correct the assertion that they have followed the Civil law approach. However, this is not to suggest that these jurists are not aware of the existence of other kinds of mistake. This is because as suggested by some authors that the above definition concerns only the specific meaning of mistakes (*maᶜnā khāṣ*). At any rate-in my opinion- to require both a specific and a general meaning of a concept is superfluous if there is no significant legal consequence in doing so. Furthermore, this separation- between general and specific meanings- was not known to the early jurists. For this reason, it would be in the interests of legal discussion to have a comprehensive definition of mistake to include every aspect of this concept as far as contract is concerned

In the light of this, it is preferable to define the term mistake as inconsistency between the utterances of the contracting parties and reality, which occurs unintentionally.[9]It may also be defined as a false or inexact representation of reality which may be form to different elements of a contract.[10]

6.2.1.2 Does the concept of mistake exist in Islamic Law?

The above heading may lead the reader to enquire about its relevancy. The justification for its inclusion is that if it should follow quite a long discussion about the meaning of mistake; this inevitably flags the existence of such a term, should this question be raised, which in turn may seem to be a contradiction in terms. This is because

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[8] See for example, Madkūr, *al-Madkhal*, p. 514, Qasim, Yusuf, *Mabād'i al- Fiqh al-Islāmī*, p. 324, , al-Khafīf, Ali, *Aḥkām al-Muᶜāmalāt*, p.137, Musa, Yusuf, *al-Amwāl*, p.403, Shalabī, Muhammad Mustafa, *al-Madkhal*, p. 403, Ramaḍān, Aḥmad ᶜAbd al-Raḥmān, *Nazariyyat al-Ghalaṭ wa Atharuhu fi al-ᶜUqūd fī al-Fiqh al-Islāmī, Dirāsah Muqāranah*, PhD Thesis. Cairo University , 1996, p. 19

[9] *Mabda' al-Riḍā*, vol 2, p. 801

[10] Rayner, The Theory of Contract, p.177

while in the first place we acknowledge that that there is a legal meaning for mistake at the same time we are in doubt as to the existence of the concept. In fact, what prompted the writer to raise this question is the diversity of opinions as regards the actual existence of such theory in Islamic law. Thus, clarification is needed before further discussion since there is a notion held by some authors that Islamic law is not concerned with the concept of mistake. For instance Nayla stresses that "the concept of error as it exists in Western juridical system is not to be found in the system of *fiqh*".[11] Quite similarly, Rayner asserts that the principles of *ghalaṭ* are certainly not to be found in any systematically theoretical exegesis among the *Sharīᶜāh* authorities.[12] Indeed some jurists such as ᶜAbd al-Bāqī go even further to maintain that the nature of Islamic law is not in accordance with the essence of mistake itself. In this respect he says.

> "The truth is that mistake being considered as an automatic physiological matter which is built on imagination, and which contradicts reality and issues spontaneously from a person, is not in conformity with the objective tendency of the *Sharīᶜah*. This is because the *Sharīᶜah* with regard to relations among people depends on the apparent condition rather than the hidden one in order to maintain stability in their transactions. As such we find that in the case of any conflict between an apparent will and a hidden will the former will prevail. Consequently, this idea conveys that in concluding a contract mistake is not recognized by Islamic law ….."[13]

Looking at Nayla's statement, the implication is that the concept of mistake is more systematically studied in Western jurisprudence; however one cannot judge whether she is in fact criticizing the way Islamic law deals with the subject. She has also attempted to justify the fact that Muslim jurists have built up a whole juridical edifice relative to the object of obligation with certain options for which one finds exclusive requirement particular to Islamic law and which reduces to a minimum all risk of error

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[11]Obeid, Nayla Comair, The law of Business Contracts, in the Arab Middle East, Kluwer International, London/The Hague/ Boston, !996, 1st edition, p. 108

[12] Rayner, The theory, p. 176

[13] Cited from, Mu'min, ᶜUmar al-Sayyid, *al-Ghalaṭ al-Mufsid li al-Riḍā, fī al-Qanūn al-Muᶜāmalat al-Imārātī, Dār al-Nahdāt al-ᶜArabiyyah*, Cairo, 1997, p.252

for the contracting parties.[14] As for Rayner, her assertion is justifiable if we are unable to find a specific chapter in classical works devoted to the concept of mistake, a matter which indeed seems to be true with regard to the vast corpus of classical manuals. However, there are also jurists such as Mirghinānī who have discussed the concept of mistake under a special heading within a topic termed " *Daᶜwā al-Ghalaṭ fī al-qismah*".[15] Furthermore it is not necessary in Islamic law to ascribe a special heading to a specific matter before it can be discussed. Indeed some discussions may even be found unexpectedly in certain places; [16] this is not to deny however that such a concept is in existence, and Rayner herself seems to recognize this. Elsewhere in her book she claims for example that there is no theory of contract in Islamic law wherein she overlooks the fact that Ibn Taymiyyah had compiled a special chapter regarding this subject. In short, Nayla and Rayner's statement merely deny the existence of a complete theory of mistake not, the concept itself; or in other words, their claims refer more to the form not to the substance which is- in my opinion- to some extent accurate.

However ᶜAbd al-Bāqī's opinion should here be examined carefully, as his claim does not only concern formality; rather he doubts the need to adopt the theory of mistake in Islamic law. It is quite clear for example that the above argument is based on the adoption of objective tendency by Islamic law whereby all acts issuing from a person should be judged according to his apparent will (*irādah ẓāhirah*). For instance, in a contract of sale, this is concluded when there is offer and acceptance. Is it true therefore

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[14] The Law of Business Contract, p. 108

[15] *Al-Hidāyah*, vol 4, p.49 ,

[16] It is worth mentioning what has been said by ᶜAwdah in this regard " It is not easy for a person who is looking for a specific legal problem to find it immediately, rather he is supposed to read the works chapter by chapter meticulously. A person may not find what he is looking for but he incidentally finds it in a place where he did not expect to do. See, ᶜAwdah, ᶜAbd al-Qādir, *al-Tashrī al-Jinā'ī al-Islāmī Muqāranan bi al-Qānūn al-Waḍ'ī*, *Maktabah Dār al-Turāth*, Cairo, n.d, vol 1, p. 10

that Islamic law especially in the case of mistake is based entirely on objective tendency? Referring to the work of Muslim jurists it appears that they are not united on this issue, meaning that some prefer objectivism while others tend to opt for subjectivism. According to the Hanafī, in the case of conflict between an apparent will (objective) and an inner will (subjective) the former will prevail. To this effect al- Bazdāwī states that "If a contract of sale is concluded mistakenly, such as a person wanting to say *Subḥānallah* but in a slip of the tongue saying I sell to you such and such then the contract is valid"[17]. Ibn Humām also stated that a sale should be valid-but not enforceable- .... if the contract is concluded mistakenly.[18] It is thus clear from these quotations that the Hanafī have preferred to opt for an apparent will regardless of the intention of the contracting parties.

On the other hand, the majority of jurists hold that the 'hidden will' (*irādah bāṭinah*) is to prevail whenever there is a conflict between the two wills. For instance, al-Shāfiᶜī asserts that a divorce uttered mistakenly is not valid, due to the fact that what merits validity is not mere words but the intention of a person. [19]Likewise, Ibn Qayyim an eminent Hanbalī jurist has stressed that among Allah's mercies to his servant is the concession of not counting against them any acts which issue mistakenly. He even equates the act of mistake with forgetfulness and slips of the tongue.[20] Interestingly, the *Majallah* which is based on Hanafī law, has also adopted the same approach; thus article 2 stipulates that matters are judged according to intention. This means in turn that any

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[17] *Kashf al-Asrār*, vol 5, p.351,
[18] *Fath al-Qadīr*, vol 3, p.143
[19] *Al-Taqrīr wa al-Taḥbīr* p vol 2, p.273
[20] Ibn al-Qayyim, *Iᶜlām al-Muwaqqiᶜīn*, edited by Ṭāha ᶜAbd al-Ra'ūf, *Dār al-Jīl*, Beirut, 1973, vol 3, pp.105-106

contract or declaration is judged by intention to render it legally valid.[21] More clearly article 3 states that in contract effect is given to intention and meaning not to words and phrases. According to this principle of archaic sale with redemption (*bayᶜ al-wafā')* is considered as a pledge albeit the word sale is used.[22]

The above discussion shows clearly that ᶜAbd al-Bāqi's claim cannot be generalised, since it refers only to one school of law i.e. the Hanafī. However the Hanafī themselves in certain instances have resorted to subjectivity in their work. In addition there is strong evidence from the Qur'ān to support the existence of the concept of mistake in Islamic law *inter alia* as follows:

1-In (33:5) Allah says " But there is no blame on ye if ye make mistake therein(what counts is) the intention of your hearts"

2-In (2:286) Allah says " Our lord condemn us not if we forget or fall into error"

Thus, these verses and others like them clearly recognise both the concept of mistake and in turn its impact upon human deeds, including contractual matters. On the basis of the above discussion the writer concludes that Islamic law does recognise the concept of mistake although its existence may never be as systematic as in modern law.

6.2.2 The ECC

Of the five provisions in the ECC regarding the concept of mistake, none have clearly touched on its actual definition. Similar to Islamic law, it is the jurists who attempt to elucidate its real meaning. In so doing some of them opine that a mistake is a

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[21] Ahdash, Mohamed A, The Effect of Mistake on contractual Relations under English and Islamic law A Comparative Overview, the Islamic Quarterly, pp.27.28

[22] Rustum Salīm, *Sharh al-Majallah*, pp. 19-20

psychological situation which causes a person to imagine something contradicting reality[23] while others refer to it as an illusion in a person's mind causing him to imagine something contrary to reality and which subsequently motivates him to conclude a contract.[24] Although these two meanings seem to be identical, the latter is more accurate and specific with regard to the present study, due to the fact that this definition covers only the area of mistake within the ambit of contract. Elaborating this definition Mu`min maintains that this false imagination has led a person to conclude a contract into which that person would not have entered had he known the reality.[25] Mistake occurs as for example; in the case of a person buying a statue that he believes to be antique but turns out to be counterfeit. Likewise, if a person presents a gift to another believing this latter is his relative but who proves to be foreigner a state of mistake is said to exist. This principle also seems to have been supported by a judicial ruling; although there is no clear ruling as to the exact meaning of the term mistake, the EgCC in a case brought to it has laid down the principal that any product of the imagination contrary to its reality which affects the will at the time of concluding a contract is considered to be a mistake as applied in article 120-124 of the ECC. As such, the contracting party concerned may seek the nullification of a contract concluded by mistake.[26] This ruling implies that not every type of mistake shall be a valid reason to nullify a contract; rather such a mistake must have an effect on the 'will" of the contracting parties.

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[23] See, Abd Fattah, *Nazariyyat al-ᶜ Aqd*, p,297,al- Badrāwī,, *al-Nazariyyāt al-ᶜ Āmmah li al-Iltizām, p.181*,

[24] See, Sultan, Anwar, *al-Mujaz fi Masadir al-iltizam*, p.90, al-Sharqāwī, *al-Nazariyyat al-ᶜ Ammah*, p.114, Al-Suddah, *Nazariyyat al-ᶜ Aqd*, p.225, Yahyā, ᶜ Abd Wadūd, *Durūs fi Mabādi' al-Qānūn p. 222*,

[25] *Al-Ghalaṭ al-Mufsid li al-Riḍā*, pp.11-12,

[26] EgCC, cas.no 349, dated 12/7/ 1994, Al-ᶜ Amrūsī, Anwar,ᶜ *Uyūb al-Riḍā fī al-Qānūn āl-Madanī, Munsha'at al-Maᶜārif*, Alexandria, 2003, 1st edition, p. 157

It is to be noted that a mistake as understood by the ECC is almost identical to that definition given by modern Muslim jurists; however it is hard to prove which influences the other. This is because as previously discussed the theory of mistake in Islamic law is not as systematic as modern law including the ECC; as such modern Muslim jurists such as al-Zarqā' have followed the criteria laid down by the ECC in order to build a theory of mistake. In an attempt to correlate the two systems the definition of mistake given by Civil law jurists is followed. This is enhanced by the fact that the definition of mistake in classical work is different to that given by Civil law jurists. Nevertheless, this is not to suggest that contemporary Muslim jurists did not benefit from their predecessors; rather, in my opinion since the work of modern jurists also incorporates classical meanings it is easy to portray such meanings in modern work. Perhaps this fact also contributes to the claim that Islamic law does not recognise the theory of mistake as it exists in the Western jurisprudence.

6.3.Conditions of mistake

6.3.1 Islamic law

It could be taken at a first glance that the right to determine whether a situation of mistake has occurred is vested with the mistaken party. However, the question arises as to what extent his claim should be entertained and the mistake consequently be remedied? While it is indubitable that this claim must be taken into consideration, the fact remains that the right of the mistaken party to nullify the contract is not absolute. In fact, the existence of a mistake creates a dilemma between two interests; that of the stability of transaction and that of the individual right. If a decision whether or not to nullify a contract is based solely on the stability of that contract this means the doctrine

of mistake has no place at all in Islamic law, a matter which has been proven to be otherwise, Likewise, if the right of the individual always prevails, this might lead to the abuse of the concept of mistake without adequate basis. Therefore, it is worth examining the criteria established in order to ascertain the existence of a mistake. In other words, what are the measures used to determine whether a mistake has occurred?

Here, although the classical jurists did not explicitly provide guidelines as to what measures they employed, analysis of their work leads us to conclude that there are three approaches utilised therein. These approaches in the language of modern law are subjective (*dhāt*ī), objective (*mawḍū*^{c}*ī*) and a combination of the two (*muzdawaj*). In general, jurists are divided into two groups using objective and subjective approaches respectively. However, it is noted, that this generalisation does not always hold true when it comes to a specific discussion. In the case of mistake for instance, some jurists even depart from their own doctrine because of certain specific considerations. The following discussion will therefore clearly categorise juristic opinion as to measures used to determine the existence of mistake.

6.3.1 .1Mistake must relate to a desirable quality (*marghūb fīh*)

This is a quality which is essential in a thing in order to differentiate between one such thing and another. It is moreover this quality that causes the contracting party to enter into the contract in the first instance. Ibn Nujaym emphasised that the requirement of this desirable quality could be either clearly mentioned or tacit.[27] Despite the fact that most mistakes concern the subject matter of the contract it is to be noted that mistake

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[27] *Al -Bahr al-Rā'iq*, vol 6, p. 26

may also occur in its other elements such as the contracting party or value[28]. For instance in the contract of leasing the hirer will normally take into consideration the criteria for a hired person before making a contract but should there be a mistake in these criteria he is then entitled to seek remedy. It seems therefore that the contracting party who claims the mistake is the one who initiates the revocation of the contract; thus, the subjective approach is here more apparent. However, the actual conditions imposed therein indicate that such a claim is not based solely on a subjective tendency since this could otherwise lead to instability in matters of contract. Jurists have thus incorporated certain objective conditions in order to consider the claim of the mistaken party, as follows.

Acceptable in view of sound mind

If a person buys a cow on the understanding that it is lactating, this state of producing milk can be considered as 'a desirable quality' in the view of those of sound mind . Lack of this quality will thus constitute a mistake that entitles the buyer to seek remedy. However, if the buyer claimed that he bought the cow because he believed the said cow to be handicapped, then he is not entitled to revoke the sale due to the fact that his desirable quality has no merit in the view of those of sound mind. In the event that a desirable quality cannot be determined by ordinary people, expert opinion should be sought. To this effect Ibn Humam states "whoever buys a jewel believing it to be red but which turns out to be yellow, then he has the right to opt (for either ratification or nullification)... this is to be judged by an expert".[29]

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[28] See detail on p.232 onwards
[29] *Sharḥ Fatḥ al-Qadīr*, vol 5, p. 201

The above example appears to suggest that the claim of the mistaken party alone is not sufficient to create a legal basis for mistake, and thus, the subsequent nullification of the contract. Rather his claim must be supported by strong proof in order to be valid, thus demonstrating a combination of objective and subjective approaches to determine the existence of mistake. Having said this, the question arises as to whether a case where a desirable quality is clearly stipulated would also be ruled as constituting a mistake. I would tend to the view that in the absence of the stipulated desirable quality, then the state of mistake should be established regardless of the opinion of the expert. Hence, if a buyer stipulates that he wants to buy a thin camel, but the seller sells him a fat one, the sale is then revocable. This is because the condition put forward by the contracting party takes priority over the views of the expert as long as it does not contravene Islamic principals.[30]

The requirement of the objective approach is further proven by the condition that a desirable quality should be deduced from circumstances leading to the making of the contract. As such, whoever buys a female camel which turns out to be male, if then the buyer is a Bedoin he has the right to rescind. However, if the buyer is a journey man then he is not entitled to revoke.[31] In this example the custom of the buyer is considered to be an indicator that his intention is to buy a female camel for milk.

In addition, the alleged mistake must be obvious and apparent to all contracting parties. This can be said to exist either when the party has declared the desired quality

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[30] According to some jurists, in order for mistake to be valid, the desirable quality should be lawful, hence if the contracting party claim that the cow is for killing, mistake is not established. In addition, the desirable quality must be systematic. I would prefer not to consider this as a specific requirement for mistake since it involves the general principal of contract itself, meaning that the subject matter of a contract must be legal.

[31] *Hāshiyah Ibn ᶜ Ābidīn*, vol , p. 94, *Maṣādir al-Ḥaqq*, vol 2, p.128

for which he concludes the contract or from circumstances of the case. Therefore in the case of a person buying a jewel without informing the seller for instance that blue is his desired colour but which turns to be red, the sale would be binding. Another example cited by al-Haṭṭāb is that Malik was asked about a person selling a *muṣallā*(carpet) after which the buyer found it to be silk, whereupon the seller said that had he known it was silk he would not have sold it at that price. Malik ruled that the *muṣāllā* should remain with the buyer and that the seller thus had no right to it.[32]

This ruling lays down the principle that the mistake is not recognisable as such if it only involves one party (in this example the seller) .This is because if we were to entertain the right of the seller to nullify the contract, at the same time this may cause harm to the buyer without reason. However, if the mistake is clear to both parties he who claims the mistake has the right to invalidate the contract.

6.3.2. The ECC

Article 120 of the ECC states that if a contracting party makes a substantial mistake he may request invalidation of the contract, in the event that the other contracting party has either committed the same mistake while being aware thereof or that is easily recognisable. It is thus clear that in order for mistake to be a legal basis for nullifying a contract two conditions must be fulfilled; namely, the mistake should be substantial and it should be connected to the other contracting party

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[32] *Mawāhib al-Jalīl*, vol 4, p. 466

6.3.2. 1 The substantiality of the mistake

This means that a mistake has occurred in an important matter which in turn influences the contracting party to enter into a contract. What makes a mistake substantial has been clearly defined by ECC in that it stipulates that a mistake shall be substantial if it is so serious that the contracting party would have refrained from concluding the contract had he not made that mistake.[33] Most jurists argue that by virtue of this provision the ECC has adopted a subjective approach in determining mistake because it leaves the claim of mistake to the contracting party. [34] Nevertheless, article 121 /2/A[35] seems to suggest that the ECC also recognises objectivity in determining substantiality . This is because the existence of mistake therein cannot be based on the claim of the contracting party alone ; rather this claim should be balanced against circumstances leading to the conclusion of contract. Hence in my view, there exists a combination of both objectivity and subjectivity in determining mistake. The need for the objective approach apart from subjectivity is vital to balance the two separate interests: the mistaken party and the stability of the transaction. To elaborate an a previous example, if a person buys an antique item from an antique shop which turns out to be counterfeit, and he then claims mistake, his claim is based on both the subjective approach (claim from the contracting party) and the objective(that is going to the antique shop is a sign that his will is to purchase the antique).[36]

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[33] Article 121

[34] Al-Sharqāwī, *al-Nazariyyat al-ᶜ Āmmah*, p. 119,

[35] It reads: A mistake shall be substantial, particularly if it occurs in a quality of the object that is essential, or should be considered as such by the contracting parties in view of the contract surrounding the circumstances and the *bona fide* requirement that should exist in the deal.

[36] Al-Sharqāwī, *al-Naẓariyyah*, p. 119,*Maṣādir al-Haqq*, vol 2, p. 106

This said, it should be noted that substantiality depends very much on the purpose of the contracting party. Therefore, for instance, if a person buys something because of its antiquity and believes at the same time that such an item is made of gold, but he later discovers that the item is actually antique but not gold, he cannot revoke the contract because the fact of antiquity is of substance here , not the material[37]Likewise, if his intent in buying the item is because it is made of gold at the same time believing the item to be antique, and the item is in fact not gold, then the state of mistake is said to exist giving the mistaken party the right to revoke the sale even though the item is antique, because antiquity here is not substantial. Mention should be made that although article 121 states two situations which constitute mistake, it does not exclude the other possible situation that may be interpreted as mistake such as mistakes as to value. This is because the Code has mentioned these situations merely as examples .

6.3.2. 2 Mistake must be connected to the other contracting party

One of the most important issues raised in the theory of mistake is perhaps that related to balance the interests of the mistaken party against the interest of the other contracting party. As for the mistaken person, granting him the right to revocation based on his defective consent protects his interest. On the other hand, ratifying the contract on the grounds of stability of contract can only preserve the other contracting party in that he is not to be surprised to revoke the contract as a result of a mistake. In giving solution the ECC has attempted to harmonise the interests of both parties.[38] Article 120 among others thus stipulates that the mistaken party may nullify the contract provided that the

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[37] *Maṣādir al-Ḥaq*, vol 2, p.106
[38] Al-Jammāl, *al-Naẓariyyat al-ᶜĀmmah li al-Iltizāmāt*, p. 118

other party has either committed the same mistake, is aware of the mistake or can recognize it without difficulty.

By virtue of this article mistake could either be common to both contracting parties or individual; it is therefore agreed upon that the common mistake in which both contracting parties are involved allows the mistaken party to rescind the contract. The question of whether the interest of the other party is taken into consideration does not arise due to the fact that he has also fallen into the same mistake. To illustrate, in the case of a seller who sells an item believing it is gold and a buyer who purchases it in the same belief, and who later discovers it to be silver, either party can ask to rescind the contract as long as the mistake is substantial.

As for an individual mistake which involves only one party, would this then be sufficient to nullify the contract? Some jurists are of the opinion that individual mistake alone can be a valid legal basis to nullify the contract. They argue that the notion of common mistake is not in accordance with justice on the grounds that it does not take into account the concept of defective consent in that mistake of this kind should only revolve around the will of the mistaken party regardless of the will of others[39] However, this view appears to be inconsistent with the Code which does not consider individual mistake unless two criteria are fulfilled:(i) if the other contracting party is aware of the mistake and (ii) whether it is easy to recognise the mistake. In the first case, once the other party is aware of the existence of mistake it is incumbent upon him to alert the mistaken party, failing which he is considered to be *mala fide*, and consequently has to

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[39]Al- Sharqāwī, *al-Naẓariyyah*, p. 124, According to this view it is suggested that individual mistake can nullify the contract; however, the mistaken party has to compensate the other party based on tortous liability.

face a remedy imposed by law. Similarly, in the second case, the other party even though not *male fide*, is considered to be negligent and should bear the consequences accordingly.

6.4 Legal rules relating to mistake in contract

6.4.1 Islamic law.

In general, the presence of mistake in contract may either cause no legal effect whatsoever to the contracting parties or render a contract non binding, in the sense that the contracting party in whose favour mistake occurs has the right to revoke or ratify such a contract. In this latter case- with which this study is more concerned- the parties concerned are governed in Islamic law by special remedy termed option *(khiyār)* Therefore it is worthwhile to examine this concept and its connection to mistake.

Literally, the Arabic word *khiyār* means to choose the best between two things. In the legal sense, this term refers to the right of the contracting parties to either nullify or validate a contract due to legal cause[40]. In exercising his right the contracting party is said to have chosen the best option in his judgment between nullification or ratification. The relationship between option and mistake is so close that some writers- as discussed- have ruled out the need to introduce a comprehensive theory of mistake to correspond to Civil law ; according to this view the doctrine of option alone is sufficient to provide for any problem that may arise.[41]

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[40] *Mughnī al-Muhtāj*, vol 2, p. 43.
[41] See *Mabda' al-Riḍā*. Vol 2, p.799

6.4.1 .1 Types of option

It should be noted at the outset that doctrine of option is considered to be an exemption of the general principle of contract; that is to say the original principal of contract is bindingness (*luzūm*). Jurists have asserted this principle as, for example, is evident in the words of Babartī "Option is not one of the criteria in the contract of sale; on the contrary a sale (contract) should be free of option , thus.... a large number of sales do not accept option"[42]

However, despite being an exemption to the general rule, jurists are divided as to the extent option is of this exemption; Notwithstanding this, there are two types of *khiyār*, which act as remedy in cases of mistake , namely; option of inspection(*khiyār al-ru'yah)* and option of defect (*khiyār al-ᶜayb).*

6.4.1.1.1 Option of inspection *(khiyār al-ru'yah)*

This is an option whereby the contracting parties have the right to choose whether to validate a contract entered into or to nullify it after the subject matter has been seen. As is obvious from the nomenclature, the contract is concluded before the buyer has the opportunity to see and inspect the subject matter (*maᶜqūd ᶜalayh*) . According to the Hanafī this type of option is permitted by the *Sharīᶜah* itself; this means that the buyer has the right to decide when he sees the subject matter even though he does not stipulate this at the time of concluding the contract. The Prophet P B U H is reported as saying " If

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[42] *Al_ᶜInāyah*, vol 5, p.125,

someone buys an item without seeing it, then he has an option when he sees it".[43] The Hanafī also rely on the narration that ᶜUthmān bin ᶜAffān sold a piece of land to Talhah, when neither of them had seen the land. Someone told Ṭalhah he had been cheated to which he replied: I have an option because I bought an item that I have not seen,The matter was then taken to Jubayr bin Mutᶜ am who ruled that Ṭalhah indeed had this option. This incident took place in the presence of companions none of whom contested the ruling which constitutes consensus (*ijmāᶜ*) as to its legality .

On the other hand, in his new edict al-Shāfiᶜī ruled that the sale of an absent object is null and void regardless of whether or not it was described[44] He argued that this sale consists of uncertainty *(gharar*) which is forbidden by the Prophet P B U H. Furthermore according to al-Shāfiᶜī the *Ḥadīth* advanced by the Ḥanafī is weak as later stated by al-Bayhaqī and Dārqutnī.[45]It seems that the reason for which al-Shāfiᶜī invalidates the sale of an absent object is the possibility it may incur uncertainty. However such a concern may be eliminated through two steps; first the contracting parties especially the buyer can obtain the item specification through description from the seller. For example if the subject matter is a car the seller should describe to the buyer its make, colour and so on. The second step is to give the buyer the right to a final decision after he has seen the sold item. This right is actually what is known as option of inspection (*khiyār al-ru'yah)*. Thus, the view of the Hanafī is more acceptable especially when the transaction takes place in the present. The Shāfiᶜī view can thus only be valid if the buyer is in ignorance of the subject matter.

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[43] Narrated by al- Bayhaqī from Abū Hurairah, *Ḥadīth* no 10426
[44] *Al- Umm* vol 2, p. 20, *al-Fiqh al-Islāmi* (English edition), vol 1, p. 216
[45] *Al-Fiqh al-Islāmi* (English edition) vol 1,p.217

It is to be noted that the doctrine of option is developed on the notion of mistake itself. This is because in the case of sale for example, the buyer who decides to annul the sale after seeing the subject matter is supposed to do this because the subject matter does not tally with previous belief. In other words he has made a mistake of perception and this mistake is remedied through option of inspection. To cite al-Kāsānī :

" The sale of an unseen object is not binding. This is because ignorance of quality(of the sold item) will affect the will (of the buyer) and thus make it defective. This defect of will necessitates option owing to the fact that the seller may later regret his decision when he sees(object). ...his regret can therefore be remedied through option"[46]

Similarly Rayner states:

"Thus when the buyer contract to buy an unseen article without disclosing his intention as to that article to the seller and upon inspection he discovers that the article does not fit his original intention he may seek remedy in mistake under the option of inspection"[47]

The above statement connotes that mistake can cause defect of 'will" since the mistaken contracting party relied on certain aspects of the object following which he could not find the said aspect. As such his consent is defective and he is entitled to option of inspection. This said, it should be noted that option of inspection applies only to the buyer not the seller. This is due to the fact that the former is not able to inspect the object at the time of contracting whereas in the case of the latter the object is already in his possession and he is therefore assumed to have full knowledge of the said object.

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[46] *Al-Badā'i'*, vol 5, p. 292
[47] The Theory of Contract p.190

6.4.1.1.2 Option of defect (*khiyār al-ᶜayb)*

This is a type of option which gives the contracting party the right either to nullify or validate the contract if there is a defect in the subject matter provided that the contracting party is not aware of the existence of such defect at the time of contracting.[48] For instance, in a sale contract, the buyer is automatically entitled to annul the contract if he discovers upon transfer of possession that the object of contract is so defective as to diminish its value.[49] According to Rayner the origins of *khiyār al-ᶜayb* are somehow obscure but they are generally thought to have evolved from the tradition concerning animal whose udders have been tied (*muṣarrāt)*. She further suggests that this option is more likely to have been the result of juristic reasoning.[50]

In fact the *Hadith Muṣarrāt* is not the only legal evidence used by jurists to deduce the legality of option of defect as other textual evidence can be found in this regard. It is reported for example that a man bought a slave. He then found a defect and returned the slave to the seller whereupon the seller complained that the buyer had benefited from the slave. The prophet P B U H then ruled that 'profit goes with liability' (*al-kharāj bi al ḍamān)* [51]This *Ḥadīth* thus shows that the seller believed however that there was no defect as to his subject matter'. If on the other hand he is aware of any such defect, then the buyer is entitled to annul the sale on these grounds, despite benefiting from the sold item. This is because such benefit is legally permissible on the basis that if that item perishes then the buyer will be fully responsible. It is to be noted that unlike

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[48] Madkūr, *al-Madkhal*, p. 649, Abū Zahrah, *al-Milkiyyah*, p. 403
[49] Rayner, The Theory of contract, p. 327
[50] *Ibid 328*
[51] Narrated by Abū Dāwūd, *Kitāb al-Buyūᶜ, Ḥadīth* no 3510

option of inspection, jurists are unanimous on the legality of option of defect on the grounds of the above evidence.[52]

Having said this, the question arises as to the connection between option of defect and mistake. If this linkage is apparent as to option of inspection, then one may argue that since the buyer in the contract of sale is satisfied with the condition of the sold item-the situation of mistake should not have arisen. However a deeper investigation proves the contrary; that is to say there is a close linkage between mistake and option of defect. This is because being free from defect is one of the conditions of a contract be it explicitly or implicitly. Thus, if a person buys something defective without being alerted by the seller about the existence of such a defect, then the buyer can rightly assume that the sold item is free from defect. At the same time it is incumbent upon the seller to comprehend and accept this assumption. In the event of the buyer encountering a defect he has the right to revoke the sale while the seller is not in a position to reject such revocation. The right to revoke in this case is based on mistake itself since the buyer has assumed that the subject matter is free from defect but this is later proven to be the opposite.[53]

This is supported by the fact that in order for option of defect to be practically valid, the buyer must not be aware of the existence of defect of the subject matter. Otherwise option of defect cannot be utilized to revoke the sale since the knowledge of the buyer as to the defect at time of contracting indicates that he has consented to such defect. This means mistake does not occur in the presence of consent; however, if there is no awareness of the defect this indicates that the buyer proceeds to conclusion of the

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[52] *Al-Mughnī*, vol 4, p. 15

[53] See the definition of mistake on pp.205-206

contract based on his assumption a discrepancy in which constitutes mistake, which in turn can be remedied through option of defect.

6.4.2 The ECC

Unlike Islamic law which recognizes preventive mistake, the provision here in the ECC concerns only mistake that is regarded as defect of consent. As regards preventive mistake its existence renders a contract void *ab initio* .As such the rules of absolute nullity apply here. However, in the case of defect of consent, a contract made under mistake will render it voidable. This means that once the contract is concluded it is legally said to be existent pending further action taken by the contracting parties. If mistake is fulfilled in all conditions, then the mistaken party may either ratify the contract or nullify it. According to this Code if the mistaken party chooses to ratify the contract he may do this in accordance with the condition of ratification, after which the contract becomes valid and binding. In a case where the party is silent the contract is considered valid and binding either three years after mistake or fifteen years after the conclusion of the contract.[54] It should be noted that such ratification may either be explicit or tacit.

In the event that nullification is sought, the mistaken party must file a petition to the court within the above period. Once the request is filed it is within the jurisdiction of the trial court to decide whether the presence of mistake is established or not, and the Court of Cassation does not have the right to intervene in such decisions as long as they

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[54] Al-Suddah, *Maṣāadir al-Iltizām*, p. 248,

are based on legal justification[55]. Alternatively the mistaken party is entitled to annul the contract without judicial process provided that the other contracting party agrees to this annulment.

It appears that the Code gives the right to ratify or annul to the parties concerned without reference to the court unless there is a dispute on the matter. Although the right of the mistaken party takes priority in annulling a contract allegedly made under mistake he cannot abuse such a right in a manner that may be seen as taking advantage of the other contracting party. Thus, for example, the mistaken party may not request the annulment of the contract if the other party is willing to accept the force of contract as if no mistake had occurred in accordance with article 5 of the ECC which forbids the abuse of this right. Similarly, a party who makes a mistake may not nullify the contract if the purpose of such annulment is only to cause harm to the other party, or his interest is small compared to the harm borne by the other party in the case of annulment.[56]

In addition, the doctrine of,voidability *(butlān nisbī)* does not apply if mistake in law occurs in the contract of reconciliation (*aqd al-sulh*), as article 556 of ECC stipulates that mistakes in law of reconciliation contracts shall not be challenged. In fact, as long as mistake in law fulfils its requirements as in the case of mistake in fact, then the rule should also be imposed on a reconciliation contract; however, this contract is nevertheless exempted due to the fact that the parties concerned are supposed to have agreed to settle their dispute regardless of what the law has to say. Accordingly if one of the parties is mistaken and quickly becomes aware of this, he then has no right to annul the contract after the dispute has been settled and thus both must relinquish any such

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[55] *Naẓariyyat al-Ghalaṭ*, p.200
[56] Al-Suddah, *Maṣādir al-Iltizām*, p. 195

right. It[57] seems that in this case the mistake *per se* is not considered to be substantial and accordingly it has no effect on the validity of the contract.

Observing the remedy provided by the ECC through the system of voidability, one may conclude that there are a number of similarities to the system of option in Islamic law. Both systems agree that the mistaken party is entitled to nullify or ratify the contract which will take effect from the time of contracting. Similarly, with regard to the exception in ECC whereby the mistaken party does not have absolute right to annul the contract, although there is no clear juristic discussion within the doctrine of option, it appears that Islamic law has another approach to address the problem through the principle of " abuse in exercising right" and the same matter is applied in the ECC. [58]

However the two systems differ as to limitation of the period during which the parties are eligible to exercise their right whether to ratify or annul the contract. While the ECC has limited the period to three years from the discovery of the mistake and to fifteen years from concluding the contract, there is no such limitation in Islamic law as jurists stipulate only that there should be sufficient period of time for the parties to decide according to the circumstances surrounding the creation of the contract. Thus, if the mistaken party is silent about the mistake for a sufficient period of time, this indicates that he has tacitly approved such mistake even if the period has not yet exceeded three years; consequently the contract would be regarded as permanently valid for the sake of transaction stability. In my view, although the limitation imposed by the ECC does not seem to contradict Islamic rules, it is recommended that the matter be left to a judge to determine once the case is brought to court.

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[57] Al- Sanhūrī, *al-Wasīṭ*, vol 5, p. 540, al-Badrāwī,*al-Naẓariyyāt al-ᶜĀammah*, pp.265-266,
[58] *Nazariyyat al-Ghalaṭ*, p. 206

6.5 Effects of mistake on contract

6.5.1 Mistake as to subject matter(*ma^{c}q ūd ^{c}alayh*)

6.5.1.1 Islamic law

Mistake as to the subject matter is the most prominent category in Islamic law given that most juristic discussion involves its analysis . a mistake of this kind is defined as relating to the appearance of the subject matter –be it in terms of essence or quality- after the conclusion of contract when that item is in a state contradicting what is apparent at the time of contracting [59] Such a definition clearly divides this kind of mistake into two categories; namely mistake as to essence (substance) and mistake as to quality. Commenting on these categories, jurists have for instance maintained that if a sale contract is concluded on a male slave found later to be female the sale is null and void due to the difference in essence. However if the subject matter is a female sheep later found to be male, this will only render the contract suspended but not void meaning that the buyer has the right to option as to non existence of quality.[60] This raises the question as to what form of measures are used by the jurists in determining whether things are different or not. Further investigation into the work of jurists demonstrates that they devised their system of distinguishing between the two categories not with regard to material substance involved, but with regard to the usufruct of the subject- that is the use to which it is intended to be put and principally with regard to the properties of that subject that the contracting party has in mind when he forms the contract.[61]

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[59] *Mabda' al-Riḍā*, vol 2,p. 800

[60] See *al-Hidāyah*, vol 3, p.47, *al-Baḥr al-Rā'iq*, vol 6,p.89, *Kashshāf al-Qinā^{c}*, vol 3.p.165.

[61] Rayner,The Theory of Contract, p. 180

Therefore the measurement applied is subjective and flexible varying from one thing to another; as an example, vinegar and molasses (both made from grape) are considered to be two different things due to their different purpose. On the other hand the male and female sheep are considered one because the purpose of animal is its meat; as such their sex therefore makes no difference.[62] Another example is if the purchase of an animal is for its meat after which the buyer discovers the animal to be blind; here the contract is valid because the defect of blindness is hardly pertinent to the purpose of sale, that is to obtain its meat.[63]

In this regard Ibn Humam asserts " Essence in jurisprudence is meant for what has a different purpose regardless of the real essence"[64]Thus in the light of these criteria the jurists have ruled whether a contract should be valid, void or voidable.The *Majallah* for instance states that if a person buys a jewel which proves to be glass the sale is void, but if he buys something for its quality but later discovers such quality is absent in the subject matter he then has the right of option.[65]

This said some jurists are of the opinion that the lack of quality will also render the contract void as in the lack of essence; however this view seems to be inconsistent. This is because a contract is based on non-existence ; it is thus agreed that the sale of a non-existent object is null and void *ab initio*. This is not the case in the lack of quality because the subject matter is still in existence.[66]

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[62] *Al-Mabsūṭ*, vol 13, pp.12-13,
[63] Rayner, The Theory of Contract, p. 180
[64] *Fath al-Qadīr*, vol 5, p. 206
[65] Article 310, 308
[66] *Mabda' al-Riḍā*, vol 2, p. 808

6.5.1.2 ECC

Article 121 of the ECC clearly touches upon the quality of subject matter. Even though what is spelt out in this article is merely an example it also states that mistake is deemed to be substantial if it occurs in the quality of subject matter. However this article is silent regarding the essence of subject matter as mistake as to essence will render the contract void not voidable, which is not of concern here. In the case of mistake as to quality, the Code provides that if such quality is the main reason behind the contract then that contract is voidable at the option of the contracting party. The examples for this type of mistake are numerous; for instance in one case the Court of Appeal has ruled that a mistake is considered substantial and will consequently render the contract void where a sold car is thought to be new but in fact is old and has been previously refused by another buyer[67]

It is worth pointing out that article 121/2 establishes the principal that in order to determine the substantiality of quality the intention of both parties must be taken into consideration. This is somewhat vague since in fact only the mistaken party has the right to determine whether a mistake is substantial or not. As regards the other party, although he is protected , his intention is not considered in determining substantiality.[68] For instance, if a person buys a car in the belief that the car is new where it proves to be old in this case, the age of the car serves as that substantial quality which causes him to

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[67] cited from *al- Ghalaṭ al Mufsid*, p. 86

[68] Al-Jammāl, Muṣṭafā, *al-Nazariyyat al-ᶜ Āmmah li al- Iltizāmāt, al-Dār al-Jāmiᶜiyyah*. n.p. 1987, p. 106

conclude the contract regardless of the opinion of the seller. Therefore it is suggested that article 123 be made clearer in order to confine it only to the mistaken party

6.5.2 Mistake as to person

6.5.2.1 Islamic law

This kind of mistake concerns the contracting parties themselves; unlike mistake as to object, mistake as to person is not widely applied in the field of contract. That is to say there are only few contracts in which, where mistake of person occurs this would have an effect. This is because in most contracts mistake as to the person with whom one is dealing is irrelevant because one is willing to contract with everyone.[69] The contract of marriage, pre-emption, lease and bequest are often quoted as being affected should mistake as to the person take place in the sense that the party who suffers as a result of mistake is given the right to annul the contract. Mistake as to person may either relate to the identity of the contracting party or to his quality. An example for the former is in a contract of pre emption whereby the rationale of its legality is to avoid neighbouring bad people; thus a pre emptor is given the right to pre- emption if he is of the opinion that the presence of his prospective neighbour is not conducive to his well being. However, in a case where the pre emptor has mistakenly waived his right as to objection to the new buyer who later turns out to be *persona non gratia* to him, this waiving is in fact effected by mistake and hence the right to pre emption remains . Ibn Nujaym clearly confirms this principles as follows:

> " If the pre emptor were told that the buyer(of the property) is such and such a person and he is agreeable- but who later turns out to be another person, then the pre emptor has the right to pre emption. This is because people are different in

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[69] Rayner, The Theory of Contract, p. 191

terms of morality.....some of them can be good neighbours while other are not. Agreement to one person does not necessarily mean agreement to others ....".[70]

This principle is also supported by *Murshid Hayran* where it states that " if the pre emptor knows the buyer's name and accordingly agrees but it then becomes clear that the buyer is another person then he still has the right to pre-emption"[71]

The above quotation clearly shows that mistake as to person plays a vital role in invalidating the contract, nonetheless; some such as Qurrah Dāghī claim that the case of pre emption is not an acceptable example for the application of mistake as to person.[72] According to him the pre emptor is not part of the contracting parties as the contract is concluded between the seller and the buyer whereas the pre emptor has no role in this contract.[73] Although this argument might sound reasonable-in my opinion- the case of pre-emption can still represent mistake as to person due to the fact that pre-emption unlike other contracts is inextricably related to the contracting party. Therefore, the seller is obliged to presume that his would be buyer is a person conducive to the pre emptor, otherwise this latter may claim that he has fallen into mistake. Since pre emption involves only immovable property and there is no other way to avoid harm being inflicted on the pre emptor, his mistake should therefore be treated as if he is one of the contracting parties.

With regard to mistake involving the quality of the contracting party, its effect is obvious in the case of a contract of lease whereby a person is hired for his service. For example, in the case of a wet nurse, if a person hires a woman to feed his baby assuming

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[70] *Al-Baḥr al-Rā'iq*, vol 8 p. 144
[71] Article 145,
[72] *Mabda' al-Riḍā*, vol 2, p. 810
[73] *Ibid*

that such a woman has the quality of being a good nurse, but who proves to be otherwise, the hirer has the right to revoke the contract on the grounds of mistake. To this effect Ibn Nujaym states:

> "If the baby vomits because of the milk, his guardian has the right to revoke the contract. Similarly if the hired nurse is a thief or a bad person... or an adulterer or an insane person, the right to revoke remains valid".[74]

Thus, it can be seen that if the purpose of hiring is not met then it will constitute mistake as to quality which gives to the hirer the right to terminate the contract. However if the mistake does not affect the purpose of hire, the hirer may not annul the hire on the grounds of mistake; for example, if the hired woman was thought to be beautiful but turns out to be ugly, the contract may not therefore be annulled because this quality has nothing to do with the feeding of the baby. In short it can be said that mistake as to person in Islamic law may to certain extents constitute grounds to revoke a contract.

6.5.2.2. The ECC

Article 121/2/B of the ECC stipulates that "the mistake is deemed to be essential more particularly when it has a bearing on the identity or one of the qualities of the person with whom the contract is entered into, if this identity or quality was the principal factor in the conclusion of the contract" This means that if the identity of the contracting party and his characteristics are taken into consideration while concluding a contract and have then motivated the other party to enter into the said contract, mistake according to these criteria (identity and character)are deemed to be substantial and consequently render the contract voidable. This kind of mistake generally involves donation

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[74] *Al- Baḥr al-Rā'iq* 8, p. 26

(*tabarru^{c}*) such as in the case of a person giving a gift to another believing the donee is his relative but who proves instead to be a foreigner. Although there is a view among jurists that this kind of mistake has no place in most financial contracts, contracts of sale and lease have proven otherwise.[75] In contracts of lease, for instance, if a person hires his house to a woman believing she is of good character but who turns out to be harmful to neighbours then this will constitute grounds for terminating the contract. However, it is to be noted that this substantiality is only regarded for the purposes of contract, hence, in the previous example the lessor cannot terminate the contract if he later find out a woman is ugly when she was believed to be beautiful. Thus in a case brought before the EgCC the plaintiff requested the termination of contract because the defendant who was an architect was not a member of an architect's club. In dismissing the plaintiff's claim the Court held that although the defendant was not registered in such a club, he was nevertheless licensed to practise his work;, as such, non registration could not be considered as substantiality for mistake, thereby causing the contract to be annulled [76]

It should be observed that unlike mistake as to the subject matter which concerns only its quality not its essence, article 121/2 establishes that mistake as to essence is of the same effect as mistake as to quality all of which affect the will but not the contract. It is not clear on what reasons the ECC has based in this provision in order to equalize the two. If the reason for not considering mistake as to essence as relevant is due to the nature of traditional theory which has been abandoned by the ECC, then by the same token this theory should be abandoned throughout and not be used selectively. In my opinion there is no reason to distinguish between the two.

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[75] Al-Jammāl, *al-Naẓariyyah*, p. 109
[76] EgCC, cas.no 221 dated 6/5/1954

6.5.3Mistake as to value

6.5.3.1 Islamic law

It is to be noted that mistake as to the value and the doctrine of deception (*ghubn*)are so interrelated that it is hard to distinguish between them, which leads some jurists to discuss the two concepts interchangeably.[77] This is because mistake as to value would normally causes deception, in which the mistaken party would have not entered into the contract had he known the real value of the subject matter at the time of concluding the contract.[78] It is noteworthy that not every type of deception can annul a contract if it exists together with mistake. Jurists are agreed that slight deception (*ghubn yāsir)* causes no effect whatsoever on contract as this kind of deception is very hard to avoid if not impossible. With regard to excessive deception (*ghubn fāhish)* this has been estimated by the *Majallah* as deception if it is not less than one twentieth of the total price respect of the goods , one tenth in respect of animals, or one fifth in respect of real estate.[79] It would thus seem that the jurists have different views as to whether or not to give the contract .

The Shāfiᶜī hold that a mistake accompanied by deception alone does not give rise to revocation,[80] but must also be accompanied by deliberate deceit *(taghrīr)*. In an example given by al-Sharbinī, if a buyer buys a piece of glass in the belief that it is a jewel and he pays a considerable sum for it, or if a seller sells a jewel believing it is a

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[77] *Mabda' al-Riḍā*, vol 2, p. 812

[78] It should be note mere deception has a wider scope than mistake, as in the case of a person being aware that he is cheated, but where he still wants to enter into a contract for certain reasons. In this case the state of mistake is not established and as such no remedy is given. See *Masādir al-Ḥaqq*, p. 143

[79] Article 165

[80] *Mughnī al-Muḥtāj*, vol 2, p.65

piece of glass and receives a minor consideration for it, in the first case there is no option for the buyer and in the second there is no option for the seller. [81] On there other hand , if the seller were to sell that jewel labelling it as such, the Shāfʿī hold that here deception is accompanied by deceit (*taghrīr)* , thus the sale may be rescinded at the option of the buyer.[82]

The same view is held by the Hanafī and the Ḥanbalī except that the latter have added the grounds for annulling a contract all of which revolve around deceit (*taghrīr).* It may thus be summarized that according to the majority mistake has no impact on the contract if not accompanied by some kind of deceit on which the grounds for nullifying a contract is mostly based.

The Mālikī on the other hand do not require mistake as to value to be accompanied by deception. For them mistake alone can constitute sufficient grounds for the annulment of a contract provided that it is of the type classified as a big mistake (*ghalaṭ fāhish)*. It has been stated by al-Dasūqī that if the buyer pays higher than a third of the price, the sale is revoked .....if he is ignorant of what he has done ..[83]before the passing of one year.

Al-Dasūqi's assertion indicates that in order for a contract to be revoked, three conditions must be fulfilled. Firstly ,the deception must exceed a third of the price in a sale or be under priced by a third more in a purchase. Secondly, the claim for deception

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[81] *Ibid*
[82] Rayner, The Theory of Contract p. 196
[83] *Hāshiyat al-Dasūqī*, vol, 3, p. 140

must proceed within one year of the action which gave rise to the deceit.[84]This said, it is observed that despite these conditions mistake as to value only applies and has its effect on contract in the Malikī school which seems to be based on reasonable grounds. With regard to the view of the majority which requires the presence of deceived to annul a contract it appears that deceit alone can be grounds to rescind the contract regardless of other factors. Therefore, a deceived person can seek remedy through other means provided by the *Shariah* such as the doctrine of option

6.5.3.2 The ECC

The ECC does not clearly stipulate this kind of mistake in its provision; however the jurists conclude that it is recognized tacitly by the Code within article 121-121. According to Mustafa al-Jamal ,mistake as to value is mistake in assessing the value of the subject matter. It may be the result of mistake in the quality of subject matter or in the other contracting party such as mistake as to the share from inheritance or the prestige of the trademark sold to the client.[85] . Aside from this, there is another type of mistake as to value such as in the case of a person selling an antique item for a cheap price because he is ignorant of the actual price. In this example it appears that mistake is accompanied by deception as in Islamic law. Since deception is governed by exploitation *(istighlāl*)in the ECC some jurists are of the opinion that the question of mistake as to value does not arise here. In other words, mistake as to value cannot be counted as one type of mistake in terms of legal remedy because the provision in exploitation is sufficient in itself to tackle this kind of mistake.[86]

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[84] Rayner, The Theory of Contract, p.197
[85] This kind is covered in the previously mentioned article
[86] *Nazariyyat al-Ghalaṭ*, p. 241

However this view seems untenable as there is a difference between mistake as to value and deception in the sense that in the latter it is a condition that a deceived party be aware of the actual value whereas this is not the case in the former, rather in the case of *ghubn* the deceived party would have not concluded the contract had he known the real price. Moreover, the rules of exploitation only apply if one of the contracting parties takes advantage of the other whilst there is no such condition in mistake as to value, meaning that the state of mistake exists even if there is no exploitation[87]

6.5.4 Mistake as to law

6.5.4.1 Islamic law

It is a common belief that mistake as to law is synonymous with ignorance of the law itself. There is ample discussion from a jurisprudential perspective regarding ignorance; however, the following discussion will confine itself only to mistake within the ambit of contract. What lead to similarities between mistake and ignorance is perhaps the fact that mistake can be said to have occurred when the contracting party is in ignorance of legal rules at the time of contracting. As such, mistake as to legal rule (*hukm shar^{c}ī*) is also expressed as ignorance of such a rule.[88]

Generally, ignorance of legal rules is not excusable unless there is strong justification for this such as in the case of a person newly converted to Islam living in unislamic environment, or a person who is ignorant of very detailed knowledge. Al-Qarāfī states that the *Shar^{c}īʿah* has excused in many cases such ignorance as it also count

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[87] *Ibid*
[88] Mahmaṣānī, *al-Nazariyyat al-^{c}Āmmah*, p. 419

in many cases; the criteria for this is what is hard to avoid is excused and what is easy is not[89]. However, Qarafis statement does not offer a solution to the question as to how a thing is defined as either hard or easy. In other words, what is the measurement used to differentiate between an excusable mistake and inexcusable mistake? It seems that jurists have attempted to answer this question by dividing ignorance into categories; namely ignorance with negligence and ignorance without negligence. With regard to the former the *Sharīʿah* does not consider such ignorance to be an excuse; for example, if a person makes a contract involving usury (*ribā)* he can not claim a state of ignorance because he is supposed to know its legal rules, and is therefore considered negligent. In the former a case here, where a person would not be considered negligent is where he sells a share from his from inheritance for one thousand pounds believing that he only inherits one fourth, not knowing the fact that he is entitled to half. In line with this, if a person buys a movable property on which the seller's neighbour later claims pre-emption, and the buyer agrees in the belief that pre-emption also applies here, what then would be the effect?

Here, according to the jurists if the ignorance occurs in a well known matter, then it constitutes no excuse whereas in unknown areas it is excusable. In the above example, jurists have ruled that ignorance of pre-emption (*shufʿah)* is not excusable since its provision should be known. Here the same question again arises as to how to determine whether or not a thing is well known. Since there is no definite measure, I am inclined to recommend standardising rules so that ignorance of the *Sharīʿah* shall have no effect on matters of contract. This is because gaining knowledge is incumbent upon a Muslim. In

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[89] *Al-furuq*, vol 2, p.150

contract for instance, before concluding the contracting party should be aware of whether what he is going to do is unlawful or not as supported by the Qur'ān in (21:7). Moreover, the excuse of ignorance in certain cases is applicable to concession *(takhfīf)* only, as al-Shāfiᶜī argues " If ignorance were to be an excuse this means that ignorance is better than knowledge due to the fact that a person will not be ask to perform legal duties.[90]

6.5.4 .2 The ECC

Similar to Islamic law, mistake as to law is always related to ignorance of the law itself. Inasmuch as there is a possibility of mistake of fact mistake as to law may occur at the time of concluding of the contract. Likewise, it may also involve all kinds of previously mentioned mistake (value, person, subject matter). For instance, if a person makes a contract with another whose age is eighteen in the belief that this is the age of prudence, not knowing that the age of prudence has been raised to twenty-two, then this ignorance constitutes mistake in the law concerning person.[91] The ECC thus regards a contract under mistake as voidable at the option of the mistaken party. Article 122 of the ECC clearly states that in the absence of a provision of the law to the contrary, a mistake in law entails the nullification of the contract if the mistake fulfils the elements of a mistake in fact". The EgCC has also upheld this principle in one of its rulings[92]Despite the clarity of this provision, the question arises as to whether it constitutes an exception to the general principal of law which states that ignorance in law is not excusable. Some jurists hold that the theory of mistake has been wrongly treated as it should not be seen as ignorance of law itself; but the two aspects must be treated separately since each has its

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[90] Al-Zarkashī, *al-Manthūr fī al-Qawāᶜid*, edited by Taysīr Fā'iq, *Wizārāt al-Awqāf wa al-Shu'ūn al-Islāmiyyah*, Kuwait, 1405 H, 2nd edition, vol 2,p.17

[91] Al- Badrāwī, *al-Nazriyyat al-ᶜ Āmmah*, p. 263

[92] EgCC , cas.no 846, dated 13/12/78

own rule in order to avoid conflict within this general principal. It seems however that this view is not convincing, as it is difficult to speak of mistake as to law without involving ignorance as the two are inextricably linked.

In reality, a deeper study of the principle " ignorance in law is not excusable" and the doctrine of "mistake as to law" demonstrate that no conflict exists here. This is because the said principle serves as a means not to avoid the implementation of law on the pretext of ignorance of such law.[93] Therefore a creditor who charges more interest than that legally allowed may not request annulment of the loan contract claiming that he is in ignorant of the law because this would lead to non implementation of the law. However, if the purpose in applying the principle of mistake is to implement the law, then the mistaken party may annul the contract such as a person regarding himself as obliged to settle a debt he thought to be civil which but turn to be natural.

In my view, since the ECC here makes clear provision; then the question of ignorance should not be raised due the fact that most of the principles bear the criteria of predominance rather than universality, as can be found in much legislation other than that of the ECC

6.6 Summary

The theory of mistake contrary to some claims has its roots in Islamic law. It is discussed under the term *ghalaṭ* and *khaṭa'* synonymously. Similar to the principle of duress (*ikrāh)* in order to determine the existences of mistake both objective and

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[93] Al- Sharqāwī, *Maṣādir al-Iltizām* p.123

subjective approaches are used which is agreed upon by both Islamic law and by the ECC. The ECC has included the doctrine of mistake under defect of consent; however, its effect will lead to that caused by impediments to legal capacity (*ʿawārid)* meaning that the use of different terminologies is not of significance as long as the substances are the same. Both Islamic law and the ECC are agreed that no doctrine of interdiction is to be imposed on the mistaken party as in the case of duress.

CONCLUSIONS

The present study has been an attempt to analyse similarities and differences between Islamic law and the ECC focusing on the concept of impediments to legal capacity (*ʿawāriḍ al-ahliyyah)*. The aim in this has been to pinpoint contradictions in the ECC and to suggest revisions to bring rulings in line with Islamic law. For this reason throughout the study certain issues have therefore been raised and each of which has been discussed within the chapters concerned. These issues are now summarized below; recommendations for legislative revision are also suggested.

1-As stated then, the focus of this research has been the concept of impediments to legal capacity in Islamic law from different angles; that is, both varying perspectives on principles of Islamic jurisprudence (*uṣūl al-fiqh*) and of jurisprudence (*fiqh*) itself were examined. These perspective fall into three categories, as follows. As to the first category, scholastic study is more related to the fitness of a person to receive legal rules *(hukm sharʿī*) within the framework of the conditions of 'a person upon whom an injunction is addressed' (*mahkūm ʿalayh*) .On the other hand the scholars of *fiqh*, have focused their works on the effect of impediments *(ʿawāriḍ*) on the validity of legal acts. Thirdly, yet another approached by modern Muslim scholars where a method using modern law is applied, employing a different set of terminologies relating to legal impediment. Since these approaches are inextricably linked the present study combines all three.

It is observed that the issue of terminology is quite significant and confusing; for example, while the classical jurists use the term 'impediments to legal capacity'

(*ʿawārid)*, the ECC has chosen to divide the concept into 'impediments' and defects of consent (*ʿuyūb al-riḍā)*. This mode of classification has influenced contemporary Muslim jurists to the extent that in their discussions on contract they specify a special heading for 'defects of consent'. The writer concludes however, that there is little apparent justification for so doing other than the need to balance principles of modern law against those of Islamic law. The study further found that this mode of classification was a result of disagreement in defining and determining what should fall under the term 'impediments to legal capacity'. Classical jurists, for example –in the view of some contemporary scholars- have widened the meaning of impediment; the present study found that such widening is founded on the fact that what is meant by impediment is the opposite of the legal effect of legal capacity (*ahliyyah)* and rather than representing the opposite of the basis of such legal capacity itself; as such this disagreement is in the writer's view of little importance. Therefore I have preferred to define 'impediment' as a matter affecting legal capacity resulting either in its removal or change in legal rules. With regard to the ECC although there is little debate on this issue, it seems that the differentiation between 'defects of consent' and 'impediment to legal capacity' in fact falls within what is known to classical jurists as the difference between the type of impediment that removes the legal capacity and the type of impediment that changes the nature of legal rules.

In addition, the study found that the concept of legal capacity is almost identical in Islamic law and the ECC ranging from definition to classification (see chapter 1). Both systems recognize the existence of receptive and active legal capacity, however only the latter can be affected by the presence of impediments.

2.As has been seen, minority (s*ighar*) in Islamic law as an impediment to legal capacity has been discussed extensively. It is nevertheless concluded that the Prophetic *Ḥadīth*" liability is exempt from... a minor until he reaches puberty" together with another *Ḥadith* in which the Prophet P B U H said "ask your children to perform prayer when they are seven" have contributed to the division of the category of minor into non discerning and discerning. As to the contract drawn up by the minor the majority of jurists do not validate such a contract when entered into by a non discerning child regardless of its nature, be it purely beneficial, purely harmful or a mixture of both beneficial and harmful. However, there is a view held by the Hanbalī –which the writer favours - that a sale carried out by a non discerning child may be validated if the subject matter is trivial; while a decision as to the actual degree of triviality of subject matter will be referred by custom. With regard to a contract effected by a discerning child it was found that the majority of jurists have given different rulings according to the nature of the contract concerned. If for example, a contract is purely beneficial to the child then the contract is valid regardless of the consent of the guardian. On the other hand, if the contract is detrimental then it would be invalid whether or not the consent of the guardian is obtained. The role of the guardian is thus only apparent when the contract involves benefit and harm, a view which the ECC has also adopted. It is further concluded that in discussing the issue of the effect of impediments on contract it seems that both classical and modern jurists use the terminologies loosely when referring to contract, disposal (*taṣarruf)* or obligation (*iltizām)*. The study has therefore been careful to differentiate between these terms; based on analysis on chapter two, it is thus concluded that while it is acceptable to use the term disposal to refer to contract the opposite cannot be the case .

3- It is also found that insanity *(junūn)* is the least disputed impediment in both Islamic law and the ECC as both systems agree to include this concept under one heading i.e impediments to legal capacity (*ᶜawārid al-ahliyyah)*. Nevertheless the exact meaning of the term is not agreed upon; the difficulty in giving an accurate definition of the term 'insanity' may be due to the fact that it involves medical concept in the first place. It is concluded that Islamic law as well as the ECC look at the effects of insanity on human beings in order to formulate its definition. It seems here that the Egyptian jurists have followed Islamic law. It is also noted that medical experts have developed comprehensive definitions and classifications of insanity; this is not surprising if it is accepted that the purpose behind such classifications is to diagnose, treat and cure mental illness with which jurists are not concerned. Nevertheless the ECC has opted not to be bound by the assessment of medical experts; I have suggested that the judge concerned may not be bound to a specific medical meaning; on the other hand he may not ignore absolutely medical opinion. It is further noted that with regard to the effect of a contract carried out by an insane person, Islamic law has ruled that his contract is null and void if the insanity is continuous (*muṭbiq*), although, in the case of intermittent insanity(*ghayr mutbiq*) his contract is then valid during lucid intervals. On the other hand the ECC has emphasized procedural matters by dividing the acts of the insane into periods before an interdiction has been registered and thereafter where in the case of the former the contract is valid. Nevertheless, it is argued that while it is acceptable to base rulings on procedures in certain circumstances such basis may lead to adherence to procedure at the expense of reality. By this is meant that if an insane person carries out a contract before interdiction is registered this means that he is acting without due legal capacity It is suggested that this situation arises because the ECC does not categorize insanity as in

Islamic law. Based on findings discussed the writer would therefore recommend that the ECC revise its provisions here to be in line with Islamic law.

Apart from insanity, both Islamic law and the ECC have recognized another mental illness called imbecility (*ᶜatah).* The research found that since the effect of imbecility in Islamic law is well treated as justifiable rulings are given to differentiate this concept from insanity, on the other hand the ECC has unjustifiably applied rules of insanity to imbecility while at the same time recognizing a distinction of actual definition.

4. Another important focus of the study was the concept of prodigality (*safah)* as an impediment on legal capacity. It was thus established that according to Islamic law this term has a variety of meanings and interpretations such as ignorance and shallowness. From a literal point of view every aspect of human acts be they religious or financial is thus covered. However, the jurists have narrowed down the concept to refer only to financial dealings. As has been established in this research; the researcher found that, in Islamic law, only overspending on permissible items can be considered as act of prodigality. With regard to other phenomenon stated by the jurists such as sinfulness (*fisq)* and meanness (*bukhl*) , evidence discussed show that these circumstances cannot be regarded as forms of prodigality and subsequently, cannot be subject to interdiction. In the ECC, the ruling of Court of Cassation has only confined prodigality in financial matters regardless of the religious integrity of the prodigal

As to the effect of prodigality on contracts, analysis shows that much debate has arisen among the Muslim jurists as to whether or not a prodigal person can be interdicted.

The arguments invoked oscillate between two contradictory factors; whether to observe the dignity of human beings or to protect their wealth.(see chapter 4). The researcher has found that as long as prodigality is proven to exist then interdiction is permissible whether this interdiction is at the expense of human dignity or property although such interdiction shall only take effect through obtaining a judicial order. While concurring with Islamic law as to the legality of interdiction the ECC is more concerned with procedural matters in the sense that a contract entered into by the prodigal may be voided only after the registration of interdiction ruling. Otherwise, such a contract will be valid as if it issued from a prudent person. However, it is concluded here that the stance taken by the ECC renders the prodigal vulnerable to exploitation by another *mala fide* party if the contract is concluded before the registration of the interdiction ruling. Realization of this has perhaps led the ECC to incorporate a safety clause stipulating that there are thus two conditions in which the contract is null and void regardless of the interdiction ruling. It is also found that little attention is given to the criteria specifying the type of contract into which a prodigal person is not allowed to enter; for this reason the researcher favours the opinion of the jurists who have ruled that the prodigal is free to contract involving small matters and necessity such as food, clothes and the like.

5-The writer also finds that in the light of discussion regarding the underlying theory of duress *(ikrāh)* the root of the concept can be traced to the a prophetic tradition " liability is lifted from a duressed person". It was further found that unlike other impediments, Muslim jurists especially those of Hanafi have devoted a specific chapter in their writings to discussing this concept. From the study of the diversity of views regarding the definitions of duress, the researcher has opted to define it as the exercise of an unlawful pressure to create in a duressed person the kind of fear which causes him to enter into a

contract. It is concluded that although there is no provision in the ECC stipulating the definition of duress jurists nevertheless seem to agree with that of Islamic law. However, a critical problem of terminology is noted whereby some jurists of both Islamic law and the ECC refer interchangeably to duress as necessity *(ḍarūrah)*; in the researcher view this is found to be inaccurate since every form of duress is necessity but not *vice versa*.

Little difference is noted with regard to the classification of duress, however both Islamic law and the ECC recognize the existence of just and unjust duress. In order for duress to exist certain measurements are to be applied. It is found that that in Islamic law both objectivity and subjectivity are used based on evidence from the Qur'ān and Sunnah. On the other hand, although, the ECC has adopted subjectivity in its approach, it is found that in a number of ruling the EgCC has implicated the adoption of objectivity as well as subjectivity although this is not explicitly stated. Thus, it is suggested that the ECC clarify in its provisions the nature of measurement used in order to remove ambiguity.

As for findings relating to the effect of duress on contract, both Islamic law and the ECC agree that the actual legal capacity of a duressed person is not removed; rather some legal rules would be affected if duress were present. The researcher would recommend that a contract entered into by the duressed person should be suspended rather than voided in line with the view of Malikī and some Ḥanafī due to the fact that a suspended contract can later be ratified when the state of duress no longer exists. It was found that this is also the stance taken by the ECC.

6-It is concluded that with regard to the concept of mistake *(ghalaṭ)*, contrary to the claims of some jurists this concept has its roots in Islamic law and is discussed under the term *ghalaṭ* and *khaṭa'* synonymously. Yet the treatment of this concept by Muslim jurists is not as systematic as in modern law; Islamic has also emphasised the effect of mistake on contract by introducing remedies such as the doctrine of options *(khiyār)*. Similar to duress in order to determine the existence of mistake both objective and subjective approaches are used. This use of both approaches is agreed upon by Islamic law and the ECC. The ECC has included mistake under the 'defects of consent' rather than under 'impediments to legal capacity', however, under a different terminology this inclusion is of little significance since the outcome is identical to that of 'impediments'. Both Islamic law and the ECC are agreed that no doctrine of interdiction is to be imposed on the mistaken party as similar in the case of duress.

As for final concluding remarks, there are more similarities than differences between Islamic law and the ECC relating to impediments to legal capacity. In the case of discrepancies suggestions have been made to remove them. As for similarities, it is concluded that ECC has actually referred to one of its sources i.e. Islamic law in dealing with the subject of impediments to legal capacity.

GLOSSARY OF ARABIC TERMS

A number of references have contributed to the compilation of this glossary such as Rayner's the Theory of Contract in Islamic law, Faruqi's Law Dictionary and Jamal J Nasir's the Islamic law of Personal Status as well as the writer's own translations.

In^{c}idām al-^{c}aql	absence of reason
^{c}āhat al-^{c}aql	mental impediments
^{c}ahd	covenant, treaty
aḥkām	legal rules
ahkām al-usrah	family law
ahliyyah	legal capacity
ahliyyat al- adā'	active legal capacity
ahliyyat al-wujūb	receptive legal capacity
ahwāl shakhṣiyyah	personal status
^{c}amal irādi	act of will
amān	peace
amwāl	properties
^{c}aqd	contract
^{c}aqd al-ṣulh	contract of reconciliation
^{c}aqīdah	belief
^{c}aql	reason, mind
^{c}atah	imbecility
^{c}atiyyah	donation
āthār shar^{c}iyyah	legal effects
^{c}awārid	impediments
^{c}awārid muktasabah	acquired impediments
^{c}awāriḍ samāwiyyah	natural impediments
^{c}azm	determination
badhā'ah	rudeness
bāligh	major
bāṭīl	void
bay^{c} ribawī	usurous sale
bukhl	miserliness, cupidity
bulūgh	puberty , majority

bulūgh ṭabīcī	natural puberty
bulūgh taqdīrī	assumptive puberty
buṭlān nisbī	voidable
ḍaghṭ	pressure
dacīf	weak
dā'iniyyah	creditorship
damān	guaranty
ḍarūrah	necessity
dayn	debt
dhawi sha'n	person responsible for others
dhimmah	engagement
diyah	blood money
fāsid	irregular
fāsiq	sinful person
fawrī	immediate
fiqh	Islamic jurisprudence
fisq	sinfulness
fuḍūlī	unauthorized agent
furūc	branches
ghaflah	unawareness
ghalaṭ	mistake
gharar	uncertainty
ghayr mulji'	non constraining
ghayr mumayyīz	non discerning
ghish	deception
ghubn	deception
ghulām	minor
ghusn	see, furūc
ḥadath	see ghulām
ḥadḍ	prescribed punishment
ḥajar	interdiction
ḥālah qānūniyyah	legal status, condition
harakah	motion
hāzil	jesting person

hibah	gift
ḥisbah	soliciting good and advising against evil
ḥudūd	prescribed punishment
ibādah	act of worship
ibtilā’	tribulation, testing
idrāk	discernment
iflās	bankruptcy
ighmā’	faintness
iḥtilām	wet dream
ijāzah	ratification
ijbār shar^{c}ī	licit duress
ijmā^{c}	consensus of jurists
ijmā^{c} sukūtī	silent consensus
ijtihād	legal reasoning
ikhtiyār	choice
ikrāh	duress
ikrāh ghayr mulji’	non constraining duress
ikrāh mulji’	constraining duress
ikrāh nafsī	spiritual duress
ikrāh bi ghayr haq	unjust duress
ikrāh adabī	moral duress
^{c} illah.	cause
iltizām	obligation, debit
inbāt	appearance of pubic hair
in ^{c}iqād	conclusion of contract
inkhida^{c}	deception
inshā’āt	creation
inhā’	termination
irādah maḥḍah	pure will
irādah mudrikah	discerning will
irādah munfaridah	unilateral will
irādah bāṭinah	hidden will
irādah	will
irtikāb akhaff al-ḍararayn	committing the lesser of two evils

isnād al-taṣarruf al-qanūnī	relating legal acts
istiḥqāq	deservingness
isrāf	extravagance
istighlāl	exploitation
istiḥqāq	deservingness
jahl,	ignorance
jam^{c}	collection
janīn	womb, foetus
junūn	insanity
junūn aṣlī	regular insanity
junun ghayr muṭbiq	intermittent insanity
junūn juz'Ī	partial insanity
junūn kullī	full insanity
junūn muṭbiq	continuous insanity
junūn ṭāri'	irregular insanity
kalimat al kufr	words pronounced to abandon Islam
kāmilah	complete
khafīf al-aql	lack of intellect
khaṭa'	see ghalat
khiffah	shallowness
khitab	legal commandment
khiyār	option
khiyār al-^{c}ayb	option of defects
khiyār al -ru'yah	option of inspection
luzūm	bindingness
ma^{c}nā khāṣ	specific meaning
ma^{c}qūd ^{c}alayh	subject matter
ma^{c}rūf	good deed
ma^{c}tūh	imbecile
mabī^{c}	sold item
māddi	objective
māni^{c} al-taklīf	hindrance from being addressed of legal injunction
mas'ūliyyah	responsibility

maḥal	container
manᶜ	prevention
marad al-mawt	death sickness
masā'il	problems
majnūn	insane person
maḥjūr	interdicted person
mawqūf	see muᶜallaq , conditional
maẓāhir al-safah	phenomena of prodigality
mawāni` mas'ūliyyah	obstacle of responsibility
mauḍūᶜī	see māddi
madyūniyyah	indebtedness
maraḍ	illness
marghūb fih	desirable
miᶜyār nafsī	subjective approach
mu'ākhazah wāqiᶜiyyah	realistic punishment
muᶜallaq	suspended
muᶜāwaḍah	exchange, synallagmatic
muᶜamalah.	transaction
mubadhdhir	wastrel
mudrik	discerning
muhābah	favouritism
muhābī.	person who favourites other
mujbar	see mukrah
mukallaf	a person upon whom legal injunction is addresed
mukrah	person under duress/ duressed person
mukrah ᶜalayh	act to be done under duress
mukrah bih	threat used to exert duress
mukrih	person exerting duress
mulji'	constraining
multazim	obligor, person undertaking obligation
mumayyiz	discerning
munākahat	marriage
musabbab.	effect

muṣallā	carpet for praying
mūṣī	testator
muṭlaq	absolute
muwaththiq	notary
nadhar	solemn pledge
nāfidh	enforceable
nafs	desires
nahi	prohibition
nāqiṣ al-ᶜaql	incomplete reason
nāqiṣah	incomplete
naqṣ	incompleteness
nawm	sleep
naẓrah māddiyyah	objective theory
nazrah shakhsiyyah	subjective theory
nifās	post natal blood
nisyān	forgetfulness
nufūḍḥ adabī	moral influence
nuṣūṣ sharᶜiyyah	legal texts
qābil li al-ibṭāl	see butlān nisbī
qaṣd)	intention
qaṭᶜī)	definite, conclusive
qisas	retaliation
qiwām	subsistence
qiyās	analogy
qiyās ma al fāriq	analogy between two different things
rabṭ	tie
rahbah	fear
rashīd	prudent person
rawābiṭ qānūniyyah	legal ties
riḍa	consent
rīh	wind
rukhṣah	concession
rushd	prudence, maturity
ṣabī	see ghulām

ṣaḥīḥ	valid
ṣalāḥiyyah	fitness
shadd	to fasten
safah	prodigality
safīh	prodigal person, spendthrift
ṣighar	see ghulām
shahawāt	desires
shakhṣiyyah	personality
shakhsiyyah qānūniyyah	legal personality
shakhsī or dhātī	subjective
sharī ᶜah	Islamic law
sharṭ	pre requisite
shufᶜah.	Pre-emption
shuḥḥ	miserliness
shurrāḥ al-qānūn	law commentators
sihr	magic
sakr	drunkenness
sulḥ	reconciliation
ṣulṭah shar ᶜiyah	legal authority
sulṭān	ruler
taᶜahhud	commitment
taᶜahhud shakhsī	personal undertaking
tabdhīr	wastefulness
tabarruᶜ	donation
taᶜbīr	expression
taᶜdīl	modification
tadlīs	hiding
taklif	imposition of legal injunction
ta'kīd	emphasis
tamyīz	discernment
taqtīr	miserliness
tāri'	unexpected matter
taṣarruf	disposal
taṣarruf fiᶜlī	actual disposal

taṣarruf mālī	pecuniary disposal
taṣarrufāt qānūniyyah	legal deeds/ acts
taṣarrufāt qawliyyah	verbal acts
taslīm	delivery
tawātu'	secret understanding
tawthīq	strengthening
ujrah musammā	fixed wage/ quoted wage
umūr ṭāri'ah	contingencies/ extraordinary matters
uṣūl al-fiqh	principles of jurisprudence
ᶜuyūb al-irādah	defects of will
ᶜuyūb al-riḍā	defects of consent
wājib qānūnī	legal duty, obligation
walī al-dain	owner of debts
walī al-haq	owner of right
waṣf sharᶜī	legal attribute
waṣiyyah	bequest
wazīfah ijtima ᶜiyyah	societal task
wilāyah	guardianship
wilāyah mut`addiyah	unrestricted guardianship
wilāyah niyābiyah	deputed guardianship
wilāyah qāṣirah	restricted guardianship
yāfiᶜ	see ghulām

Appendix 1

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