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11. Hajr, Legal Disability

Hajr literally means *man'* (to prohibit, refuse, prevent, deprive, detain), and this meaning is also evident from the Qur'anic verse:

وَيَقُولُونَ حِجْراً مَحْجُوراً

(***Upon the day that they see the angels, no good tidings that day for sinners: they--i.e. the angels--shall say*), *'A ban forbidden.'* (*25:22*)**

Legally it implies prohibiting the dispositions of a person with respect to all or some of his property. The causes of disability, which we will discuss here, are four: (1) insanity (*al-junun*); (2) minority (*al-sighar*); (3) idiocy (*al-safah*), (4) insolvency (*al-'iflas*).1

1. Insanity

In accordance with explicit traditions as well as consensus, an insane person is prohibited from all dispositions, irrespective of whether his insanity is permanent or recurring. But if a person suffering from recurring insanity manages his property during the period he is free from it, his dispositions are binding. Further, where it is uncertain whether a particular disposition belongs to the period of sanity, it will not become binding. Because sanity is a condition for the validity of an agreement and an uncertainty regarding it amounts to an uncertainty concerning the existence of the contract itself, not its validity, consequently its very basis is negated. In other words, where there is uncertainty about the validity of a contract due to uncertainty concerning the presence of sanity at the time of its conclusion, we will presume that the situation before the contract continues to exist and will leave it at that.

The rule applicable to an insane person is also applied to a person in a state of unconsciousness and intoxication.

If an insane person cohabits with a woman and she becomes pregnant, the child will be considered his,

exactly like in the case of 'intercourse by mistake.'

2. Minority

A minor is considered legally incapable by consensus, and there is a difference of opinion regarding some dispositions of a child of discerning age, as will be mentioned later. When a minor matures mentally and attains puberty he becomes an adult and all his dispositions become enforceable.

The Imami and the Shafi'i schools observe: When a child reaches the age of ten, his will shall be considered valid in regard to matters of charity and benevolence. More than one Imami legist, relying on some traditions, has said: His divorce is also valid.

The reader may refer to the chapter on marriage, the section entitled "Capacity to enter into a Marriage Contract," regarding the age of puberty and its signs.

Liability (al-Daman)

If an insane person or a child destroys another person's property without his permission, they are considered liable, because liability pertains to *al-'ahkam al-wad'iyyah* in which mental maturity and puberty are not considered as conditions.[2] Therefore, if they have any property that is being administered by their guardian, compensation will be claimed from this property; otherwise, the person entitled to the compensation will wait until the insane person regains sanity and the child attains puberty and then claim from them his dues.

A Discerning Child

A discerning child (*mumayyiz*) is one who can in general distinguish between that which is harmful and beneficial, and who understands the difference between contracts of sale and rent and between a profitable bargain and one entailing loss.

The Hanafis say: The dispositions of a discerning child without his guardian's permission are valid provided they involve sheer benefit, e.g. the acceptance of gifts, bequests and *waqf*s without giving anything in return. But the dispositions in which the possibility of profit and loss exists – such as transactions of sale, mortgage, rent and bailment – are not valid except by the permission of the guardian.

As to a non-discerning child, none of his dispositions are valid, irrespective of the permission of the guardian, and regardless of the thing involved being of petty or considerable worth.

The Hanbalis observe: A discerning child's dispositions are valid with the permission of the guardian; so are those of a non-discerning child, even without the guardian's permission, if the thing involved is of petty worth, e.g. where he buys from a confectioner what children usually purchase, or buys a bird from

someone in order to set it free. (*al-Tanqih* and *al-Tadhkirah*)

The Imami and the Shafi'i schools state: A transaction by a child whether discerning or not, is altogether illegal, irrespective of whether he acts as an agent or for himself, irrespective of whether he gives or takes delivery, even if the object transacted is trivial and insignificant, and whether it involves a vow (*nadhr*) or a confession (*iqrar*). Al-Shaykh al-Ansari observes in *al-Makasib*: "The basis for invalidating a child's transaction is a narrated consensus (*al-'ijma' al-mahki*) strengthened by an unusual preponderance (*al-shuhrat al-'azimah*). The criterion is to act in accordance with the preponderance."

The Imami legists have mentioned in this regard a number of subtle sub-issues which al-'Allamah al-Hilli has recorded in *al-Tadhkirah*. Among these are the following:

1. If one owes something to a person, and he tells one: "Give what you owe me to my son." when his son is legally incapable, and one does so on the basis of the father's behest, and by chance the child loses it, in such a situation one's liability concerning the debt does not cease and the creditor is still entitled to demand it from one, although it was he who asked one to deliver it to his son. Similarly, the child will not be responsible for the thing he has lost, and one is neither entitled to claim it from his guardian nor from him on his attaining majority.

As to one's remaining liable for the debt, this is because the debt is not cleared unless it is validly delivered, and it is presumed that neither the creditor nor his authorized representative has taken delivery. As to the delivery taken by the child, its occurrence and non-occurrence are equal, presuming his incapacity for taking and giving delivery. As to the father's permission to deliver to the child, it is exactly like someone telling one: "Throw what you owe me into the sea," and one does as he tells one. Here, one's liability for the debt is not cast off.

The reason for not considering the child liable for the thing delivered to him is that it is the deliverer who has destroyed it by improperly using his discretion and giving it to someone whose possession has no effect, even if it is by the permission and order of the child's guardian.

2. Where one has in one's possession something belonging to a child and his guardian tells one to give it to him, and one gives it to the child who destroys it, one will be liable for it because one is not entitled to act negligently regarding the property of someone legally incapable even if his guardian permits it.

3. If a child gives one a *dinar* to see whether it is genuine or counterfeit, or gives one an article for pricing it or selling it or for some other purpose, it is not valid for one, after it has come into one's hands, to return it to him; rather one must return it to his guardian.

4. If two children buy and sell between themselves and each takes delivery from the other and then both destroy what they have received, their guardians will be liable if they had permitted the transaction; if not, the liability will be borne from the property of each child.

This is what the Imami legists have observed, but what we consider appropriate is this: If we know doubtlessly that a particular disposition of a discerning child is cent per cent to his benefit, it is obligatory for his guardian to accept it and he cannot annul it, especially if his annulling it entails a loss for the child.

As to the general proofs which indicate that a child's disposition is void, they either do not include this situation or it is exempted from these general proofs. This is so because we are sure that the purpose of the Shari'ah is benefit, and when we are certain that it exists, we are bound to accept it exactly like our acceptance of a self-evident notion or a valid syllogism. And this is not *ijtihad* contradicting *nass* (an explicit Qur'anic verse or tradition); rather, it amounts to acting in accordance with *nass* for the knowledge of the aim of the Shari'ah is exactly like the knowledge of a *nass*, if not a *nass* itself.

If we were to accept the view of the Imami and the Shafi'i schools, a prize – for instance, a watch – given by the school to the best student would be something out of place, and if a child under the age of majority were to receive it he would not own it. This is something unnatural and goes against the practice of rational beings, creeds and religions.

A Child's Intentional Act is a Mistake

If a child kills a person or injures him or severs any part of his body, he will not be subject to retribution. He will be dealt exactly like an insane person, because he is not capable of being punished, neither in this world nor in the Hereafter. A tradition states:

عمد الصبي خطأ

A child's intentional act is a mistake.
There- no difference of opinion among the schools concerning this. As to the compensation given to the victim, it will be borne by the paternal relatives (*al-'aqilah*).

In some circumstances where beating a child is permissible, it is only for reforming him, not as retribution (*qisas*) or punishment (*ta'zir*).

3. Idiocy (al-Safah)

An 'idot' differs from a child due to majority and from an insane person on account of sanity. Thus idiocy as such is accompanied with the capacity to comprehend and distinguish. An 'idiot' is one who cannot manage and expend his property properly, irrespective of whether he has all the qualities necessary for its proper management but is negligent and does not apply them, or lacks these qualities. In short, he is negligent and extravagant, in that he repeatedly performs acts of negligence and extravagance. The acts of extravagance may be such as donation by him of all or a major part of his wealth, or building a mosque, school or hospital which a person of his social and monetary status would not build, so that it is

detrimental to his own interests and those of his dependants, and the people view him as having strayed from the practice of rational persons in the management of property.

Declaration of Legal Disability (al-Tahjir)

The schools – with the exception of Abu Hanifah – concur that the idiot's legal disability is confined to his financial dispositions, and excepting where his guardian permits him, his position in this regard is that of a child and an insane person. He is totally free regarding his other activities that are not closely or remotely connected with property. An idiot's disability continues until he attains mental maturity, in accordance with the following verse:

وَلاَ تُؤْتُوا السُّفَهَاءَ أَمْوَالَكُمْ الَّتِي جَعَلَ اللَّهُ لَكُمْ قِيَاماً وَارْزُقُوهُمْ فِيهَا وَاكْسُوهُمْ وَقُولُوا لَهُمْ قَوْلاً مَعْرُوفًا وَابْتَلُوا الْيَتَامَى حَتَّى إِذَا بَلَغُوا النِّكَاحَ فَإِنْ آنَسْتُمْ مِنْهُمْ رُشْداً فَادْفَعُوا إِلَيْهِمْ أَمْوَالَهُمْ

And do not give to fools your property which Allah has assigned to you to manage; provide for them and clothe them out of it, and speak to them words of honest advice. And test the orphans until they reach the age of marrying; then if you find in them mental maturity, deliver to them their property; (***4:5-6***)[3]

This is the view of the Imami, Shafi'i, Maliki and the Hanbali schools, as well as that of Abu Yusuf and Muhammad, the two disciples of Abu Hanifah.

Abu Hanifah observes: Mental maturity is neither a condition for delivering property to its owners nor for the validity of their monetary dispositions. Thus if a person attains puberty in a state of mental maturity and then becomes an idiot, his dispositions are valid and it is not valid to consider him legally incapable even if his age is less than 25 years. Similarly, one who attains puberty in a state of idiocy so that his childhood and idiocy are concomitant, he will not be considered legally incapable in any manner after attaining maturity at 25 years (*Fath al-Qadir* and Ibn 'Abidin).

This contradicts the explicit *ijma'* of the entire ummah, or rather it contradicts the obvious teaching of the faith as well as the unambiguous text of the Qur'an:

وَلاَ تُؤْتُوا السُّفَهَاءَ أَمْوَالَكُمْ

The Judge's Order

Imami legal authorities state: The criterion for considering the dispositions of an idiot as void is appearance of idiocy, not the order of a judge declaring him legally incapable. Thus every disposition of his during the state of idiocy is void, irrespective of whether a judge declares him incapable or not, and regardless of whether his idiocy continues from childhood or occurs after puberty. Hence, if an idiot

acquires mental maturity, his disability will be removed, returning only on the return of idiocy and disappearing with its disappearance (al-Sayyid al-Isfahani, *Wasilat al-najat*). This opinion is very close to the one expressed by the Shafi'i school.

The Hanafi and the Hanbali schools observe: An idiot will not be considered legally incapable without the judge's declaration. Therefore, the dispositions prior to the declaration of his legal disability are valid even if they were improper: after the declaration his dispositions are not enforceable even if appropriate.

This opinion cannot be substantiated unless we accept that the declaration of the judge alters the actual fact. This view is confined to the Hanafis only. As to the Shafi'i, Maliki and the Hanbali schools, they concur with the Imamiyyah in holding that the judge's order has no bearing, close or remote, on the actual fact, because it is only a means and not an end in itself. We have dealt with this issue in detail in our book *Usul al-ithbat*.

The Malikis say: When a person, man or woman, comes to be characterized with idiocy he becomes liable to be declared legally incapable. But if idiocy occurs after a short period, say a year after his attaining puberty, the right to declare his legal incapacity lies with his father, because the time of its occurrence is close to the period of his attaining puberty. But if it occurs after a period exceeding a year after puberty, his disability can be only declared by a judge (*al-Fiqh 'ala al-madhahib al-'arba'ah*, vol. 2, 'bab al-hajr').

The Malikis also observe: A woman, even if she becomes mentally mature, is not entitled to dispose her property unless she has married and the marriage has been consummated. After the consummation of marriage, her right to donate is limited to one-third of the property, and for the remainder she requires the permission of the husband until her old age (al-Zarqani).

But all the other schools do not differentiate between the sexes, in accordance with the general import of the Qur'anic verse (4:6):

وَلاَ تُؤْتُوا السُّفَهَاءَ أَمْوَالَكُمْ

The Idiot's Confession, Oath and Vow

If an idiot is permitted to dispose his property and he does so, the schools concur that it is valid. As to non-financial acts, such as his acknowledgement of lineage (*nasab*) or his taking an oath or a vow to perform, or abstain from, a certain act that does not involve property, these acts are valid even if the guardian has not permitted them.

If he confesses to having committed theft, it will be accepted only for the purpose of amputation and not for financial liability, i.e. his confession will have effect vis-a-vis the right of God (*haqq Allah*) and not vis-a-vis the rights of other human beings (*haqq al-nas*),

The Hanafis state: His confession will be given credence in regard to those of his assets which have been realized after his disability and not from what he owned at its advent. Also, his will is valid to an extent of one-third in matters of charity and benevolence.

The Imamiyyah state: There is no difference between the former and the latter properties. Rather, they say, it is not valid for an idiot to hire himself for any work even if advantageous without his guardian's permission. They also observe: If a person deposits something with an idiot with the knowledge of his idiocy and the idiot personally destroys it, either voluntarily or by mistake, he will be liable. But if the deposited thing is not destroyed personally by the idiot but as a consequence of his negligence in preserving it, he will not be liable, because in this situation the depositor himself has been negligent and at fault. As to the liability of the idiot where he personally destroys the deposit, it has its basis in the dictum:

مَن أتلف مال غيره فهو له ضامن

'He who destroys another's property is liable for it.' (*Wasilat al-najat*)

The Idiot's Marriage and Divorce

The Shafi'i, Hanbali and Imami schools say: The idiot's marriage is not valid, and his divorce (*talaq* or *khul'*) is valid. But the Hanbalis allow his marriage where it is a necessity.

The Hanafis observe: His marriage, divorce, and freeing a slave are valid, because these three are valid even when performed in jest, and with greater reason in a state of idiocy. But if he marries for more than *mahr al-mithl*, the *mahr* will be valid only to the extent of *mahr al-mithl*.

The Proof of Mental Maturity

The schools concur that mental maturity (*rushd*) is ascertainable through testing, in accordance with the words of God Almighty:

وَابْتَلُوا ...فَإِنْ آنَسْتُمْ مِنْهُمْ رُشْدًا

But the modes of testing are not specific, though the legists mention as examples such methods as handing over to a child the management of his property, or relying upon him to buy or sell for fulfilling some of his needs, and the like.

If he shows good sense in these activities, he will be considered mentally mature. As to a girl, she will be given domestic responsibilities to ascertain her mental maturity or the lack of it.

As per consensus, mental maturity in both the sexes is proved by the testimony of two male witnesses because the testimony of two male witnesses is a principle. The Imamiyyah say: It is also proved in the case of women by the testimony of a man and two women, or that of four women. But in the case of men, it is only proved by the testimony of men (*al-Tadhkirah*).

The Guardian

A Minor's Guardian

We have discussed the legal disability of the minor, the insane person and the idiot. It is obvious that every legally incapable person needs a guardian or an executor to attend to the things concerning which his disability has been declared, and to manage them as his representative. Now, who is this guardian or executor? It is worth pointing out at the outset that the discussion in this chapter is limited to guardianship over property. As to guardianship concerning marriage, it has already been discussed in the related chapter.

The schools concur that the guardian of a minor is his father; the mother has no right in this regard except in the opinion of some Shafi'i legists. The schools differ concerning the guardianship of others apart from the father. The Hanbali and the Maliki schools state: The right to guardianship after the father is enjoyed by the executor of his will, and if there is no executor, by the judge (*hakim al-shar'*). The paternal grandfather has no right to guardianship whatsoever, because, according to them, he does not take the father's place in anything. When this is the state of the paternal grandfather, such is the case of the maternal grandfather with greater reason.

The Hanafis say: After the father the guardianship will belong to his executor, then to the paternal grandfather, and then to his executor. If none are present it will belong to the judge.

The Shafi'is observe: It will lie with the paternal grandfather after the father, and after him with the father's executor, followed by the executor of the paternal grandfather, and then the judge.

The Imamiyyah state: The guardianship belongs to the father and the paternal grandfather simultaneously in a manner that each is entitled to act independently of the other, though the act of whoever precedes acquires legality, in view of that which is necessary. If both act simultaneously in a contrary fashion, the act of the paternal grandfather will prevail. If both are absent, the executor of any of them will be the guardian. The grandfather's executor's acts will prevail over those of the father's executor. When there is no father or paternal grandfather nor their executors, the guardianship will be exercised by the judge.

The Guardian of an Insane Person

An insane person is exactly like a minor in this regard, and the views of the schools are similar for both

the cases, irrespective of whether the child has attained puberty while continuing to be insane or has attained puberty in a state of mental maturity to become insane later. Only a group of Imami legists differ here by differentiating between insanity continuing from minority and that which occurs after puberty and mental maturity. They say: The father and the paternal grandfather have a right to guardianship over the former. As to the latter, the *hakim al-shar'* will act as his guardian despite the presence of both of them. This view is in consonance with *qiyas* (analogical reasoning) practised by the Hanafis, because the guardianship of both the father and the paternal grandfather had ended (on the child's attaining puberty and mental maturity), and that which ends does not return. But the Hanafis have acted here against *qiyas* and have opted for *istihsan*.

The Imami author of *al-Jawahir* says: It is in accordance with caution (*ihtiyat*) that the paternal grandfather, the father and the judge act in consonance, i.e. the property of an insane person between whose insanity and childhood there is a time gap, will be managed by mutual consultation among the three. Al-Sayyid al-Isfahani remarks in *al-Wasilah*: Caution will not be forsaken if they act by mutual consent.

In my opinion there is no doubt that caution is a good thing, but here it is only desirable and not obligatory, because the proofs establishing the guardianship of the father and the paternal grandfather do not differ in the two situations. Accordingly, the father and the paternal grandfather will always be preferred to the judge, because the applicability or inapplicability of a particular rule revolves around its subject, and the generality of the proofs proving the guardianship of the father and the paternal grandfather enjoy precedence over the generality of the proofs proving the judge's guardianship.

Apart from this, the sympathy of the judge or someone else cannot equal that of the father and the grandfather, and what rational person would approve the appointment by the judge of a stranger as a guardian over a legally incapable person whose father or paternal grandfather are present and fulfil all the necessary conditions and qualifications?

The Guardian of an Idiot

The Imami, Hanbali and Hanafi schools concur that if a child attains puberty in a state of mental maturity and then becomes an idiot, his guardianship will lie with the judge to the exclusion of the father and paternal grandfather, and, with greater reason, to the exclusion of the executors of their wills.

That which was observed concerning an insane person holds true here as well, that no rational person would approve that a judge appoint a stranger as guardian in the presence of the father and the paternal grandfather. Hence, as a measure of caution, it is better that the judge choose the father or the paternal grandfather as the guardian of their child. However, if the idiocy has continued from childhood and the subject has attained puberty in that state, the opinion of the three above-mentioned schools is similar to their opinion concerning a minor (*al-Mughni*, *al-Fiqh 'ala al-madhahib al-'arba'ah*, Abu Zuhrah and *al-Jawahir*). 4

The Shafi'is neither differentiate between the guardianship of a minor, an insane person and an idiot, nor between idiocy occurring after puberty and one continuing from childhood.

The Qualifications of a Guardian

The schools concur that a guardian and an executor require to be mentally mature adults sharing a common religion. Many jurists have also considered *'adalah* (justice) as a requirement even if the guardian is the father or the grandfather.

There is no doubt that this condition (*'adalah*) seals the door of guardianship firmly with reinforced concrete and not merely with stones and mud. Apart from this, *'adalah* is a means for safeguarding and promoting welfare, not an end in itself. The inclusion of *'adalah* as a condition, if it proves anything, proves that *'adalah* was not something rare in the society in which those who consider it necessary lived.

There is consensus among the schools that those dispositions of a guardian which are for the good and advantage of the ward are valid, and those which are detrimental are invalid. The schools differ concerning those dispositions which are neither advantageous nor detrimental. A group of Imami legists observe: They are only valid if the guardian is the father or the paternal grandfather, because the condition for their dispositions is the absence of harm, not the presence of an advantage. But where a judge or an executor is involved, their dispositions are valid only when advantageous. Rather, some of them observe: The dispositions of a father are valid even if they are disadvantageous and entail a loss for the child. 5

Other non-Imami schools state: There is no difference between the father, the paternal grandfather, the judge and the executor in that the dispositions of all of them are invalid unless they are advantageous and entail benefit. This is also the opinion of a large number of Imami legists.

On this basis, it is valid for the guardian to trade with the wealth of his ward – be he a child, an insane person or an idiot – or to give it to another to trade with it, to buy with it real estate for his ward, and to sell and lend from what belongs to him, provided all this is done for benefit and with good intention, and the surety of benefit in lending is limited to where there is a fear of the property being destroyed.

It is beneficial here to mention some sub-issues mentioned by the great Imami legist al-'Allamah al-Hilli in *al-Tadhkirah*, 'bab al-hajr'.

1. Pardon and Compromise (al-'Afw and al-$ulh)

Some Imami scholars have said: A child's guardian can neither demand *qisas* (retaliation), a right to which his ward is entitled, because the child may opt for pardon, nor can he pardon, because the child may opt for the execution of the sentence for his own satisfaction. Al-'Allamah al-Hilli has then opined that a guardian can demand the execution of the sentence, or pardon, or conclude a compromise regarding a part of the child's property, provided it is advantageous.

2. Divorce and Pre-emption (al-Talaq and al-Shuf'ah)

A guardian is not entitled to divorce the wife of his ward, irrespective of whether it is with or without any monetary compensation.

If there is along with the child a co-sharer in a property and the co-sharer sells his share to a stranger, the guardian of the child is entitled to opt for pre-emption or to forgo it, depending on the child's interest. This is the more *sahih* of the two opinions subscribed to by the Shafi'is.

3. Deduction of Claims (Ikhraj al-Huquq)

It is obligatory upon the guardian to deduct from the property of his ward those claims whose payment is compulsory, e.g. debts, criminal damages, zakat, even if they have not been claimed from him. As to the maintenance of those relatives whose maintenance is *wajib* upon the child, the guardian will not pay it to the person entitled unless it is demanded.

4. Spending Upon the Ward

It is obligatory upon the guardian to spend towards his ward's welfare and it is not permissible for him to act either niggardly or extravagantly. He is expected to act moderately, keeping in mind the standard of those similar to the ward.

The guardian and the executor are trustees and are not liable unless breach of trust or negligence is proved. Hence, when a child attains puberty and claims breach of trust or negligence on behalf of the guardian, the burden of proof lies on him, and the guardian is only liable to take an oath, because he is a trustee and the dictum, 'The trustee is liable to nothing except an oath' (**وما على الأمين إلاّ اليمين.**) will apply.

A Guardian's Sale to Himself

The Shafi'is as well as some Imami legists observe: It is not valid for a guardian or an executor to sell himself any property belonging to his ward or to sell his own property to the ward. Al-'Allamah al-Hilli himself has considered it permissible, making no distinction between the guardian and a stranger, provided such a deal is advantageous (for the ward) and no blame is involved. Similarly it is also permissible for a guardian appointed by the judge to sell to the judge an orphan's property whose sale is valid. This also applies to an executor, even if he has been appointed by the judge to act as a guardian. As to the judge selling his property to the orphan, Abu Hanifah has prohibited it on the basis that it amounts to the judge's pronouncing a decision concerning himself, and such a judgment is void. Al-'Allamah al-Hilli says: "There is nothing objectionable in it," i.e. the opinion of Abu Hanifah.

As may be noted, there is more to it than mere objectionability, because this act is neither the same as pronouncing judgment nor related to it, closely or remotely. Therefore, if it is valid for a judge to buy from the property of an orphan provided it is advantageous, it is also valid for him to sell to the orphan if

advantageous, and the distinction is arbitrary.

The Guardian's or Executor's Agent

The guardian and the executor are entitled to appoint others as their agents for those activities which they are not capable of performing personally, as well as for those activities which they are capable of performing personally but do not consider it appropriate on the basis of custom to perform them personally. But where they consider it appropriate, the opinion prohibiting it is preferable.

It is evident here that acting personally or through an agent is a means for securing the ward's advantage and for fulfilling what is *wajib*. So wherever this end is achieved, the act is valid, irrespective of whether it is performed by the guardian or his agent: otherwise, the act is not valid even if performed by the guardian himself.

4. The Insolvent Person (al-Muflis)

'Muflis', literally, means someone who has neither money nor a job to meet his needs. In legal terminology it means someone who has been declared legally incapable by the judge because his liabilities exceed his assets.

The schools concur that an insolvent person may not be prohibited from disposing his wealth, regardless of the extent of his liabilities, unless he has been declared legally incapable by the judge. Hence, if he has disposed of all his wealth before being declared incapable, his dispositions will be considered valid and his creditor, or anyone else, is not empowered to stop him from doing so, provided these dispositions are not with an intent to elude the creditors, especially where there is no reasonable hope of his wealth returning.

A judge will not declare a person insolvent unless the following conditions exist:

1. Where he is indebted and the debt is proven in accordance with the Shari'ah.

2. Where his assets are less than his liabilities. There is consensus among the schools regarding these two conditions.

The schools also concur on the validity of the declaration of disability where the assets are less than the liabilities. They differ where the liabilities are equal to the assets. The Imami, the Hanbali and the Shafi'i schools state: He will not be declared legally incapable (*al-Jawahir*, *al-Tanqih* and *al-Fiqh 'ala al-madhahib al-'arba'ah*). The two disciples of Abu Hanifah, Muhammad and Abu Yusuf, observe: He will be declared legally incapable. The Hanbalis have followed these two in their fatwa. But Abu Hanifah has basically rejected the idea of considering an insolvent person as legally incapable even if his liabilities exceed his assets because legal disability entails the waste of his capabilities and human qualities. However, Abu Hanlfah says: If his creditors demand payment, he will be imprisoned until he sells his

property and clears his debts.

This form of imprisonment is reasonable – as we will point out later – where the debtor has some known property. But Abu Hanifah has permitted his detention even if no property is known to exist in his name. The following text has been narrated from him in *Fath al-Qadir* (vol.7, p.229, 'bab al-hajr bi sabab al-dayn'): If no property is known to be owned by the insolvent person, and his creditors demand his detention while he says: "I have nothing." the judge will detain him for debts accruing from contractual obligations, e.g. *mahr* and *kifalah*.

This is contrary to the explicit Qur'anic verse:

وَإِنْ كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَى مَيْسَرَةٍ

...if the debtor is in straitened circumstances, then let there be postponement until they are eased. (***2:280***)

Moreover, there is consensus on the issue among all the legal schools of the Ummah: the Shafi'i, the Imami, the Hanbali, the Maliki, as well as Muhammad and Abu Yusuf (*Fath al-Qadir*, Ibn 'Abidin, *al-Fiqh 'ala al-madhahib al-'arba'ah*, and al-Sanhuri in *Masadir al-haqq*, vol. 5)

3. The debt should be payable presently, not in the future, in accordance with the opinion of the Imami, Shafi'i, Maliki and Hanbali schools. But if part of it is to be paid presently and part of it in the future, it will be seen whether the assets suffice for clearing the present debts; if they do, he will not be declared legally incapable; if not, he will be declared so. If he is declared legally incapable for debts presently payable, the debts payable in the future will remain till the time of their payment arrives (*al-Tadhkirah* and *al-Fiqh 'ala al-madhahib al-'arba'ah*).

4. That the creditors, all or some of them, demand the declaration of his legal disability.

When all these conditions are present, the judge will declare him legally incapable and stop him from disposing his property by selling, renting, mortgaging, lending, and so on, being detrimental to the interests of the creditors.

The judge will sell the assets of the insolvent person and distribute the proceeds among his creditors. If they suffice for repaying all the debts, they will be so applied. In the event of their falling short, a proportionate distribution will be affected.

On the completion of the distribution, the disability will automatically end, because its purpose was to safeguard the interests of the creditors and this has been achieved.

Exceptions:
Al-'Allamah al-Hilli observes in *al-Tadhkirah*, 'bab al-taflis': From among the assets of the insolvent

person, the house where he resides, his slave, and the horse which he rides will not be sold. This is the view held by the Imamiyyah, Abu Hanifah and Ibn Hanbal. Al-Shafi'i and Malik state: All of these will be sold.

A day's provision will also be left for him and his family on the day of distribution, and if he dies before the distribution, the cost of his shroud and burial will be met from his own assets, because funeral expenses have precedence over debts.

In fact all that which is immediately necessary will be left for him, e.g. clothes, a day's provision or more, in accordance with the circumstances, books that are essential for someone like him, the tools of his trade by which he earns his living, the necessary household goods such as mattresses, blankets, pillows, cooking pots, plates, pitchers, and all other things which one requires for his immediate needs.

A Particular Thing and Its Owner

If an owner (from among the creditors) finds a particular thing which the insolvent person had purchased from him on credit, that thing will belong to him in preference to all other creditors even if there exists nothing else besides it. This is the opinion of the Imami, Maliki, Shafi'i and the Hanbali schools.

The Hanafis observe: He is not entitled to it but will have a joint interest in it with the other creditors (*al-Tadhkirah* and *Fath al-Qadir*).

Wealth Accruing after Insolvency

If after legal disability any wealth accrues to an insolvent person, will his disability extend to it exactly like the wealth existing at the time of the disability, or not? Will the insolvent person be completely free in his dispositions concerning it?

The Hanbalis say: There is no difference between the wealth acquired after insolvency and the wealth present at the time of it.

The Shafi'is hold two opinions, and so do the Imamiyyah. Al-'Allamah al-Hilli states: That which is more likely is that the disability extends to it as well, because the purpose of the disability is to give those entitled their claims, and this right is not limited to the wealth existing at the time of the declaration.

The Hanafis observe: The disability does not extend to it and his dispositions as well as acknowledgement (of debt) are valid in regard to it (*Fath al-Qadir*, *al-Tadhkirah*, and *al-Fiqh 'ala al-madhahib al-'arba'ah*).

If a crime has been committed against an insolvent person, if it is unintentional and requires the payment of damages, the insolvent person cannot pardon the crime because the right of the creditors extends to it, and if it is intentional and entails *qisas*, the insolvent person is entitled either to take *qisas* or to opt for damages, and the creditors are not entitled to force him to take damages and forsake *qisas* (*al-Jawahir*).

The Acknowledgement of an Insolvent Person

If after being declared legally incapable an insolvent person acknowledges being indebted to some person, will his word be accepted and that person included among the creditors at the time of distribution of the property?

The Shafi'i, the Hanafi and the Hanbali schools observe: His acceptance will not be valid in respect to his property present at the time of declaration of his insolvency.

The Imami legists differ among themselves, with the author of *al-Jawahir* and a large number of other authorities subscribing to the view of the Hanbali, Shafi'i and Hanafi schools.

Marriage

The Hanafis say: If an insolvent person marries after his being declared legally incapable, his marriage is valid and his wife is entitled to be included among the creditors to the extent of *mahr al-mithl*, and that which exceeds it remains a claim against him.

The Shafi'i and the Imami schools observe: The marriage is valid but the entire *mahr* will be considered a claim against him and the wife will not be entitled to anything along with the creditors.

Imprisonment

The Imamiyyah say: It is not valid to detain a person in financial straits despite the disclosure of his insolvency because the Qur'anic verse says:

وَإِنْ كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَى مَيْسَرَةٍ

And if the debtor is in straitened circumstances, then let there be postponement until they have eased (***2:280***).

If he is found to possess any known asset, the judge will order him to surrender it, and if he refuses to comply, the judge is entitled either to sell it and clear the debts – because the judge is the guardian (*wali*) of the uncompliant – or to imprison the debtor until he clears his debts himself, in accordance with the tradition:

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It is legitimate to punish and humiliate (as when the creditor calls his debtor 'injust', 'a delayer', etc.) a debtor who possesses (financial capability).

Abu Hanifah observes: The judge is not entitled to sell his property against his will, but he can imprison him.

Al-Shafi'i and Ibn Hanbal state: The judge is empowered to sell and clear the debts (*al-Tadhkirah* and *al-Jawahir*).

Prohibition on Travelling

There is no doubt that if it is permissible to punish a debtor by imprisonment it is also valid to prohibit him from travelling provided the necessary conditions exist. These conditions are: the debt be proven as per the Shari'ah; the debtor be capable of repaying it, and he procrastinate and keep on postponing payment. Apart from this, the interests of the creditors should be feared to be in jeopardy if he travels, such as where the journey is long and dangerous. Hence if the debt is not proved, or is proved but the debtor's circumstances are straitened and he is unable to repay, or he has an agent or surety, or there is no fear of the creditors' interests being hurt if he travels, in all these circumstances it is in no way permissible to prohibit him from travelling.

From here it becomes clear that the measures taken by the courts in Lebanon for stopping a defendant from travelling simply on the initiation of proceedings against him have no basis in the Islamic Shari'ah but in positive law.

1. Last illness (marad al-mawt) is also one of the causes, considering that it leads the person in last illness to being prohibited from dispositions exceeding one-third of his property. We have already discussed this in the chapter on wills under the title, 'Dispensations of a critically ill person.' Please refer.
2. Every moral duty that is a duty vis-à-vis God Almighty is conditional on mental maturity ('aql) and puberty (bulugh), whereas every economic duty vis-à-vis people is not conditional to mental maturity and puberty.
3. At first the Qur'anic verse mentions the property of the legally incapable while relating it to the second person (kaf al-mukhatab in اموالكم) and the second time to the third person (ha' al-gha'ib in اموالهم), alluding thereby that everything owned by an individual has two aspects: firstly, his personal authority over it, and secondly, that he apply it in a manner profitable to himself and the society, or, at the worst, in a manner unharmful to the two.
4. The author of al-Jawahir observes in the 'bab al-hajr': "There is ijma' among the Imamiyyah that if idiocy occurs after the attainment of puberty, the guardianship will be exercised by the judge, and if it continues from childhood, the ijma' has been narrated that it belongs to the father and the paternal grandfather. But the truth is that there is a difference of opinion in the latter case, and a group of scholars has explicitly mentioned that the guardianship belongs to the two.
5. Al-Na'ini, in al-Khwansari's Taqrirat (1357 H., vol.1, p.324) states: "The truth is that the guardianship of the father is a proven fact, even if it entails disadvantage or loss for the child." But the complier of this work narrates from his teacher, al-Na'ini, that he retracted from this opinion after having been emphatic about it earlier.

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