The Legal Capacity of Women in Islamic Law

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During my research into the equal rights of women in Islamic Law I discovered that most writers have dealt with this issue paying little attention to some doctrines that clearly indicate such equality. Amongst these doctrines is the legal capacity doctrine. This article, therefore, is intended to discuss women's equal rights in the light of the general concept of legal capacity in Islamic Law. The discussion will first provide a general perspective of the legal capacity doctrine representing the general framework of legal capacity for both men and women, and will then turn to discuss special questions relating to women.

The Doctrine of Legal Capacity (Ahliyyah) in Islamic Law

Al-Zarqa defines legal capacity (ahliyyah)1 as "a description presumed in a person rendering such a person a possible candidate to receive a legislative injunction".2 Al-Sabouni sees al-ahliyyah as "the ability of a person to oblige, be obliged and conduct ones affairs by oneself".3 El Alami refers to it as "... the fitness of a person to enter into obligation, that is, to bind and be bound".4 From these definitions it seems that al-ahliyyah is a required set of qualifications in accordance with which the person becomes able to acquire rights, bear obligations and conduct actions and transactions that are able to produce their legal effects.5 This definition entails four conditions. The candidate of al-ahliyyah must be:

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1 The word "ahliyyah" in Arabic means "sufficient qualifications, the possession of which enables the possessor to enjoy something or be qualified for certain matters". The source origin of this word which is "ahl" means worthy of. See Lisan Al-'Arab Al-Muluatt, edited by Yusef Khailyyatt and Nadeam Mar'ashi, Beirut, vol. 1, p. 125.
(1) A person;
(2) Able to acquire rights;
(3) Able to bear obligations; and
(4) Able to conduct legally effective actions and transactions.

To begin with, a person, by definition, is an entity who is able to receive the divine and legal aspects of Shari'a. As far as human beings are concerned "Natural Personality" corresponds to the living status of a human being and it, therefore, starts at birth and ends at death. That is to say, the only attribute of the natural personality concept is the living status. Every living human being is therefore an *ipso facto* and *ab initio* natural person regardless of sex, colour, creed, age, or mental and physical ability or disability. As will be seen later, Islamic capacity is composed of two concepts, namely, *Ahliyyat al-wujup* and *Ahliyyat al-ada'.* Concerning the relationship between legal personality and the two aspects of *al-ahliyyah* it can be said that although these two concepts are equally important elements of legal personality, it is the first concept, *ahliyyat al-wujup*, that is the core issue of legal personality. Thus, legal personality can exist without *ahliyyat al-ada'*, but can under no circumstances exist without *ahliyyat al-wujup*. This convergence between the concepts of *ahliyyat al-wujup* and legal personality has caused some Islamic scholars to erase any difference between the two concepts and say that *ahliyyat al-wujup* is legal personality. Other scholars, including Al-Sabouni, reject this contention saying that *ahliyyat al-wujup* is a divisible concept, whereas legal personality is indivisible. This latter view seems to be more accurate because it is true that legal personality appears in a single form which is full personality, whereas *ahliyyat al-wujup*, as will be seen later, appears in two forms, namely, full and restricted.

*Al-ahliyyah* can appear in several forms depending on the age and mental ability of a person. Islamic scholars, therefore, define two major aspects of legal capacity and identify five different levels that can be a suitable ground to represent the various forms of the *al-ahliyyah* concept. The first aspect of *al-ahliyyah* which is termed by Islamic scholars as eligibility capacity, "*Ahliyyat al-wujup*", concerns the basic qualifications that are required to be present in an entity in order to be qualified as a natural or juristic personality. *Ahliyyat al-wujup*, by definition, is the ability of a person to acquire rights and bear obligations. As has been said above, *ahliyyat al-wujup* corresponds to the living status of a human being and co-exists

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8 Al-Zarqa', Ahmad M., op. cit., p. 734.