

A Comparative Analysis of the Contractual Capacity of Infant under the Common and Islamic Laws

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Abstract: *Contractual Capacity is one of the enablers of any binding contractual undertaking recognized by law and enforceable by the courts. Generally, any person with capacity can enter into a contract. However, this general position admits of some exceptions and as such, in some cases, it may not apply with equal strength; that is to say, some certain category of persons by law, are accorded 'special protection', who save for the law, may be exploited or defrauded during the bargaining process leading to the formation of a binding contract. This 'protected person's' are infants, lunatics, illiterates and drunkards. It is trite, that one of the basic and important principles of the law of contract is that for there to be a binding agreement that the courts will enforce, all the parties must possess the requisite contractual capacity- in addition to the other elementary but necessary elements of offer, acceptance, consideration and intention to create legal relations. Suffice it to say, that even where all the other essential ingredients necessary for the formation of a valid contract are present, an agreement may nonetheless be adjudged illegal, voidable or unenforceable where any of the parties belong in the category of persons that enjoy the 'special status'. Having underscored that contractual capacity is sine qua non to any binding and enforceable undertaking, this work focuses on juxtaposing the contractual capacity of infants under the common law vis-à-vis sharia law, illuminating on the salient features and similarities of the concept inherent in both systems and clearing the attendant misconceptions which afortioribe clouded, especially, the contractual capacity of an infant under the Islamic jurisprudence, which very often, is misconceived as an intellectually sterile and archaic body of knowledge. It is important to note however, that there is a poverty of Nigerian judicial pronouncement on the subject matter under discourse, and to remedy this lacuna, recourse would be had to foreign decisions on the topic, hence the bulk of the principles of the Nigerian Law of Contract as we know are derived there from.*

Keywords: Contract, Contractual Capacity, Infant, Islamic Law, Shariah Law

1. Introduction

The terms "minor" and "infant" are used interchangeably in law to refer to any person who is under the legal age of an adult. In most cases, an "adult" is likened to a person who has attained the age of eighteen (18) which in most jurisdictions is considered as the age of majority.

Apart from defects *stricto sensu*, a contract may generally not be enforceable against minors¹. This rule regarding contracting with minors or infants is that such a contract is voidable at the instance of the minor subject to certain exceptions. The rule has been established to protect younger individuals who may not fully grasp the consequences of certain transactions and in the end, suffer detriments. Therefore, courts and statutes provide minors with the ability to exit the contract at their discretion. This right does not belong to the other contracting party; it is only at the discretion of the minor. So while the contract is still valid, the minor can basically leave it as he or she sees fit. Due to the fact that such a rule can be abused or otherwise lead to harsh results, a variety of exceptions have been carved out of the general voidability of a minor's contract.

It is firmly established that any contractual transaction governed by English law, whether statutory, common law, received or local, the age of majority is twenty-one (21)². The question that bugs the mind now is: Does this position apply *mutatis mutandis* in all circumstances and in all jurisdictions?

Before delving into finding answers to the poser above, it is sacrosanct to establish legally who the statutes say is an infant or a minor, hence, doing otherwise would be tantamount to 'placing the cart ahead of the horse'

Who is an Infant

The Osborn's Concise Law Dictionary³ defines a minor as a person under the age of 18 years.

Under the common law, by virtue of the Infant Relief Act 1874, an infant is a person, who had not attained the age of 21.

The Constitution of the Federal Republic of Nigeria 1999 (as amended) by virtue of Section, places the age of majority at Eighteen years (18) being the legal age of franchise.

Under Sharia Law, the parties who want to enter into a contract must be legally competent to do so. A minor (one who has not attained the age of puberty) or a slave or an insolvent or a person of unsound mind, or an intoxicated person cannot enter into contract. Likewise, a person suffering from death illness (*mard al-maut*) cannot make a valid contract.⁴ By necessary implication, Islamic law fixes majority at puberty which usually is fifteen years also known as *bulug* (puberty)⁵.

³ 8th edition; edited by Leslie Rutherford and Sheila Bone (Sweet & Maxwell, 1993)

⁴ Abdur Rahman I. Doi, *Sharia The Islamic Law*, (Iksan Islamic Publishers, 1990)P.357-358

⁵ Dr. Md. Abdul Jalil and Muhammad K. Rahman "Islamic Law of Contract", *International Journal of Business and Social Science* Vol. 1 No. 2; November 2010.

¹ I.E SAGAY, *Nigerian Law of Contract*, (Spectrum Books Limited,2007) P. 477-478

² *ibid*

A child is defined under the Child's Right Act⁶ as a person who is under the age of eighteen (18) years⁷

Considering the divergent positions as depicted above, what then is the age of majority for the purposes of contractual transactions?

Contractual Capacity of Infants Under Common Law

At common law, persons under the age of 21 were designated "infants" and had only a limited capacity to contract. From January 1, 1970, the Family Law Reform Act 1969 reduced the age of majority to 18 and authorized the term "minor" as an alternative to "infant." "Minor" is now the preferred term. The capacity of a minor to contract is still regulated by the common law, modified by the Minors' Contracts Act 1987 which repealed a troublesome statute, the Infants Relief Act 1874.⁸

The general principle is that a contract under the common law is that a contract made by a minor with an adult is binding on the adult but not on the minor. If, after attaining his majority, he ratifies it by an act confirming the promise he made when a minor, he is bound. There need be no consideration for the act of ratification. A contract by a minor is not void and any money or property transferred by him under the contract can be recovered only if there has been a total failure of consideration. There are three exceptional cases where a minor is to some extent bound.⁹

The textbooks reveal dozens of cases which attempt to define what a 'necessary' is. The problem is that what may be a necessary to one person may not be a 'necessary' to another. Sale of Goods Act provides as follows:

*Where necessaries are sold and delivered to an infant or minor, or to a person who, by reason of mental capacity or drunkenness, is incompetent to contract, he must pay a reasonable price therefor.*¹⁰

A minor is bound to pay for necessaries supplied to him under a contract. The Sale of Goods Act 1979 S.3, re-enacting the Act of 1893, provides:

"... where necessaries are sold and delivered to an infant (or minor)... he must pay a reasonable price therefor.

'Necessaries' in this section means goods suitable to the condition of life of such infant (or minor)... and to his actual requirements at the time of sale and delivery."

"Necessaries" are those things without which a person cannot reasonably exist and include food, clothing, lodging, education or training in a trade and essential services. The "condition of life" of the minor means his social status and

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⁷ Section 277 Child's Right Act

⁸"Capacity Law Lecture Notes." lawteacher.net. 11 2018. All Answers Ltd. 11 2020 <<https://www.lawteacher.net/lecture-notes/capacity-lecture.php?vref=1>>.

⁹ ibid

¹⁰See Nash V. Inman (1908). Also Peters V. Fleming (1840) on the effect of the minors condition in life.

his wealth. What is regarded as necessary for the minor residing in a stately home may be unnecessary for the resident of a council flat. Whatever the minor's status, the goods must be suitable to his actual requirements-if he already has enough fancy waistcoats, more cannot be necessary: Nash v. Inman [1908] 2 KB 1, CA.

The nature of the minor's liability for necessary goods is uncertain. The fact that the Sale of Goods Act makes him liable only for goods "sold and delivered" and to pay, not any agreed price, but a reasonable price, suggests quasi-contractual liability-he must pay, not because he has contracted to do so, but because the law requires him to recompense the seller for a benefit conferred and accepted. Some dicta support this view but others treat the minor's liability as contractual. In Roberts v Gray [1913] KB 520, CA, a minor was held liable for his failure to perform a contract for a tour with the plaintiff, a noted billiards player. It was a contract for the instruction of the minor. The contract was wholly executory and but it was held that the contract was binding on him from its formation. It may be thought that there is a distinction between necessary goods and necessary services but this is difficult to justify logically or historically. Perhaps the contract in Roberts v. Gray belongs more properly to the category of beneficial contracts of service, below.

A contract is not binding on a minor merely because it is proved to be for the minor's benefit; but a contract which would otherwise be binding as a contract for necessaries is not so if it contains harsh and onerous terms: Fawcett v. Smethurst (1914) 84 LJKB 473, (Atkin J).

Beneficial contracts of service. It is for the minor's benefit that he should be able to obtain employment which would be difficult if he could not make a binding contract. The law allows him to do so, provided that the contract, taken as a whole, is manifestly for his benefit. So where a young railway porter agreed to join an insurance scheme and to forgo any claims he might have under the Employers' Liability Act, he had forfeited his rights under the Act, the contract as a whole being for his benefit: Clements v London & North Western Railway [1894] 2 QB 482, CA. Contracts enabling a minor to pursue a career as a professional boxer and as an author have been held binding as being for their benefit.

Acquisition of property with obligations. When a minor acquires "a subject of a permanent nature... with certain obligations attached to it"-such as a leasehold, or shares in a company-he is bound by the obligations as long as he retains the subject. He must pay the rent or calls on the shares: London & North Western Railway v M'Michael (1850) 5 Ex 114. The contract is voidable by the minor-he may repudiate it any time during his minority or within a reasonable time thereafter. It is uncertain whether avoidance here means rescission ab initio or avoidance of only future obligations; but, whether it is retrospective or not, it seems that the minor cannot recover money which he has already paid unless there has been a total failure of consideration: Steinberg v. Scala Ltd [1923] 2 Ch 452, CA.

Restitution by a minor. Where a minor has obtained property under a contract which is not enforceable against him, the adult party who can neither sue for the price nor get the property back may suffer an injustice. Even where the minor has lied about his age, no action in deceit will lie because this would, in effect, enable the contract to be enforced against him; and for the same reason it is improbable that the minor would be estopped from asserting his true age. The Minors' Contracts Act 1987, s3, now affords a limited measure of redress. Where a contract made after the commencement of the Act is unenforceable against a defendant because he was a minor when it was made:

"... the court may, if it is just and equitable to do so, require the defendant to transfer to the plaintiff any property acquired by the defendant under the contract or any property representing it."

This may assist the plaintiff where the property is identifiable but where the plaintiff has loaned the money it will usually not be. The plaintiff will then be able to recover in equity only if he is able to prove that he loaned the money for the express purpose of enabling the minor to buy necessaries and that he in fact did so: *Lewis v Alleyne* (1888) 4 TLR 560.

The 1987 Act, s3, provides "Nothing in this section shall be taken to prejudice any other remedy available to the plaintiff." The plaintiff might rely on the equitable doctrine which required a fraudulent minor to return property which he had obtained by deception and which was still identifiable in his possession: *R. Leslie Ltd v. Shiell* [1914] 3 KB 607, CA; but it is not clear that there would be any advantage in doing so, since the remedy under section 3 appears to overlap the equitable remedy and does not require proof of fraud.

Guarantee of a minor's contract. Section 2 of the 1987 Act provides that a guarantee of a minor's contract is not unenforceable against the guarantor merely because the contract made by the minor is unenforceable against him on the ground that he is a minor. The section does not apply if the contract made by the minor is unenforceable against him for some other reason, for example misrepresentation or duress by the adult party. In such a case the guarantor would not be bound.

Distinguish between 'necessaries' and 'necessities'. We are concerned with necessaries— i.e. goods which are suitable to the minor's condition in life and his actual requirement. The rule regarding necessaries is also applicable to contracts entered into in which the person lacking legal capacity contracts to purchase certain personal and beneficial services: medical attention or apprenticeships and education or training, to name a few. In assessing whether the nature of these contracts is beneficial to the infant, the courts would examine the entire contract as distinct from deciding that certain clauses do not appear to be so.¹¹

Necessaries include services: Beneficial contracts of services may be, in certain cases, another form of

necessaries.¹² You will recall when you studied 'consideration' that there are execute contracts (an infant marches into the store and collects the software, promising to pay within a week) and executory contracts (where he/she merely orders the software for delivery in one week). In the latter instance, he/she can, being an infant, change his/her mind and repudiate (reject) the contract and the store will have no recourse against him/her.

However, if the subject matter is a contract for services, he/she may not be so lucky and the store may successfully proceed against him/her. In one case, an infant contracted to go on a world tour with a professional billiards player in order to improve his game. He repudiated the agreement before the left on the tour. The professional successfully obtained damages from him. In Common Law, there was little distinction between infants on the one hand and mentally ill and drunken (intoxicated) or drugged person on the other, in terms of their overall capacity to contract. In the latter, the contract is voidable on their part but the onus is on them to show that at the time the contract was made they were not aware of what they were doing and the other contracting party must have realized that. In an Australian case¹³ the Plaintiff sought to enforce the sale of a farm in which the Defendant, who was drunk at the time the contract was made, agreed on a price that was well under the market value. The action failed as it was shown that the Defendant, to the Plaintiff's knowledge, was incapable of forming a rational decision although he was aware of the general nature of the transaction.

Contractual Capacity of Infants Under Islamic Law

The Islamic religion emphasizes on the importance of the law of contract. The Islamic law of contract has detailed provisions to ensure viable business transactions between companies. Islam only prohibits earnings through usury or interest in business as clearly mentioned in the Al-Quran. Allah (God) says in the holy Quran: 'Taking interest on loan is prohibited for you but doing business is permitted for you'.¹⁴ This verse of the holy Quran is exhorting the business community not to lend money with a fixed rate of interest. As a matter of fact, it encourages the rich people to give interest-free loans (qard al-hasan) to the poor and the needy people to help them solve their daily needs for survival. On the other hand, this verse encourages the rich people to also invest their money in business because the profit they gain from business is halal (permitted) as business creates employment opportunity for the people as well as contributes to the GDP growth of the country. On the same line of reasoning, the Islamic banks are operating some interest-free financial transactions based on the profit-loss sharing mechanism.¹⁵ The Islamic banking transactions are also conducted by using the Islamic contract law principles.

¹²See Roberts Raray (1913).

¹³(Blomley V. Ryan (1956)

¹⁴The Quran, Surah (Chapter) 2, Verse 275.

¹⁵Ahmad, Abu U.F. 2010. *Theory and Practice of Modern Islamic Finance: The Case Analysis from Australia*. USA: Brown Walder Press; Iliyas, M. 1995. Islamic interest-free banking in Malaysia: some legal considerations. *MalayanLaw Journal*. 3: cxlix-clxiv; Ahmad, Abu U.F. 2007. Riba and Islamic Banking. *Journal of Islamic Banking, Economics and Finance*. 3 (1): 9-42.

¹¹ (See *Doyle V. White City Stadium Ltd.* (1938).

It is to be noted that the Islamic legal system did not develop and progress for a long time, that is, for the last 600 years in most of the Muslim countries which were occupied and ruled by the British Empire. Before, the English rulers ruled the Muslims countries for almost 200 years; the Islamic law¹⁶ was applied in Muslim countries in the informal courts to give decisions on disputes submitted to the courts. England started ruling the Muslim countries from the 16th century. The English rulers applied the English law, which they brought from England, in the Muslim countries instead of the Islamic law.¹⁷

Therefore, the Islamic legal system could not develop in a systematic way as the common law and the civil law system have been developed by refinement and amendment process from time to time. Even today, all the Muslim countries which were colonized by England are applying the English contract law principles in their pursuit of their daily business transactions. This has been the main reason until today that the Islamic law of contract is not applied in the Muslim countries and for this particular reason the Islamic contract law cannot be developed to meet the standard of business transactions in the present era.

However, Muslims are now conducting researches on the Islamic legal system which had been basically applied around 600 years ago in different Muslim countries when commerce did not progress tremendously as in the present time. Nonetheless, research works on the Islamic legal system are producing a lot of prosperous interest-free transactions which are currently being applied in the Islamic banks.¹⁸

A contract is an agreement which is enforceable by law and only legal agreements are contracts whereas illegal agreements are not contracts.¹⁹ To draft a valid contract there must be some basic legally enforceable elements which are basically similar and applicable either in the

Islamic law of contract or the English law.²⁰ As mentioned above, these elements are: i) an offer (Ijab); ii) an acceptance (qabul); iii) a free consent; iv) a consideration; v) an intention to create a legally binding relationship; vi) the objective and consideration of the contract should be legal; vii) a certainty of legitimate performance, viii) a capacity (ahliyah); and ix) a formality.

Capacity (*ahliyyah*)

Under the *Shariah* (Islamic) contract law, capacity is known as *ahliyyah*.²¹ Capacity is the ability to make a contract under a fully sane physical condition with a healthy mental awareness. Not every person can make a legal contract, such as, a minor, an insane person and any person incapable of making a decision due to physical and mental defect, etc. Under the Malaysian Contract Act 1950 and Age of Majority Act (Malaysia), a person must be eighteen years of age before he can make a valid legal contract which is basically similar to the contract law of the UK.²²

Under the Islamic contract law, the age of majority is fifteen years. This is known as *bulug* (puberty)²³ of a man or woman. At this age he/she understands things better, however, taking into account of legal consequences of a contract, it is better to fix the majority age as eighteen years when making a valid contract without the need to have a written consent from the parents or guardians. For a marriage contract, the Islamic Family Law (Federal Territory) Act 1984 (IFLA 1984) (Malaysia) provides that a man must be of 18 years of age and the woman must be of 16 years of age before a marriage can be solemnized in Malaysia.²⁴ If a man and a woman want to solemnize a marriage but they are below the minimum age prescribed in the above mentioned Act, they must take a permission in writing from the Shariah Judge.²⁵ Thus, IFLA 1984 prohibits early marriage for boys and girls because an early marriage of boys and girls most of the times creates social problems, such as, they cannot maintain friendly conjugal life resulting in divorce later on.

¹⁶Islamic law in Arabic known as shariah. The basic principles or the guiding principles of Islamic law are derived from the religious book of Muslims known as the Quran and Hadis. The Quran was revealed to prophet Muhammad (the last prophet in this world) through the angel Jibril and Hadis is defined as 'the sayings, deeds, and tacit approval of acts of his companions.' In other words, hadis is the interpretation and practice of the Quran by prophet Muhammad. He practiced his whole life based on Quranic guidance and injunctions and asked his companions to follow him as he follows the Quran, to write down his deeds and sayings if necessary. The companions wrote down the important lectures and instructions given by prophet Muhammad and his deeds during his life time.

¹⁷See, Hashim, M.S. 1989. *An Introduction to the Legal System of Malaysia*. Malaysia: Fajar Bakti. In this book the author has discussed in detail how the English rulers applied English laws including English contract law principles in Malaysia. English laws including the principles of contract law was applied in Malaysia through First Chapter, Second Chapter and Third Chapter between 1786 to 1938. See, Alsagoff, S.A. 2003. *Principles of Law of Contract in Malaysia*.

¹⁸CERT. 2006. *A Mini Guide to Islamic Banking and Finance*. Kuala Lumpur: CERT Publications; Siddiqi, M.N. 1983. *Issues in Islamic Banking*. UK: Islamic Foundation; Nik Norzrul et al. 2003. *Law and Practices of Islamic Banking and Finance*. Malaysia: Sweet and Maxwell Asia.

¹⁹Vohrah, B. and Aun, W.M. 2010. *The Commercial Law of Malaysia*. Malaysia: Longman. pp. 6-7.

²⁰Razali, S.S. 2010. *Islamic Law of Contract*. United Kingdom: Cengage Learning. pp. 1, 27; See also Zuhayli, Wahbah. 1977. *Al-fiqh al-Islami wa adillatuhu*. Damascus: Darul Fikr. p. 2947; See also Coulson, Noel J. 2000. *Commercial Law in Gulf States*. p. 40.

²¹Abdullah, N. I. & Razali, S.S. 2008. *Commercial Law in Malaysia*. Kuala Lumpur: Pearson; Zuhayli, W. 2003. *Financial Transactions in Islamic Jurisprudence*. Lebanon: Dar al-Fikr al-Mouaser.

²²McKendrick, E. 2003. *Contract Law Text, Cases and Materials*. Oxford: University Press.

²³Under Islamic law *bulug* (puberty) starts when certain signs appear e.g. for a boy when he gets wet dream and for a girl when she gets menstruation or he/she attains the age of fifteen. So, under Islamic law the age of majority to make a contract is 15 years of age.

²⁴So, the Islamic Family Law Act (Federal Territory) 1984 provides two types of ages for the boy and the girl for marriage purpose. To conduct a valid marriage, the boy must be of 18 years of age and the girl must be of 16 years of age. The age for girls is fixed in the Act is 16 years because, usually girls become *bulug* (age of majority) earlier than boys or there is a possibility of girls to be victimized by boys who may convince them to have illegal sex with them.

²⁵Section 8 of the Islamic Family Law (Federal Territory) Act 1984.

The age of majority is the capacity for a person to make a valid enforceable contract. At this age a man or woman can understand the legal consequences of a contract and they have a good judgment on different matters.²⁶ If a person is below the age of majority, he/she cannot make a valid contract under the shariah law.²⁷

Comparison of Common Law and Islamic Law

There are similarities between the English legal system and the Islamic legal system in terms of different types of courts, functions of courts, law making procedure and court procedures which are being adopted in the Muslim countries at present. The fundamental difference between the English legal system and the Islamic legal system in framing the law is that in Muslim countries the Parliament can make laws for the benefit of the society but it must not be contradictory or inconsistent with the Islamic law principles, such as, Allah is the Creator of the universe and sustainer of all things contained therein. He is alone and there is no partner with Him and every man will be answerable to Him in the Hereafter for his deeds in this world. The fundamental sources of the Islamic legal system are the Quran, *Sunnah*, *Ijma* and *Qias* which are not available in the English legal system.

In fact the Islamic contract law is not totally different from the English contract law principles. In the English law, 'contract is an agreement enforceable by law'. In the Islamic law, contract is known as '*aqd*' which means tie or bond. It means a contract that binds the parties together. To make a contract in the Islamic law, there must be an agreement between two parties.²⁸ The agreement must be based on a free consent of the parties.²⁹ To make an agreement legally effective, there must be an offer and an acceptance between the parties. In other words, the offeree must accept the offer from the offerer absolutely and without any qualification.³⁰ To effect a valid contract the parties must have the intention to create a legally binding relationship.³¹ Islam emphasizes on fulfilling contractual obligations. Allah says in the Quran: 'O ye who believe, fulfill all of your obligations'.³²

²⁶O'Sullivan, J. and Hilliard, J. 2006. *The Law of Contract*, New York: Oxford University Press; Kool, Chin Nam. 1991. *A comparative study of Islamic law and civil law in Malaysia on contract, arbitration, banking principles and documentation*. Petaling Jaya, Kuala Lumpur: International Islamic University Malaysia.

²⁷Zuhaily, Wahbah. 1997. *Al-Fiqhul Islamiy Wa Adillatuhu*, p. 122; Sanhuri, Abdul Razak Ahmad. 1990. *Syarh Qanun Al-Madaniy*.

²⁸For a detailed discussion on the formation of a contract law in Islamic law see, Razali, S.S. 2010. *Islamic Law of Contract*. United Kingdom: Cengage Learning. pp. 1-25.

²⁹Hasbullah, Abdul Rahman. 2000. Offer and Acceptance in Islamic Law of Contract. *Journal Shariah*, 8 (2): 23.

³⁰Ashshafi, J.A.H.S. 2001. *Majlis Aqdi fil fiqhi Islami wal Qanun al-wadi*. Iskandariah. p. 91.

³¹O'Sullivan, J. and Hilliard, J. 2006. *The Law of Contract*. Oxford, New York: Oxford University Press. pp. 46-50.

³²Surah (Chapter) Al-Maidah: Verse 5.