

**Financial Rights of the Children  
in the “Convention on the Rights of the Child 1989”  
and Islamic Law  
(A Comparative Analytical Study)**

(A dissertation in partial fulfillment of the requirements for the degree of  
LLM - Islamic Commercial Law)



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**IN THE NAME  
OF  
ALLAH**

**THE COMPASSIONATE**

**THE MOST MERCIFUL**

## Acceptance

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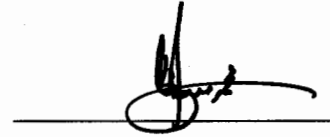
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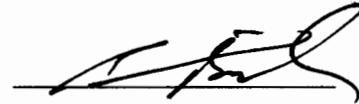
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## **DEDICATION**

### **This thesis is dedicated to:**

#### **My Parents**

Who brought me up with precious guidance and instructions all the time. What I am is nothing but a result of their prayers.

#### **My Wife**

For making the life peaceful; for her support and co-operation

#### **My Children**

For making the life meaningful and a pleasure

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## **ABSTRACT**

Children are weak unit of the society. They face violations to their rights every moment. Therefore, need is to know and highlight the rights they are entitled to and how those can be protected. On the one hand, Islamic law is as a unique system regulates all the matters. On the other hand, United Nation's Convention on the Rights of the Child 1989 (CRC) is an important document concerning child rights which has been ratified by almost all of the countries of the world except some. This study is a comparison between the Islamic law and CRC regarding financial rights of the children and their protection. Moreover, finds out the measures taken by both for the purpose.

Children are protected by the Islam and CRC both. Both of them try to solve the financial problems of the children and control their violations by their own different manners. Islamic law, however, has the precedence over CRC by almost fourteen centuries in introducing such rights whereas the World thought first about children rights in 1923. The study shows also that Islamic law treats the roots by its both general and special provisions and is more comprehensive than CRC.

### INTRODUCTION

In the modern time, the area of human rights has become more complex than ever before. Children being human beings, their rights belong to the same area. A child does not know its entitlements being minor and immature and is easy to exploit being vulnerable. Their rights can be infringed very easily. It is the reason that children rights have the priority in the field of human rights. Then, children are in fact future of the nations whether bad or good; it depends on how the children are brought up.

Across the world, almost 130 million children are deprived of their right to get education; they are even unable to read and write.<sup>1</sup> Over 200 million children in the world involved in labor practices harming them; some of such practices are even illegal.<sup>2</sup> The children come across these among other severe situations mostly on account of their and their families' poverty or due to states' failure. Reports further identify that 30,000 children die a day due to reason of poverty.<sup>3</sup> Moreover, this poverty impairs child's intelligence quotient and productivity. So, need is to address financial rights and issues of the children.

The armed conflicts, wars and invasions by the west led the children live poor and socially and financially insecure lives. This situation reasoned the world to raise voices in shape of many conventions and declarations to save this segment of the society. Efforts also made by Muslims in shape of conventions based on teaching of Islam.

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<sup>1</sup> [www.crin.org/themes/ViewTheme.asp?id=7](http://www.crin.org/themes/ViewTheme.asp?id=7). Last visited on 23/04/2009.

<sup>2</sup> [www.oil.org/global/Themes/Child\\_Labour/lang--en/index.htm](http://www.oil.org/global/Themes/Child_Labour/lang--en/index.htm). Last visited on 02/07/2009.

<sup>3</sup> [www.crin.org/themes/ViewTheme.asp?id=4](http://www.crin.org/themes/ViewTheme.asp?id=4). Last visited on 23/04/2009.



In first chapter of this research, I have discussed basic issues regarding financial rights of the children because, unfortunately, some of the people think that children have no rights. Major of these issues is the issue of legal capacity of the children.

The second chapter is devoted for the United Nation's Convention on the Rights of the Child 1989 - hereinafter referred to as CRC - and the rules it specifies with relation to financial rights of the children. It is very important and widely ratified international document concerning the children rights and their protection. It is the reason that I have selected it for this research.

The third chapter discusses the Islamic law regarding children financial rights. Islamic law works basically to preserve the religion, life, progeny, intellect and property; called as purposes of Shari'ah. These purposes are a beautiful combination makes the Islamic law organizing and regulating all aspects of human life in a fruitful manner. Here need is to know how financial rights of the children are provided and protected by the Islamic law.

The fourth chapter is a comparison between the CRC and Islamic law regarding those financial rights. It discusses the differences between both regulating systems, analyzing and mentioning the conclusions and recommendations at the end.

### **Importance of the research**

This research and this comparison are essential because in spite of wide ratification of the CRC, its interpretation and implementation all over the world is a complicated and complex area. It is because CRC contains some provisions not universally acceptable or the manner in which they are provided is not universally acceptable. As an example, Islamic teachings

are playing effective role in directing behavior of the people. Even the countries that claim separation of religion and state to each other can not impose on their subjects what is against subjects' believe, religion and culture.<sup>4</sup> Moreover, even the people belonging to other thoughts present themselves to be desirous to learn what Islam says in matters concerning them. Because, generally speaking, after centuries of efforts, causing global changing, separating the religion and worldly affairs and trying to limit the religion to certain practices, the world failed to get the required satisfaction. People are now looking towards the teachings of Islam with a hope for comprehensive satisfaction. So, a great participation is required from Muslim scholars.

### **Statement of the Problem**

What are the financial rights of the children provided by the CRC and Islamic law? To what extent they succeeded or may succeed in preserving those rights.

### **Literature Review**

No doubt that a huge work has been done on human rights by both western and Islamic thinkers. Some of such literature concerns general human rights such as: *Huqūq Al-Insān fī Al- Islām* by Dr. Amīr Abd Al-‘azīz and *The International Law of Human Rights* by Paul Sieghart.

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<sup>4</sup> [www.fmreview.org/FMRpdfs/Human-Rights/3.pdf](http://www.fmreview.org/FMRpdfs/Human-Rights/3.pdf). Last visited on 10/11/2009.

Same is the case with regard to children rights. Literature is available discussing the social rights in general stream. These are like *Huqōq-e-Aulād (Aulād kē Huqōq aur Tarbiyat ka Sunnat Ṭarēqah)* by ‘ālam Faqrē and *Huqūq Al-Awlād fī Al-Sharī‘ah wa Al-Qānūn* by Badrān Abul ‘aynayn.

In short, the literature available is either regarding general and social rights of the children or related to only one of the western or Islamic approach regarding children rights. Specifically, the financial view of children rights is not separately emphasized. Further to that, a comparative writing also lacks. This deficiency is tried to be covered by this research. This research will identify the financial rights of the children provided by the CRC and Islamic law; compare and analyze them; point out the deficiencies, if any, in respect of financial rights of the children and hopefully will provide solutions for violation of those rights.

### **Methodology**

This is a descriptive analytical research, based on library material. While writing the Islamic law, proper texts of the Holy Qur’ān and Traditions of the Holy Prophet (PBUH) are quoted with references along with their translation in English. Translation used for the verses of Holy Qur’ān is by Abdullah Yusuf Ali. As far as traditions of the Holy Prophet (peace be upon him) are concerned, they are translated by myself after consulting different translations and dictionaries.

Focus is made on the primary sources but secondary sources are also consulted in case of need and for illustration purposes. Concentration is made intact to only the financial view of children rights.

It has been tried to provide evidences and proofs for each topic under discussion, and when suitable, examples of the efforts from the past as well as from the present time have also been provided to serve need of the topic. As far as comparison is concerned, each point is separately compared under the both CRC and Islamic law so as to get proper analysis and results.

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## Chapter No. 1

### Concept of Rights of the Child

#### 1. Meaning of *Child*

##### 1.1 Literal Meaning of "Child"

Child literally means a young human being, a son or daughter; offspring; an innocent and immature person<sup>1</sup>. Child is a young human being, who is not yet an adult. An adult who behaves like a child is also referred to as child<sup>2</sup>.

The word "child" corresponds to the word "*tifl*" in Arabic. Arabic dictionaries define *tifl* as baby<sup>3</sup>. *Tifl* refers to small and called to small of every thing<sup>4</sup>.

Based on the above definitions, childhood refers to the period of somebody's life when they are a child. This is subject to difference of opinion regarding starting and ending limits of childhood which is discussed in coming lines.

##### 1.2 Terminological Meaning of "Child" in International Law

Terminological Meaning of child relates to the period of childhood. Prior to the Convention on the Rights of the Child 1989, though some international documents regarding child rights were in hand, there was no specific definition of child. Thus, it was not an easy job for the Convention to define it because national laws of the countries differ while deciding starting and ending limits of the childhood. Regarding start of childhood, law of several countries

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<sup>1</sup> *Webster's Universal Dictionary & Thesaurus*, s.v. "child".

<sup>2</sup> *Oxford Advanced Learner's Dictionary*, s.v. "child". [hereinafter referred to as *Oxford*].

<sup>3</sup> *Mukhtār Al-Şiḥāḥ*, s.v. "طفل".

<sup>4</sup> *Lisān Al-'arab*, s.v. "طفل".

start it from the moment of conception while others start it from the moment of birth. On the other hand regarding end of childhood, some countries consider puberty and occurrence of some sexual signs as end of the childhood while others fix different specific ages for the purpose. It was due to this gap among the countries that the Convention defined the child as:

“Every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”<sup>5</sup>

### 1.3 Terminological Meaning of "Child" in Islamic Law

According to the Islamic law Child is a baby from the moment of birth till the attaining of puberty<sup>6</sup>. The whole of this period is referred to as childhood. The matter is also recognized by the Arabic dictionaries<sup>7</sup>. There exists no difference regarding deciding about childhood in Islamic Law<sup>8</sup>.

A child attains puberty on appearance of certain signs like ejaculation in male, menstruation and pregnancy in female. The Prophet (PBUH) says:

“رفع القلم عن ثلاثة، عن النائم حتى يستيقظ وعن الصبي حتى يحتلم وعن المجنون حتى يعقل”<sup>9</sup>

(No responsibility, charge devolves upon three persons, the one who is sleeping till he wakes up, the child till he wets dream, and the mad (insane) till he becomes of sound mind).

<sup>5</sup> Convention on the Rights of the Child 1989, Art. 1.

<sup>6</sup> Ibn ‘ābidīn, *Radd Al-Muḥtār ‘alā Al-Durr Al-Mukhtār*, vol. 2 (Bayrūt: Dār Iḥyā’i Al-Turāth Al-‘arabī, 1987), 74.

<sup>7</sup> *Al-Mu’jam Al-Wasīl*, s.v. "طفل".

<sup>8</sup> People misunderstood the matter and believe that a child at pre-birth stage has no rights. In fact, Islamic law provides the child at pre-birth stage rights under the title *Ḥuqūq Al-Janīn*, because the embryo is called *janīn* in Arabic. The issue is discussed in detail at (4.3), first chapter.

<sup>9</sup> Al-Bayhaqī, *Al-Sunan Al-Kubrā*, vol. 3 (Al-Riyād: Maktabah Al-Rushd, 2004), 122, Ḥadīth No. 5191. [hereinafter referred to as *Al-Bayhaqī*].

Also about menstruation, a Ḥadīth says:

" لا يَقْبَلُ اللَّهُ صَلَاةَ حَائِضٍ إِلَّا بِخِمَارٍ " <sup>10</sup>

(Allāh does not accept the prayer of a menstruating woman unless she wears a veil)

This Ḥadīth is a proof that menstruating woman has reached the puberty. As far as pregnancy is concerned, it is a proof of precedence of puberty because it is impossible to take place without prior puberty.

In case of absence of these signs of puberty, according to majority of the Muslim jurists both male and female get puberty at the age of fifteen years<sup>11</sup> whereas in the opinion of Imām Abū Ḥanīfah male at the age of eighteen years and female at the age of seventeen years are supposed to have got puberty<sup>12</sup>.

In all the cases, the research in hand does not deal with this difference. The reason is that, subject of this research is to find out financial rights of the children whatever the period of childhood is.

<sup>10</sup> Abū Dāwūd, *Sunan*, vol. 1 (Syria: M. Ali Al-syed, 1969), 421, Ḥadīth No. 641. [hereinafter referred to as *Sunan Abī Dāwūd*].

<sup>11</sup> Al-Khurshī, *Al-Khurshī 'lā Mukhtaṣar Sayyidi Khalīl*, vol. 5 (Bayrūt: Dār Al-Fikr), 290 [hereinafter referred to as *Al-Khurshī*]; Al-Bahūtī, *Kashshāf Al-Qinā' 'an Matn Al-Iqnā'*, vol. 3 (Bayrūt: 'ālam Al-Kutub, 1997), 147 [hereinafter referred to as *Kashshāf Al-Qinā'*]; Al-Qazwīnī, *Al-Muḥarrar* (Bayrūt: dār Al-Kutub Al-'ilmiyyah, 2005), 181. [hereinafter referred to as *Al-Muḥarrar*].

<sup>12</sup> Al-Mirghinānī, Burhānuddīn, *Al-Hidāyah*, vol. 3 (Egypt: Dār Al-Salām, 2000), 1351. [hereinafter referred to as *Al-Hidāyah*].

## 2. Introduction to *Financial Rights*

### 2.1 Concept of Right

Right of a person is defined as his entitlement<sup>13</sup>. The word “right” corresponds the word *ḥaq* in Arabic. It can be understood as something necessary and established for a person<sup>14</sup>. The rights may be divided into three kinds; natural, moral and legal. Natural right is an interest recognized by the rules of natural justice i.e. by what is proper, truthful and fair. Moral right is the interest recognized by the ethical code of a community. Legal right on the other hand is the interest recognized by the law and is created under a law or under a contract<sup>15</sup>. View of Oxford Advanced Learner’s Dictionary also – to big extent – similar to what is mentioned in previous lines. It defines “right” as moral or legal claim to have or get something or to behave in a particular way<sup>16</sup>. Jan Garrett, while discussing kinds of rights says that legal right get the force through a proper legislation but human or moral rights get their validity through sources other than the legal rights. He adds more that the contractual rights have their concern only with the contracting parties which mean that base for contractual rights is in fact, the promise among them<sup>17</sup>.

### 2.2 Islamic View of Rights

Islamic view regarding rights can be achieved in such a way that Allāh has created all the creatures for the human beings as the verse of the holy Qur’ān says:

<sup>13</sup> *Oxford Eng-Arab Dictionary of Current Usage*, s.v. “right”.

<sup>14</sup> *Al-Munjid Arab-Urdu*, s.v. “الحق”.

<sup>15</sup> Avtar Singh, *Introduction to Jurisprudence* (Nagpūr-India: Wadhwa & Company, 2006), 223.

<sup>16</sup> *Oxford*, s.v. “right”.

<sup>17</sup> Jan Garrett, *The Concept of Rights*, see [www.people.wku.edu/jan.garrett/ethics/rights.htm](http://www.people.wku.edu/jan.garrett/ethics/rights.htm). Last visited on 28/01/2010.



هُوَ الَّذِي خَلَقَ لَكُمْ مَا فِي الْأَرْضِ جَمِيعًا...<sup>18</sup>

(It is He who hath created for you all things that are on earth...)

The status allows the humans to get benefit of them; it is their right, but in return they should take reasonable care of them and work for their betterment and development. This corresponding responsibility is in fact a duty. So, where there is right, there is a corresponding duty. It reflects extensive scope of rights in Islamic law. The reason is that right is something related to every thing in the universe including human beings, plants, animals and even non-living things. Some reported *ahādith* in this regard are stated below:

" ما من مسلم يغرس غرسا أو يزرع زرعاً فيأكل منه طير أو إنسان أو بهيمة إلا كان له به صدقة " <sup>19</sup>

(There is none among the Muslims who plants a tree or sows a seed, and then a bird, or a person or an animal eats from it, but is regarded as a charitable gift for him).

"بينما رجل يمشي فاشتد عليه العطش فنزل بئرا فشرب منها ثم خرج فإذا هو بكلب يلهث يأكل الثرى من العطش فقال لقد بلغ هذا مثل الذي بلغ بي فنزل بئرا فملا خفه ثم أمسكه بفيه ثم رقي فسقى الكلب فشكر الله له فغفر له. قالوا يا رسول الله وإن لنا في البهائم أجرا؟ قال ( في كل كبد رطبة أجر ) " <sup>20</sup>

(While a man was walking he felt thirsty and went down a well and drank water from it. On coming out of it, he saw a dog out of breathe and eating mud because of excessive thirst. The man said, 'This (dog) is suffering from the same problem as that of mine. So he (went down the well), filled

<sup>18</sup> Holy Qur'an 2 / 29.

<sup>19</sup> Al-Bukhārī, Muhammad Bin Ismā'il, *Al-Ṣaḥīḥ* (Al- Riyāḍ: Maktabah Al-Rushd, 2004), 306, Ḥadīth No. 2320. [hereinafter referred to as Al-Bukhārī].

<sup>20</sup> Ibid. 312, Ḥadīth No. 2363.

his shoe (with water), held it with his mouth and climbed up and watered the dog. Allah thanked him (for his good deed) and forgave him." The people asked, "O Allah's Apostle! Is there a reward for us in (serving the) animals?" He replied, "Yes, there is a reward for serving any animate").

" عذبت امرأة في هرة سجنتها حتى ماتت فدخلت فيها النار لا هي أطعمتها ولا سقتها إذ حبستها ولا هي تركتها تأكل من خشاش الأرض " 21

(A lady was punished because of a cat which she had confined till it died. She entered the (Hell) Fire because of it, for she neither gave it food nor water as she had confined it, nor set it free to eat from the vermin of the earth).

One thing more, distinguishes Islamic law from other systems that it does not content with providing rights to all rather provides also a specific order of their superiority and seniority for the purpose of performing those rights in case of any clash among them. For example, if a person is under obligation – as per rules of Islamic law - to maintain his brother and a relative, but the person is in such a state that he can maintain only one of them. In this case he should prefer his brother on the other relative. One of the verses of Holy Qur'an that reveals this order is as under:

يَسْأَلُونَكَ مَاذَا يُنْفِقُونَ ۗ قُلْ مَا أَنْفَقْتُمْ مِنْ خَيْرٍ فَلِلْوَالِدَيْنِ وَالْأَقْرَبِينَ وَالْيَتَامَىٰ  
وَالسَّائِلِينَ وَابْنِ السَّبِيلِ ۗ وَمَا تَفْعَلُوا مِنْ خَيْرٍ فَإِنَّ اللَّهَ بِهِ عَلِيمٌ ﴿٢٢﴾

(They ask Thee what They should spend (in charity). say: whatever ye spend that is good, is for parents and kindred and orphans and those In Want and for wayfarers. and whatever ye do that is good, -(Allah) knoweth it well).

<sup>21</sup> Ibid. 477, Hadith No. 3482.

<sup>22</sup> Holy Qur'an 2 / 215.

This rule however, does not apply where a matter of justice; truth and false is involved, because in such a situation a Muslim is supposed to side with what is truth regardless of the personalities and relationships<sup>23</sup>. The fountain of right is Allāh; the *shāri'* (lawgiver). Every right is given by Allāh Almighty<sup>24</sup>. A right which is not recognized as such by Allāh Almighty can not be claimed as right.

### 2.3 Concept of Financial Rights

Financial Rights particularly means the rights connected with and related to money, or where money has the primary concern, either directly like maintenance, or indirectly like guardianship of child's property and education. They are monetary rights. The term "financial" is not something unknown. It is repeatedly used in CRC in articles: 21(d), 23(2), 27(2) & (4), 28(1) clause (b). Technically thinking, the term "financial" is wider and more suitable here in this research to use than the term "economical", because economical rights are the rights arising out of proceeds of trade or commercial activity only. It is because economic implies the idea of certain gain or profit through production, distribution and consumption of goods and services.<sup>25</sup> The term "financial rights" on the other hand, is comparatively a general term. It comprises of rights connected with the money whether there is commercial activity or not.

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<sup>23</sup> Syed Sulayman Nadvi, *Sīrat Al-Nabī (SAW)*, vol. 6 (Lahore: Nāshirān-e- Qur'ān Ltd. 1975), 203-211.

<sup>24</sup> *Al-Mawsū'ah Al-Fiqhiyyah*, s.v. "حق", vol. 18 (Kuwait: Ministry of Awqāf and Islamic Affairs, 1990), 11-12.

<sup>25</sup> [www.unhchr.ch/html/menu2/6/crc/doc/days/exploit.pdf](http://www.unhchr.ch/html/menu2/6/crc/doc/days/exploit.pdf). Last visited on 02/07/2009.

The research in hand is a humble attempt to find out legal financial rights of the children; that are directly or indirectly financial. It means that natural and social kind of rights of the children e.g. nutrition...etc. are excluded from the scope of this research.

A thing I feel necessary to clarify here with the help of an example is that nutrition itself may be a social or natural right of a child, but financing this right and provision of nutrition is a financial right of his / her.

### **2.4 Children Vs Rights**

Considering the above headed issue people divided themselves into two groups. One thinks that children obviously have rights like those of adults. The other group has the view that children have no rights. The former thought is referred to as “liberationism” while the latter is referred to as “arbitrariness”. The arbitrary approach based on the reason that children are disqualified because children have no capacity to have rights. Liberationists reply to the issue in a way that providing rights to children could play an important role for children qualifying capacity<sup>26</sup>.

On the other hand when observing Islamic law, it treats children as human being rather young ones. There is no difference of opinion among the Muslim jurists regarding the issue. The children definitely have rights as human beings. In fact, recognizing their powerlessness, Islamic law provides them rights even at pre-birth stage. It is referred to as *ahliyyat al-wujūb* in Islamic law.<sup>27</sup>

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<sup>26</sup> [www.Plato.stanford.edu/entries/rights-children/](http://www.Plato.stanford.edu/entries/rights-children/). Last visited on 28/01/2010.

<sup>27</sup> The issue is discussed in detail while discussing legal capacity in Islamic law in this chapter below.

### 3. Legal Capacity in Different Laws

The law in most of the cases defines child as a minor. It considers only two stages of the capacity i.e. minority and majority. While determining the age of majority, the law does not consider the puberty<sup>28</sup> rather it considers the adulthood. However, laws of different countries fix different ages of attaining adulthood or majority for various matters according to their requirements and environments.

On observing Pakistani law, we analyze that there is no single age of capacity for all the matters; different ages have been fixed for several matters. The Majority Act 1875 presumes the majority at the age of eighteen, provided that if a guardian has been appointed for person or property of a minor his majority shall be presumed at the age of twenty one years<sup>29</sup>, but this Act does not effect the capacity of a minor (under eighteen years of age) in the matters namely marriage, dower, divorce and adoption<sup>30</sup>.

Age of capacity to marry is fixed by The Child Marriage Restraint Act 1929 for male child at eighteen and for female child at sixteen<sup>31</sup>. The Act provides punishment for the one who makes marriage with a girl below sixteen but does not render it invalid. Moreover, it provides no punishment for female<sup>32</sup>.

Juvenile Justice System Ordinance 2000 also defines child as a person who at the time of commission of an offence has not attained the age of eighteen years<sup>33</sup>. Child below seven

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<sup>28</sup> Islamic law primarily relates legal capacity with the puberty.

<sup>29</sup> The Majority Act 1875, Act No. IX of 1875, Section 3.

<sup>30</sup> Ibid, Section 2 (a).

<sup>31</sup> The Child Marriage Restraint Act 1929, Act No. XIX of 1929, Section 2 (a).

<sup>32</sup> PLD 1975 Lah. 234.

<sup>33</sup> Juvenile Justice System Ordinance 2000, Ordinance No. XXII of 2000, Section 2 (b).

absolutely and a child below twelve if immature to understand his acts are not liable for their criminal acts<sup>34</sup>.

A minor child i.e. according to The Majority Act, is incompetent to make any transaction. His transactions and contracts are void and not merely voidable<sup>35</sup>.

Looking at laws of different countries, we see "Age of Legal Capacity (Scotland) Act 1991" fixes the age of majority at sixteen and makes the person below sixteen incompetent to enter into any transaction<sup>36</sup>. However, he may enter into transactions that are commonly entered into by persons of his age and circumstances<sup>37</sup>. The Act validates marriage of a person under the age of sixteen and also makes him criminally liable<sup>38</sup>. In spite of fixing the age of legal capacity, the law does not prevent him from holding any right, title or interest at the time of minority<sup>39</sup>.

Canadian law on the other hand validates the contracts and transactions of a minor to the extent of purchasing of necessaries and beneficial contracts of service<sup>40</sup>.

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<sup>34</sup> Pakistan Penal Code 1860, Code NO. XLV of 1860, Sections 82-83.

<sup>35</sup> The Contract Act 1872, Act No. IX of 1872, Section 11. Islamic law does not render it void at once. Rather it considers the transaction itself, whether is beneficial to the child or is harmful. For detail see third stage of capacity at (4.3), first chapter.

<sup>36</sup> Age of Legal Capacity (Scotland) Act 1991. Section 1(a).

See [www.opsi.gov.uk/acts/acts1991/ukpga\\_19910050\\_en\\_1](http://www.opsi.gov.uk/acts/acts1991/ukpga_19910050_en_1). Last visited on 14/01/2009.

<sup>37</sup> Ibid. Section 2 (1) clause (a). Islamic law also, validates the transactions of *ṣabi mumayyiz* with conditions. For detail, see the third stage at (4.3) of this chapter.

<sup>38</sup> Ibid. Section 1 (3) clauses (c) & (g). Islamic law does not make a child criminally liable in any case. It makes a person criminally liable only on his attaining the puberty, for detail see the third and fourth stage at (4.3), first chapter.

<sup>39</sup> Ibid. Section 1 (e). This is the concept of capacity for acquisition (of rights) referred to in Islamic law as *Ahliyyat Al-Wujūb*. For detail see (4.1), first chapter.

<sup>40</sup> [www.en.wikipedia.org/wiki/capacity\\_\(law\)](http://www.en.wikipedia.org/wiki/capacity_(law)). Last visited on 18/02/2009. This is the concept of profitable transactions of *ṣabi mumayyiz* referred to in third stage of capacity. See (4.3), first chapter.

It is clear that different countries provide different ages of capacities for several matters. All the laws are not unanimous on the matter.

## 4. Legal Capacity in Islamic Law

Legal capacity referred to in Islamic law as "*Ahliyyah*". *Ahliyyah* literally means absolute ability. In a technical sense it is defined as ability of a person to acquire rights and exercise them and to accept duties and perform them<sup>41</sup>. This definition indicates to two kinds of *ahliyyah*<sup>42</sup> namely:

1. *Ahliyyat Al-Wujūb*.
2. *Ahliyyat Al-Adā'i*.

### 4.1 *Ahliyyat Al-Wujūb*

It may be termed as capacity for acquisition of rights. It enables a person to acquire both rights and obligations. This capacity is based on *insaniyyah* or existence of a person. Thus, it starts from start of one's life (from the moment of conception) and continues till one's death.

#### 4.1.1 Classification of *Ahliyyat Al-Wujūb*:

- i. *Ahliyyat Al-Wujūb Al-Nāqishah* (incomplete capacity for acquisition): This capacity is attached to the unborn child - the period in which child is embryo in womb of his or her mother. It is incomplete because an unborn child at this stage acquires some rights but undertakes no obligation or corresponding duty.

<sup>41</sup> Nyazee, Imran Ahsan Khan, *Theories of Islamic Law* (Islamabad: Islamic Research Institute, 1994), 75. [hereinafter referred to as *Theories of Islamic Law*].

<sup>42</sup> Abū Zahrah, Muhammad, *Usūl Al-Fiqh* (Cairo: Dār Al-Fikr Al-'arabī, 1958), 329.

- ii. *Ahliyyat Al-Wujūb Al-Kāmilah* (complete capacity for acquisition): This capacity is attached to life of a person. Thus, starts from one's birth alive and continues till one's death. A person in his/her life period is entitled to and undertakes full range of rights and obligation respectively.

### 4.2 *Ahliyyat Al-Adā'i*

It may be termed as capacity for execution. It is ability of a person to issue words, deeds and acts that may create rights for him or make him duty bound to others and which enables him to exercise such rights and perform such duties. In other words, it is capacity of a person to be responsible for his own statements and actions. This capacity is based on the establishment and development of 'aql (intellect) and *tamyīz* (discriminating power) of a person.

Thus, this capacity starts when the child starts discriminating; which is presumed at the age of seven by Islamic law<sup>43</sup>, as the Prophet (PBUH) also has ordered in a Ḥadīth to command the children to pray when they are at seven<sup>44</sup>. Moreover, it remains intact as long as discriminating power is sound. It means that an insane person lacks this capacity for execution in period of his insanity.

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<sup>43</sup> Fixation of seven years of age for discriminating power is not something unreasonable, because in fact, a child starts understanding the matters at this age. In Roman times, children were considered having no criminal liability. In the nineteenth century children younger than seven years old were believed incapable of crime. But, starting from the age of seven they were considered responsible for their actions. See [www.wikipedia.org/wiki/child](http://www.wikipedia.org/wiki/child). Last visited on 15/01/2009.

<sup>44</sup> *Sunan Abi Dāwūd*, vol. 1, 334, Ḥadīth No. 495.



### 4.2.1 Kinds of *Ahliyyat Al-Adā'i*:

- 1) *Khiṭāb Al-Ibādāt* (communication regarding worship). It is capacity to issue words or perform acts which are considered *ibādāt*. Validity of worship and entitlement to its reward in hereafter is therefore, based on understanding *khiṭāb al-ibādāt*.
- 2) *Khiṭāb Al-Jinā'ī* (communication regarding crimes). It is capacity to be held criminally liable. A person having this capacity is therefore punished, if performs any act of crime. Thus, entitling a person to punishment is based on understanding *khiṭāb al-jinā'ī*, nature of crimes and their legal effects provided by Allāh Almighty.
- 3) *Khiṭāb Al-Mu'āmalāt* (communication regarding transactions). It is capacity to make contracts and transactions. A person having this capacity can independently issue words or make valid transactions and contracts. Thus, creating rights for or duties upon him. Validity of transactions is based therefore, on understanding *khiṭāb al-mu'āmalāt* and nature of transactions.<sup>45</sup>

### 4.2.2 Classification of *Ahliyyat Al-Adā'i*:

- i. *Ahliyyat Al-Adā'i Al- Nāqīṣah* (incomplete capacity for execution). This capacity starts from seven years of age when the child starts discriminating and continues till he attains puberty. It is incomplete because such child though has

<sup>45</sup> Mansoori, Muhammad Tahir, *Islamic Law of Contracts and Business Transactions* (Islamabad: Sharī'ah Academy, IIUI, 2004), 47.

capacity to do certain acts and transactions; it does not make him/her fully independent for all kinds of transactions.

- ii. *Ahliyyat Al-Adā'i Al-Kāmilah* (complete capacity for execution). This capacity starts when the person attains puberty. Although a pubescent person has complete capacity, he gets it in its perfect form on attaining *rushd* (maturity). On attaining *rushd*, the person is fully independent; he may make any kind of transaction, take full range of rights and undertake full range of obligations by his own acts.

The Cairo Declaration on Human Rights in Islam of 1990<sup>46</sup> in its article 8 also, reaffirms legal capacity of human beings in shape of both obligations and commitments.

### **4.3 Development of Legal Capacity in Islamic Law:**

#### **First Stage: Janīn (Unborn Child)**

This stage starts from the moment of conception and continues till birth of the child. An unborn child has deficient capacity for acquisition. The reason is that unborn child has independent personality on the one hand, so he/she is entitled to rights such as inheritance, will and *waqf* (entailment), subject to birth alive. On the other hand, it is part of its mother, so undertakes no duty<sup>47</sup>.

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<sup>46</sup> For detail of the Declaration see third chapter.

<sup>47</sup> Zuhaylī, Wahbah, *Al-Fiqh Al-Islamī Wa Adillatuhu*, vol. 4 (Syria: Dār Al-Fikr, 1997), 2962. [hereinafter referred to as *Al-Fiqh Al-Islamī Wa Adillatuhu*].

Example of rights: A man dies leaving behind legal heirs; one of them is an unborn child of his. The unborn child is entitled to inherit his deceased father; he has share in the estate of his deceased father, subject to his birth alive.

Example of obligations: As per rules of Islamic law, an unborn is under no obligation to maintain its needy relatives. The reason can be that an embryo does not own while it is embryo; it owns its share on birth alive.

This unborn child has no intellect which is base for capacity for execution; therefore, he has no such capacity. He neither can do any act nor can enter into any contract.

### **Second Stage: *Sabī Ghayr Mumayyiz* (Child Without Discriminating Power)**

This stage starts from birth of a child and continues till the age of seven years. Since capacity for acquisition is attached to the life, therefore, a person gets complete capacity for acquisition from the moment of his/her birth alive. This position continues till one is dead. So, question of capacity for acquisition is settled for all subsequent stages. Such person acquires the rights and undertakes the duties completely. For example; a child of 5 years inherited an estate and is a wealthy person. He is under obligation to pay the concerned government taxes. Moreover, he is under obligation for payment if something is purchased on his behalf.

Even at this stage, the child has no capacity for execution because his mental position is not developed enough to understand the transactions. He is not subject to *khiṭāb al-ibādāt*. Thus, is not bound to do worship. Also, he is not subject to *khiṭāb al-jināʿ*. Thus, is not punished

for his criminal acts. Moreover, he is not subject to *khiṭāb al-muʿāmalāt*. Thus, he can not make any transaction or contract. All the contracts made by him will be considered void<sup>48</sup>.

### **Third Stage: Sabī Mumayyaz (Child With Discriminating Power)**

This stage starts from seven years of age and continues till a child attains the puberty. The question of capacity for rights and obligations was settled in the discussion of second stage *supra*, so no need for its repetition.

As far as capacity for execution is concerned, the child gets deficient capacity. The reason is that, although the child starts discriminating and understands the transactions; his mental ability is not developed enough to understand the transactions and their meanings completely, so he can not make all kinds of transactions independently. He is not subject to *khiṭāb al-ibādāt* but is rewarded in hereafter if he does worship. Also, he is not subject to *khiṭāb al-jināʿī*. As far *khiṭāb al-muʿāmalāt* is concerned, his acts and transactions in relation to their validity may be divided into three kinds:

1. Profitable transaction. These are valid and do not need permission of any person. It is a transaction where a child gets something without corresponding duty or liability and loses nothing. For example: acceptance of a gift.
2. Harmful transactions. These are void even though the guardian of the child has permitted the transaction. It is a transaction where a child loses something without corresponding consideration or benefit. For example: a contract to donate.

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<sup>48</sup> Ibid. 2968.