

Child Testimony in Islamic and Western Legislations: A Comparative Study with reference to International Human Rights Law

**Thesis for PhD
Shari‘ah (Islamic Law & Jurisprudence)**

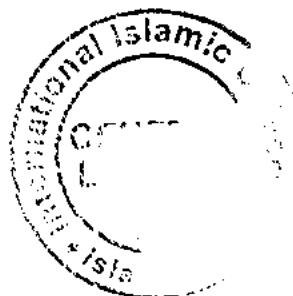


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**Child Testimony in Islamic and Western Legislations: A Comparative
Study with reference to International Human Rights Law**

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**A thesis submitted to the Faculty of Shari'ah and Law, International Islamic University
as partial fulfillment of the requirements for the degree of Ph.D. Shari'ah.**

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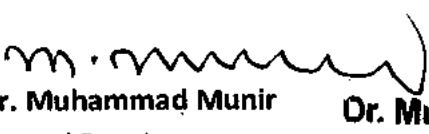
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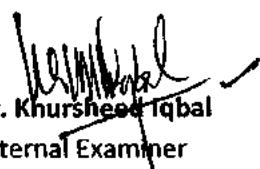
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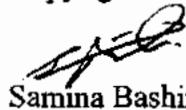
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Declaration

This research is submitted as partial fulfillment for the degree of Ph.D Sharī'a (Islamic Law and Jurisprudence). It is entirely my own research and it or any part of it has not been copied. The sources or references cited therein have been properly acknowledged according to the contemporary rules and practices of research.

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Abstract

In the contemporary world like all weak and vulnerable groups children are facing different problems. Their involvement in the judicial process can be a traumatic experience. The children's statements might be taken in different matters before the court. They have been, historically, considered as 'bad witnesses'. Moreover inadmissibility of their testimony can lead to injustice especially in the cases where child is a victim.

The study was set out to explore the legal capacity of child and rules of admissibility of a child witness in Shari'a and western legislations. The admissibility of child testimony was studied in the light of classical Muslim jurists. It was discussed as a means to vindication of rights and provision of justice while applying theory of 'objectives of Shari'a' and the concept of 'maslaha' (public interest).

The competency of child in common law tradition was studied. In the light of precedents the 'rule of prudence' regarding child witness, preliminary test of witness and corroboration of evidence, was elicited from common law. Competency of child witness and admissibility of the evidence of a child was studied in the law of evidence in Pakistan.

International human rights standards were studied and model best practices based on these standards were looked at for providing guidance to improve the state law and court practices in this regard.

Once it was proved that a child is a competent witness, when judged in accordance with the pre-requisites and conditions provided in Shari'a and Common Law, the recommendations to improve national judicial practices were given. The recommendations suggested a consolidated approach based on Islamic Law, International Human Rights Law and national law of Evidence to elicit the truth from a child witness while applying the model best practices to improve the judicial procedures.

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Perfection is attributed to Allah only. I have tried my best in available circumstances and hope that the research may open new avenues of knowledge and do a little good to the judicial process while dealing with child witnesses.

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Zia ur Rehman v. The State PLD 1973 SC 49.

Acronyms

CRC Convention on the Rights of the Child.

ICC International Criminal Court.

ICCPR International Covenant on Civil and Political Rights.

ICESCR International Covenant on Economic, Social and Cultural Rights.

ICTR International Criminal Tribunal for Rwanda.

ICTY International Tribunal for former Yugoslavia.

NICHHD National Institute of Child Health and Human Development.

RS Rome Statute.

SCSL Special Court for Sierra Leone.

UNICEF United Nations Children's Fund.

UNODC United Nations Office on Drugs and Crime.

Chapter 1

Introduction to Research

Chapter 1. Introduction to the Research

1.1. Introduction and Importance of Testimony in Shari‘a and Common Law

The importance and significance of judicial evidence cannot be over emphasized as it is a means to provide justice and vindication of rights. Every legal system of the world has given importance to the evidence and witnesses. Generally the word ‘*bayanah*’ is used for every sign indicating and disclosing truth in the Qur’ān;

“ ...then although there came to them our apostles with clear signs, yet, even then after that many of them continued to commit excesses in the land.”¹

The verse condemns the ‘Children of Israel’ for being transgressors even after the messengers of Allah came to them with ‘clear proofs’ (*bayanāt*).

‘*Bayanah*’ is ‘clear proof’ and it is legal to prove the right. One of the ways to *Bayanāt* is *Shahadah* which is afforded great significance among the rules of *Shari‘a*. Bearing and giving *Shahadah* is obligatory by way of *kifayah* but when none is forthcoming then it becomes obligatory by way of ‘*ain* to one who is present and can testify² therefore it is prohibited for him to refuse to testify; “The witnesses should not refuse when they are called on (to testify).”³

The word ‘evidence’, considered in relation to law, “includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the

¹ Al-Qur’ān 5:32. (The translation of Al- Qur’ān has been generally taken from ‘The meaning of the Holy Quran’ by ‘Abdullah Yusuf ‘Ali)

² Abū Muḥammad ‘Abdullah, Ibn Qūdamah, ‘al-Muqni‘e’ 3rd ed., (State of Qatar: 1393 H), 3:276.

³ Al-Qur’ān 2:282.

truth of which is submitted to judicial investigation".⁴ It refers to something presented at a judicial or administrative proceeding either to establish the truth or falsify an allegation. In a real sense, according to Phipson, it is all that is placed before the court so that it may decide the issues of fact.⁵ In other words, in law, the evidence is used for "the material items or assertions of facts that may be submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of fact under investigation before it."⁶

Except for the contents of a document in most cases the evidence is offered by a witness in the form of testimony which is oral evidence before the court. The principle of Common Law regarding oral evidence is that it must be 'direct' and not 'hearsay evidence' as the best available evidence is to be produced. For testifying in the court a witness must be competent. The competency of witness means that there is nothing at law to prevent a witness from being sworn and examined if s/he wishes to testify.⁷

In Islamic Law evidence is afforded great significance. The corresponding word for evidence in Arabic is 'Shahadah' which means 'definitive information', it denotes 'oath', 'embracing death' in the path of Allah⁸ and is also used to testify faith (*Imān*).⁹ Al-Qur'ān has mentioned word 'Shahadah' in various contexts. Sometimes it

⁴ Ratanlal & Dhirajlal, *The Law of Evidence*, 22nd ed. (Nagpur : Wadhwa,2007), 29.

-John Burke, 'Evidence', Osborn's Concise Law Dictionary, 6th ed., (London: Sweet & Maxwell,1976).

⁵ John Huxley Buzzard, Richard May, M.N. Howard (eds.) *Phipson On Evidence*, 13th ed. (London: Sweet & Maxwell,1982),2.

⁶ The New Encyclopaedia Britannica Vol.4 15th edition, s.v. "evidence" 1986 p.622.

⁷ H.S. Ursekar, *Law of Evidence* (Short Edition of Chief Justice Monir's Law of Evidence) 5th ed., (Allahabad: Kitab Mahal Pvt. Ltd.1994), 13 & 541.

⁸ *Al-Munjid fi 'l-lughah wal'ilām*, 33rd ed. (Beirut : Dār al-Mashriq, 1994).

⁹ 'Imān' is when a Muslim testifies or bears witness that there is no Lord except Allah and that the Prophet Muhammad is His messenger. There are specific Arabic words for this purpose.

has been used for Muslims to be witnesses at the Day of Judgment¹⁰, it means ‘to be present’¹¹ and is also used to denote ‘knowledge’¹². ‘*Shahadah*’ is a statement based on knowledge acquired by observation either by sight or insight.¹³ The Prophet (Peace be upon him) has said; “The one who is present must convey to the one who is absent.”¹⁴ Thus urging the Muslims to report or narrate what they have listened from the Prophet to their brethren (in Islam). The evidence or *Shahadah*’ has been defined in *Shari’ā* as ‘a true report to prove a right by using word *Shahadah*’ in the judicial council (or judicial proceeding).¹⁵

It has been prohibited in the Qur’ān for a Muslim to abstain from testifying when he is called to do so,¹⁶ as it is the means of vindication of rights. It is more a religious duty than merely a legal business in the Islamic tradition therefore false testimony is considered among great sins according to a tradition of the Prophet (peace be upon him).¹⁷ A witness who comes forward to testify without even being asked for it encouraged and praised as reported by *Zaid b. Khalid* in *Muslim*, The Prophet (peace be upon him) said, “Shall I not inform you who is the best witness? He is the one who produces his testimony before he is asked.”¹⁸ One step forward, the witnesses are honored as they assist the process of justice. The Prophet (peace be upon him) said;

¹⁰ Al-Qur’ān 2: 143.

¹¹ Al-Qur’ān 23:92, 28:22, 2:24.

¹² Al-Qur’ān 3:70.

¹³ Raghib Ispahānī, *Mufridāt fi Ghareeb al-Qur’ān*, (Lahore: Academia’ Ahl al-Ḥadīth Kashmīrī Bazar n.d.) ,267-268.

¹⁴ Abū ‘Abdullah Muḥammad b. Ismā’il, Al-Būkhārī ‘*Kitāb-al-‘Ilm*’, Chapters; 9,10,47. (Qatar: Dār-al-Tūrāth al- Islāmī n.d.) Hadīth: 67.

¹⁵ Ibn-e-‘Abdin, *Hashiyatū Radd al-Mūkhiṭār*, (Egypt: Sharikah wa matba‘a Muṣṭafā Al-Bābī al-ḥalabī wa Awiadūhū n.d.), 7:64.

¹⁶ Al-Qur’ān 2:282

¹⁷ Al-Būkhārī ,*Kitaab al-Shahadāt*, 2654.

¹⁸ Al-Ḥafiz Ibn Ḥajar Al-‘Asqalānī, *Bulūgh al-Marām*, *Bāb al-Shahadāt* 1201. ‘*Muslim*’ in ‘*Kitab-al-Aqdiyya*’ chapter 9 (*bayān khair-al-shuhūd*),(Dār-al-tūrāth al-‘arabī n. d.),1344.

“Honor (and raise) the status of witnesses as Allah elicits rights through them and removes injustice.”¹⁹ The Prophet (peace be upon him) has enumerated ‘giving false evidence’ among great sins.²⁰

All aforementioned traditions of the Prophet signify the importance of the role of witnesses in judicial process. The witnesses may be respected for their assistance in judicial process (this may imply in contemporary world as ‘protection of witnesses’ as well). Moreover the Prophet has declared the ‘perjury’ a great sin.

Technically speaking *Shahadah* under *Shari‘a* and ‘evidence’ in Common Law denote the same meaning. These share the same objective that is, to vindicate the rights and provide justice through assisting the judicial process. The concept of *Shahadah* is distinct from the concept of Common Law evidence in one respect and that is that giving *Shahadah* under *Shari‘a* is not only a judicial and moral duty but is also a religious duty violation of which may invite the wrath of Allah. The violation can be by refusing to testify when a person is under obligation by way of ‘*ain*’²¹, by giving false evidence, by hiding the truth or concealing evidence.

Moreover *Shari‘a-al-Islamiyyah* is appropriate and suitable to provide guidance, rules, principles and laws for all ages. The Divine Legislator has based His Rules on the interests of His subjects not only in this world but in the Hereafter. It is definitive that all His Rules and Laws are designed to “fetch good and repel evil”. The essential

¹⁹ Alaud Din ‘Ali Almuttaqi b. Ḥassam ud Dīn Al-Hindi Albūrhan faurī d.975, ‘Kanz-al-‘Amāl fi Sunan al-Aqwāl wa’l af’al’, Kitāb al-Shahadāt, Hadith 17733, (Beirūt: Mōassissat-al-Risalah’ n.d.), 7:12.

²⁰ Agreed upon tradition. *Al- Bukhārī*, Kitab-al-Shahadāt, Chapter; *Ma’ qeela fi Shahadat al-Zūr* (Dār-al-Turāth- al- ‘Arabi n.d.), 173 hadīth; 11:2477.

²¹ As it is an obligation for every adult Muslim.

objectives of *Shari'a* are; protection of faith, life, intellect, progeny and property.²² The *Shari'a-al-Islamiyyah* aims at attainment and protection of these objectives and their embellishment through different means including *Shahadah* ' or evidence.

1.2. Child as Witness in Islamic Law

'Child' in Islamic legal system is every person male or female who has not yet attained puberty.²³ Child is not considered to be a subject of duty therefore s/he is not liable to testify as an adult. In case of adult it is inferred from the preceding verse²⁴ that it is religious duty of a person to testify in case when it is required from him to assist the justice process for restoring the rights to their rightfully entitled person (s) but in case of children they are not considered duty bound.

'Intellect' and 'probity' are conditions for admissibility of evidence in Islamic law.²⁵ 'Intellect' develops gradually like physical development.²⁶ 'Probity' means that a person is not only 'major' but also that he bears a certain level of piety to be a witness. Therefore Muslim jurists have differed upon testimony of children and most of them have rejected it on the basis of condition of 'probity' to which 'majority' is one condition.

²² Abū Ishāq Ibrāhīm b. Müsa al-Shaṭibī (d.790/1388) 'Al-Mwafiqāt' (Beirūt: Lebanon:Dār al- M'arifa' li-al-Taba'a wa 'l-Nashr,1395 H. 1975) 2:8-9.

²³ The signs of puberty in female is menstruation and in male ejaculation. Childhood and majority will be discussed in 2nd chapter at length.

²⁴ Al-Qar'ān 2:282.

²⁵ Abū Waleed b. Muḥammad Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasad* (Beirūt: Dār al-Kutub al-'Ilmiyyah n. d.) 2:462.

²⁶ Shamil Rasheed Yaseen, Al-Shaikhili 'Awaridh al-Ahliyyah bain-al-Shari'a wa'l-Qāmīn (Baghdad : Matb'a al-'Ani, 1974), 109.

Classical Muslim jurists²⁷ have either distinguished between ‘bearing the evidence’ and actually ‘testifying’.²⁸ According to this opinion a child who is judicious enough to understand bearing the evidence at the age of minority can testify later when he attains the age of majority. Some jurists have allowed testimony of children about the matters among themselves in cases of hurts and injuries or ripping of clothes during play or have allowed with the condition that the evidence must be recorded before any event of being tutored by elders.²⁹ Some others have rejected it in totality and said, “they (children) are not among those whom we ‘consent’ for evidence” and reference is the Qur’ānic verse 282:2³⁰ (detailed opinions and arguments will be listed in Chapter 2).

On the other hand we observe that incidents happen to children or crimes are committed to them or sometimes they find themselves in conflict with the law and it

²⁷ Eponym founders of classical *Sunni* schools are Imām Abū Hanifa (d.150/767), Imām Mālik b. Anas (d.179/795), Imām Shāfi‘ī (d.204/820) and Imām Ahmad b. Hanbal (d.241/820). Their works were recorded by their disciples and they were gradually recognized as founders of four *Sunni Madhahib* sig. *Madhhab*. Abū Hanifa, Al-Nu‘mān b. Thābit was born in Kufa in 79 A.H., then, the capital of ‘Irāq. He was the first Imām of *Sunni* School of thought, Hanafi School. His theological opinions and doctrines were developed by his disciples further and were widely accepted. He did not compose his work rather dictated to his disciples. Abū Yūsūf and Mūhammad were his famous students. His followers comprise a vast majority of the Muslim population. He developed ‘speculative fiqh’ and answered the questions that might arise. Mālikī School was founded by Imām Mālik b. Anas. He was born in Madīna in 93 A.H. His famous work and basis of his school is *Muwatta*. His school is followed by the Muslim territories in the west like; Morocco, Tunis and Algiers. Imām Mūhammad b. Idrīs al-Shāfi‘ī, born in Palestine in 150 A.H., was founder of Shāfi‘ī school. He memorized the Qur’ān at the age of seven and Imām Mālik’s *Muwatta* at the age of fifteen. His well-known work on Fiqh is *Kitāb al-Umm*. Imām Ahmad b. Hanbal, founder of Hanbali *Madhhab* was born in Baghdað, ‘Irāq in 164 A.H. He started learning fiqh from Abū Yūsūf, Abū Hanifa’s disciple, but later inclined more towards learning Hadīth. His famous book of Hadīth compilation is *Musnad*. His perseverance and adherence to the ‘Truth’ was unprecedented. (See The Encyclopaedia of Religion, Encyclopaedia of Religion and Ethics and See also;

<http://insider.pk/life-style/religion/four-great-imams-of-islamic-jurisprudence/> (Visited on; 13/11/2015).

²⁸ ‘Ala-ūd-Dīn Abū Bakr b. Masūd, Al-Kāsānī, *Bada‘e al-Sana‘e fi tartīb al-Shara‘e* (Beirūt : Dār al-Kutub Al-‘Ilmiyyah n. d.), 6:246.

²⁹ Abū Muhammad ‘Ali b. Ahmad b. Sa‘eed, Ibn-Hazm, *Al-Muhaðdhah*, (Dār al Kutub Aljadida n.d.), 9:420.

³⁰ Muhammād b. Idrīs, Al-Shāfi‘ī, *Kitāb al-Umm* (Beirūt : Dār al-Ma‘arifa), 4:48.

becomes important to accept their statements during judicial proceedings. Protection of life and rights is a principle of Islamic legal system investigated from definitive text. Therefore, non admissibility of child testimony can lead to non vindication of rights and lives. This study aims at finding out the standing of Islamic Law on the legal capacity of a child and admissibility of the evidence of a child in the light of the opinions of Islamic Jurists and other legal systems.

1.3.Legal Capacity and Child

Legal capacity is capability of a person to undertake a transaction or enter into a binding contract or it is a person's capability to attain rights and incur liabilities.³¹ A child is an individual from birth to full growth. Childhood is a state where a person may enjoy some special benefits, or some restrictions might be imposed in his interest for instance a child has limited capacity to act before he attains the age of eighteen years.

Legal capacity under Islamic law is twofold; the capacity of acquiring a right (*Ahliyyat u'l-Wujūb*) and the capacity to execute a right (*Ahliyyatu'l-Adā*).³² The capacity to execute a right is either complete, appropriate to incur liability or deficient, incapable of incurring liability.³³ A child does not possess the capacity of execution of rights or performance of obligations until the time he attains intellect.³⁴

³¹ Shamil Rasheed Yaseen Al-Shaikhili, 'Awaridh al-Ahliyyah bain-al-Shari'a wal Qanūn' (Baghdād : Matb'ā al-'Ani, 1974), 18.

³² 'Ala-ud-Dīn 'Abdul 'Azīz b. Ahmad Al-Bokhārī, (d.730 H), *Kashf al-Asrār 'un 'Usūl Fakhr al-Islām al-Bazdawī* (Beirūt: Dār al-Kutab Al-'Ilmiyyah, 1997) 4:335.

³³ Ibid.

³⁴ Ibid., 340-341.

Across the world different practices may be observed in terms of determination of a child's capacity for a number of purposes, ranging from age of employment, contracting marriage (which is sometime lower than the universally accepted age of majority), exercising preferences in familial matters where courts decide whether a child of certain age might be given a chance to be heard and express his views and those views given due weight.³⁵ Similarly Muslim Jurists have considered a child of seven or above a discerning child and is considered to be capable of carrying out some instructions like daily prayers and doing some beneficial transactions as accepting gift.³⁶

1.4. Childhood and Changing Needs of Children in Contemporary world

Historically children were only considered to be responsibility of their adults and were not exposed to the issues which now require revisiting their needs. In the present day scenario, children become mature before the universally recognized age of majority and can assert their rights. This very well corresponds to the gradual release of financial rights to the children in Islamic Law in contrast with the application of interdiction on them due to immaturity. Unlike being considered property of their elders they are gradually attaining the status of holders of rights and are being considered as separate individuals, thanks to the children rights movement in 1960s. This was the period of change as previously children were considered in terms of their needs but as a result of this movement in the west now they were being considered in terms of their

³⁵ Malfrid Grade Flekkoy, "Attitude to Children-Their Consequences for work for Children" in Michael Freeman and Philip Veerman (ed.), *The Ideologies of Children's Rights*, (Martinus Nijhoff Publishers, 1992),143-147.

³⁶ Al-Bokhārī, *Kashf al-Asrār*, 4:88-89.

rights.³⁷ This was the time when courts in USA and Britain acknowledged some legal rights for children which were previously considered for adults only.³⁸ Among these rights, right of separate and independent representation for children in the court proceedings especially in neglect and abuse cases was demanded through legislation.³⁹ In fact this was an era of paradigm shift from 'needs' to the 'rights' of the children.⁴⁰

1.5. International Human Rights Law and Children

Any legal issue in the child's perspective cannot be studied effectively without having recourse to the child human rights law. The emergence of International human rights law and significant international instruments on child rights will be looked at in Chapter 3. However it seems pertinent to mention here some of those instruments and relevant provisions. In the aftermath of First World War the League of Nations was formed. The League of Nations adopted in 1924 the first Declaration on the rights of the child (Geneva Declaration). It is the earliest human rights instrument. The Universal Declaration of 1948 for the first time acknowledged need of special care and assistance for children.⁴¹ In the Declaration of 1959 duties of mankind towards the children were mentioned. The Declaration on the Rights of the Child of 1959 has reiterated the need

³⁷ Martin Guggenheim, *What's Wrong with Children's Rights*, (Harvard University Press, 2005), 8.

³⁸ For example see famous *Re Gault* case of US Supreme Court 387 US 1 (1967) giving the child right to cross examine, court-assigned counsel and right to remain silent (against self incrimination) and also *Gillick Case* (1985 3 All ER 402) of England is famous for 'Gillick Competence Test' that a child is capable of giving consent to medical treatment without parents' authority provided that the child can make "reasonable assessment of advantages and disadvantages of the treatment..."

³⁹ Congress Legislation on the right of separate representation for the children in 1974. Children's advocates favor child's right of representation in dependency cases too.

⁴⁰ Martin Guggenheim, *What's Wrong with the Children's Rights*, 8.

⁴¹ Article 25 (2) of the Universal Declaration of Human Rights 1948.

of special safeguards and legal protections for children as given earlier in the Geneva Declaration of the Rights of the Child of 1924 and the Universal Declaration of Human Rights of 1948.⁴² The United Nations Convention on the Rights of the Child 1989, popularly known as CRC, is a binding instrument, widely ratified by the nations. It has recognized the children as independent right holders and put the children's rights at the core of mainstream human rights. The Convention does not merely enumerate a list of rights for the children but it has provided full status of individuals entitled to the right to live with dignity. The CRC provides varying right from civil, political, social, economic and cultural rights including right to liberty, fair trial, education, adequate standard of living, health care and recreation. These existing rights have been provided in a child specific version like the freedom of expression and the right of the child to be heard, generally and specifically i.e. in all proceedings which affect the child.⁴³ Although CRC is a binding instrument of international law, it lacks a powerful system of enforcement, however, in addition to its legally binding nature CRC carries certain moral force due to its unanimous approval by the General Assembly in 1990 and further more due to the status it has subsequently acquired as the most widely ratified instrument in the International Law.⁴⁴ After a quarter century of its coming into force the research suggests that only ratification of the Convention could not improve the children's rights situation in different States Parties.⁴⁵ As mentioned earlier that CRC is

⁴² See Preamble of the Declaration of the Rights of the Child of 1959.

⁴³ See generally Garaldine Van Bueren, *The International Law on the Rights of the Child* (Martinuss Nijhoff Publishers, 1995).

⁴⁴ Ursula Kilkelly, "The Impact of Convention on the Case-law of the European Court of Human Rights" in Deidre Fottrell (ed.), *Revisiting Children's Rights-10 years of the UN Convention on the Rights of the Child* (Printed in Great Britain: Kluwer Law International 2000), 87-88.

⁴⁵ Brian K. Gran, "Comparing Children's Rights: Introducing the Children's Rights Index," *International Journal of Children's Rights* 18 (2010): 13. DOI 10.1163/157181809X457905 (Martinus Nijhoff Publishers).

a binding instrument of international law but it lacks a powerful system of enforcement in individual cases whereas the European Convention on Human Rights (ECHR) with 47⁴⁶ states now party to it is truly “pan-European”. The children’s rights are essentially absent from ECHR but it carries out a highly successful system of individual petitions. It is, therefore, possible to maximize the potential of both treaties (ECHR and CRC) by interpreting the ECHR in the light of its highly successful system of individual petition while using detailed and comprehensive provisions of CRC and thus promoting and protecting children’s Rights. In this regard CRC’s right to “best interest” (article 3) and “right to expression” (article 12) has been “invariably used”.⁴⁷ This approach has been adopted by the Commission⁴⁸ (up to its abolition) and the European Court of Human Rights. Though this strategy has not been adopted in all children’s cases however frequent references of CRC has been made in Strasbourg.⁴⁹ The influence of CRC is most strongly felt in two areas viz; physical punishment and juvenile justice.⁵⁰ Through its combination of substantive rights and some very basic different principles the Convention has established that the child is “entitled to the full range of human

⁴⁶ www.ihrc.ie/yourrights/whatarehumanrights/echr.html (Visited on; 27. 11.2013).

⁴⁷ Kilkelly, “The Impact of Convention on the Case-law of the European Court of Human Rights”, 87-88. And see also Ursula Kilkelly, “The CRC in Litigation under the ECHR- The CRC and the ECHR: The Contribution of The European Court of Human Rights to the Implementation of Article 12 of the CRC” in T. Liefaard and J.E Doek (ed.) *Litigating the Rights of the Child*, (Dordrecht : Springer Science+ Business Media 2015), 194. DOI 10.1007/978-94-017-9445-9_12.

⁴⁸ European Commission of Human Rights was abolished in 1998 and the individual’s cases were allowed to be taken by the European Court of Human Rights directly.

⁴⁹ See generally Kilkelly “The impact of Convention”. ‘Strasbourg’ is the capital and principal city of the Alsace region in north-eastern France and a de facto co-capital city of the European Union for it is the official seat of European parliament and seat of several European institutions such as the Council of Europe (with its European Court of Human Rights, European Directorate for the quality of medicines and its European Audiovisual Observatory) and the Euro corps as well as European Parliament and European Union’s Ombudsman.

⁵⁰ See generally Kilkelly, “The Impact of Convention”, 87-100.

rights.”⁵¹ The Convention has led to the recognition of the child as ‘holder of rights’.

Aforementioned position of the Convention lies basically in two of its articles; Article 3 and 12. The best interest of child as defined in Article 3 is:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

The ‘best interest’ principle has been referred to in other provisions of the Convention as well particularly in relation to issues related to family law and administration of juvenile justice system. The best interest principle can both be a procedural rule and a substantive right. It not only requires specific steps to be taken in decision making process which can affect a child (or group of children) to consider the possible impacts of such decision while taking into account different interests but also the states parties are required to place a mechanism to ensure the application of principle and do necessary legislation in this regard. It is considered to be a “fundamental interpretative legal principle”⁵² which limits the unchecked powers and authority of adults over children which might be in contradiction to the principle of best interest. In order to translate the principle into reality the states parties should take into consideration and follow the “rules of application as articulated by the Committee” (on CRC).⁵³ Similarly article 12(2) states that a “child be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a

⁵¹ Jean Zermatten, “The Best Interests of the Child Principle: Literal Analysis and Function” *International Journal of Children’s Rights* 18 (2010), 483-499. (Martinus Nijhoff Publishers) (Available at the European Commission Library Brussels), 483.

⁵² Ibid. 485.

⁵³ Ibid. 493.

representative or an appropriate body in a manner consistent with the procedural rules of national law" it is obvious that the right of a child to be heard directly and not through the representative and appropriate body if that is in the best interest of the child. This right must be observed through all stages of the trial right from the beginning of trial or pre-trial stage like in front of investigating officer etc.⁵⁴ Effective implementation of article 12 is only possible in the presence of necessary mechanism, articles 37,39 and 40 of the Convention has laid down the duties of the states parties to conform the national legislation to the convention through necessary legislation and administration of child criminal justice.⁵⁵

Under article 44 of the Convention States Parties are required to submit periodic report to the Committee regarding the measures taken to give effect to the rights recognized in the Convention and progress made in this regard. The states parties were required to submit these reports first time within two years of the enforcement of the Convention⁵⁶ and thereafter after every five years.⁵⁷ Pakistan signed the Convention on 20 September and ratified it on 12 November 1990. The first report which was due in 1992 was submitted on 28 May, 1993. Second periodic report was due in 1997 was submitted on 11 April 2003. Third and fourth periodic report was due in 2007 and was submitted on 19 March 2009 on which the Committee observed with concern that despite legislative measures undertaken by the State Party there is still "apparent lack of a legislative framework harmonized with the Convention in many areas and about delays in the

⁵⁴ CRC/C/GC/10,25 April 2007.

⁵⁵ See Chapter3 for more details.

⁵⁶ Article 44 (a).

⁵⁷ Article 44 (b).

adoption of laws that are instrumentation of the Convention.”⁵⁸ Among other concerns the Committee also noted that the “Juvenile Justice System Ordinance (JJSO) is not fully recognized and implemented.”⁵⁹

There are specific issues related to child witness that must be resolved before admitting him to testify actually; like protecting the child victim and witness from secondary victimization, safeguarding the privacy and security of the child. The danger of secondary victimization is more likely where the child is not only a victim but a key witness also. However protection of child victim and witness should not erode fair trial of defendant. The UN Model Law: ‘Justice in Matters involving Child Victims and Witnesses of Crime’ 2009, provides measures in this regard. The law was drafted to provide assistance to the States Parties in fulfilling their obligations under CRC while taking into consideration the Guidelines of the Economic and Social Council resolution 2005/20 of July 2005.⁶⁰

1.6. Common Law and Child Witness

The Common Law gradually recognized the rights of a child participating in the judicial process either as a victim or witness. At least need of separate courts and a facilitated eliciting of testimony were felt and steps were taken to ensure certain rights of the child in this regard.

It was only in 1908 that British parliament fully recognized the need and desirability of making special arrangements to cater for criminal cases of younger offenders .The

⁵⁸CRC/C/PAK/CO/3-4.

⁵⁹Pakistan CRC Reporting Notes: <http://resourcecentre.savethechildren.se/pakistan-crc-reporting-notes>

⁶⁰See Chapter 3 for detailed analysis of UN Model Law 2009.

Children Act 1908 established the Juvenile Court, which continued until 1992, later it was transformed into modern day youth court under the criminal justice Act 1991 which also raised the upper age limit to include the 17 years old.⁶¹

It was intended that the juvenile court should have regard to the special need of young people when passing sentence and this led to the enactment of later statutory principle;

“Every court in dealing with a child or young person who is brought before it either as an offender or otherwise , shall have regard to the welfare of the child or young person and shall in a proper case take steps...for securing that proper provision is made for his education and training.”

(Children and Young Persons Act1993 s.44 (1))⁶²

A question may arise, why should we study a discipline of law in the child's perspective? It is comparatively a new historical phenomenon that young people between the age of seven and seventeen are considered to constitute a separate category having their own special needs. Before the renaissance⁶³, young people in western societies were viewed as small version of their adults. Their physical dependence makes them different from their elders. Prior to the nineteenth century in America, for instance, the family house hold was the basic social and economic unit and the youth worked with their elders and were integrated in the domestic economy. Nineteenth century industrialization replaced the domestic economy and therefore resulted into the separation of work from home. The social construct changed. Now the children had to

⁶¹ Winston Gordon , Philip Cuddy and Jonathan Black, *Introduction to Youth Justice ,Incorporating Introduction to the Youth Court* 2nd ed. (Waterside Press Winchester,1999), 9-10.

⁶² Kevin Haines and Mark Drakesford, *Young People and Youth Justice* (Macmillan Press,1998), 36.

⁶³ The period of development in Europe (14th-17th Century).

work outside home sometimes under very bad conditions which mostly resulted into work related diseases, injuries and deaths. This led 'child labor law movement' followed by compulsory school attendance and juvenile court system. Now the concept of 'childhood' evolved and children were considered to be different from adults having their special needs and the period of childhood was redefined as the period of economic dependence, innocence and vulnerability.⁶⁴ The vulnerability of child victims and witnesses in the judicial process has been addressed recently in international instruments as well as in the national legislations. The recent studies in UK suggest that a number of physical and sexual abuse of children and adults cases in 1990s could not be effectively prosecuted mainly for two reasons; either because there were doubts as to the ability of vulnerable witnesses to cope with the prosecution process or due to the non attendance of witnesses. To deal with this problem under 'No Witness, No Justice' (NWNJ) project 2003, 'Witness Care Units' were established to provide information and assistance to the witnesses. The research also suggest that young witnesses have to wait for long hours to give evidence, face aggressive cross-examinations making them "upset, distressed and angry".⁶⁵ The Youth Justice and Criminal Evidence Act 1999 by virtue of its sections 24 and 27 provides for the witness to give evidence by means of live link and or through video recording.⁶⁶

'Evidence' for the purpose of law is something presented at a judicial or administrative proceeding to establish the truth or falsify an allegation of fact. Mostly evidence is

⁶⁴ Barry C. Feld, *Bad Kids- Race and the Transformation of the Juvenile Court*. (Oxford: Oxford University Press,1999),17,42,43 & 44.

⁶⁵ Dame Helen Reeves and Peter Dunn, "The status of crime victims and witnesses in the twenty first century", in Anthony Bottoms and Julian V. Roberts (ed.), *Hearing the Victim- Adversarial Justice, crime victim and the State-*, (Willan Publishing,2010), 54,55 & 57.

⁶⁶ Peter Murphy, *Murphy on Evidence 8th ed.* (Oxford: Oxford University Press, 2003), 588.

offered by a witness who testifies before the court of law. The question of competence of a witness must be resolved first of all by showing that the potential witness is able to understand, remember and recount the matter regarding which he or she is to testify and can give rational answers to the questions put to him/her this is termed as *voir dire* or test of competency.⁶⁷ The traditional view about child witness has been that he/she is unreliable witness as children are considered to be prone to fantasy, can be easily manipulated, influenced and tutored besides they are considered to have inaccurate and incomplete memories of the incident they have seen or experienced.⁶⁸

The earliest recorded example found in American legal history is Salem Witch Trials of 1692 in which twenty innocent people were executed on the basis of testimony of children who were thought to be bewitched or possessed by the devil. Initially the children accused three women as witches who afflicted them this led to further accusations and executions and resulted into the historic tragedy.⁶⁹

A land mark case, *Re Gault* (1967)⁷⁰ of USA for the first time acknowledged some very basic rights of child delinquents. These rights include; a child's and his parents' right to be informed timely about the charges and issues to be discussed at trial so that they have sufficient time to prepare for the trial, right of 'due process' under 14th amendment is extended to the delinquents, the delinquent has the right to counsel and if he or his family cannot afford one, counsel should be provided by the court. Similarly the child has right to confrontation and cross-examination. It was held that there was no

⁶⁷ Khalil-ur-Rehman Khan J, *Principles and the Digest of The Qanun-e-Shahadat*, 5th ed. (Lahore: PLD Publishers, 1991), 1:62.

⁶⁸ <http://www.kidsindistress.org.an/childEvidence.php> (Visited on 5.5.2011)

See also Khalil-ur-Rehman. *The Qanun-e-Shahadat*, 1: 80.

⁶⁹ http://www.cbsnews.com/2316-100_162-529581-4.html (Visited on 5.5.2011).

⁷⁰ US Supreme Court. 387 US 1 (1967).

difference between the sworn testimonies in juvenile and criminal courts. In order to find a juvenile to be a delinquent and to commit him to a detention centre the witness must have been available for sworn testimony, cross examination and confrontation by the juvenile. The Supreme Court also held that the constitution of the United States guarantees that no person shall be "compelled to be a witness against himself when he is threatened with deprivation of his liberty" such right is termed as 'privilege against self incrimination' and is extended to juveniles. In *Gault* case for the first time the SC declared that the Constitution and Bill of Rights is not limited to the adults only.⁷¹

The law of evidence in Pakistan is termed 'Qanoon-e-Shahadat' Order of 1984. The previous law of evidence of 1872 was a British legislation which was replaced by this Order as a result of Islamization process during the regime of late General Muhammad Zia-ul-Haq however some provisions of the previous legislation were retained in the new law one of these was article 3 of the Qanoon-e-Shahadat which states;

"All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind..."

In the foregoing article the words "tender years" do not indicate minimum age of child witness or any specific age for the purpose, the only test seems to be the ability of a witness to understand the questions put to him/her and to provide rational answers to those questions. Although the law does not provide for how and when exactly this

⁷¹ Ibid.

See also <http://voices.yahoo.com/how-write-legal-brief-using-gault-decision-1270259.html> (visited on: 10/6/2011)

capacity of a witness may be tested but practice of the courts suggests that before actually testifying the child may be asked some questions in order to judge his capacity and the judge is to record his observations in this regard which is sufficient evidence to determine the capacity of child as witness and is acceptable for the appellate court as well.⁷²

Gradually the concept of child bearing separate identity from his elders developed in Common Law. This has led the legislators and judiciary to acknowledge certain rights for a child participating in the judicial process as were previously available to adults involved in judicial proceedings.

1.7 Significance and importance of the Research, Objectives, Thesis Statement, and Research Questions/Hypotheses

The changing needs of children in contemporary world have given rise to the acknowledgment of their separate rights from adults. Their exposure to the world outside home, cyber world and the bulk of information has made them more vulnerable today as compared to the past. The recent consumerism and commercialization, one can foresee, will increase legal liability along with adults towards children as well. Where a decade or two ago the children were usually victims of physical and sexual abuse while now they are also becoming victims of virtual abuse. It can give rise to more and more litigation in this regard. Moreover children's participation in judicial process has increased. There has been a gradual acceptance in different judicial systems for representation of children. The international as well as national legislations have

⁷² Khalil-ur-Rehman, *The Qanun-e-Shahadat*, (Commentary on Art.3. See Chapter 4 for more details and relevant case law.)

accepted that the voices of children should be heard. CRC provides the right of expression and to be heard in all judicial or administrative matters concerning children.⁷³

The increased participation of children in judicial process has given rise to the need of hearing their voices. Unless they are provided the opportunity to be heard justice cannot be done. It is time that effective legislation and court procedures are devised to enhance the acceptability of children's testimony. The participation of children in the judicial process can be as a victim, witness or even perpetrator. Their involvement is seen in various issues; family matters, child abuse cases and even armed conflicts. Unless their statements are admitted justice cannot be done. This research aims at finding out the legal capacity and rules of admissibility of the child testimony in *Shari'a* and the western legislations. It also aims at finding out the methodologies of eliciting the truth from young victims or witnesses. A child usually suffers at the hands of those who are entrusted with his/her protection. In these cases, unless a child is heard his/her victimization will never end. Therefore, it often seems more a matter of right of a child than being simply a matter of legal importance. The research is also aimed at finding out the practical application of the 'right of being heard' as a human right of the child in judicial proceedings.

In the light of foregoing discussion the present research is aimed at the following;

1. To find out the Islamic law standing on the issue of child testimony. First of all the opinions of classical Islamic jurists are to be enlisted and analyzed to explore possible

⁷³Article 12 of CRC.

consensus among those opinions. The objectives of Islamic Law (*maqāsid-al-Shārī'a*) and principle of public good (*maslaha*) are to be studied with the aim to derive a common theory that can be adopted based on the definitive text and opinions of jurists?

2. Being signatory of a number of international instruments, especially the Convention on the Right of the Child 1989 (CRC) the states parties (Pakistan is one of these) have undertaken to implement the Convention by doing necessary legislation and establishing a mechanism. The issue of child testimony is to be studied in the light of CRC and it is seen if the national legislation can be improved by having recourse to international human rights law?
3. The Evidence Law of Pakistan is based on Islamic Law and Common Law traditions. The courts interpret the law and seek guidance from both disciplines owing to the peculiar legal history.⁷⁴ This research aims at finding out the common law concept of credibility and competency of witness while keeping in view the competency of child witness with the help of case law.
4. The research is not extended to the psychological assessment of a child witness however occasional references are made to such researches. The study also aims at exploring the best international practices as the intention is to give suggestions and recommendations to improve the national judicial system while facilitating and protecting the child witness so that the truth can be extracted and justice is done.

Thesis Statement

Keeping in view the above mentioned objectives of this research it seems pertinent now that a clear research statement may be framed as:

⁷⁴See Chapter 4.

The classical Muslim jurists have dealt the issue of testimony of child in accordance with the need of their era. The rules developed by them are fine but these may not adequately deal with the problems posed in the contemporary situations. Therefore the need is to look at the issue of admissibility of child testimony in other contemporary legislations, common law, international standards and model best practices to supplement the present legislation in Pakistan which is based on Islamic law and Common Law traditions.

The Research Questions

The foregoing statement may be justified through answering the following questions;

- i- Is testimony (*shahadah*) of child admissible in Islamic Law (*Shari‘a*)?
- ii- How the theory of Objectives of Shariah can be invoked in the light of contemporary need of protection of children’s rights?
- iii- How the International Human Rights Standards and the Western Legislations deal with the issue of competency of child witness?
- iv- What is the position of Common law tradition on the competency of child witness? And
- v- How the issue of competency and admissibility of testimony of child witness is dealt in the evidence law of Pakistan?

1.8. Literature Review

The issue of child testimony has not been researched in a comprehensive, systematic and coherent manner till now. The studies conducted in some countries were based on

psychological aspect and were based on ‘memory’ of child and effect of ‘suggestibility’ on the quality of testimony of child. Interviewing techniques were devised to examine and cross examine the child witness. Interview protocols were also designed. No legislation expressly allows a child witness to testify except that competency test of witness at Common Law has long ago suggested indirectly that a child witness was not excluded from testifying;

“Mental competency to give evidence depends not upon age but upon understanding or intelligence. There is no fixed age under which an infant is excluded as a witness.”⁷⁵

Classical sources of Islamic *Fiqh* have scarcely mentioned the issue while discussing the conditions for admissibility of evidence. Generally it has not been permitted except where it fulfills the conditions or prerequisites provided by the Muslim jurists for admissibility of child testimony. The quality or credibility of such witnesses have not been discussed rather the admissibility of evidence of a child has been restricted to specific matters and situations. For instance ‘Alauddīn Al-Samargandī in his book *Tohfatū'l-Fiqahā* mentioned conditions for admissibility of the testimony of a child, *Imām Malik*’s compendium *Al-Mudawwana* (compiled by *Suhmūn* on the report of *Ibn al-Qasim*) and other jurists like *Imām Al-Shāfi‘ī*, *Imām Abū Hanīfa*, *Imām Al-Sarakhsī*, *Ibn Qūdāmah* and *Ibn Rushd* and *Ibn Hazm* all have given conditions for admissibility of a child’s evidence with slight differences of opinion which this research has explored.

⁷⁵R. v. Brasier (1779) 1 Leach, C. C. 199. As cited by Ernest Cockle, *Leading Cases and Statutes in the Law of Evidence* 2nd ed. (London :Sweet and Maxwell Limited, 1911), 207.

The *Hanafī* writings allow bearing the testimony by a minor and actually testifying after attaining majority. The *Mālikī* writings have mainly restricted the admissibility of child's statements to the matters concerning children. Others have generally not favoured the admissibility of the child's evidence. The details of their opinions (discussed in second chapter) thus provide inadequate solution to the contemporary situations in case of either non-admissibility or limited admissibility of child's testimony. A contemporary writing, "Shahadatu al Saghr wa hujjiyyatuhā fi'l fiqh'al-Islāmī" by 'Ali Abū'l Basl published in *Majjalatu Jami'a Damishq li'l 'Ulūm al-Iqtasādiyyah wal Qānūniyyah*, Volume.25, Number.1 (2009), 743-761. This article discusses the age of majority in Islam and states that *bulūgh* (puberty) or majority is either attained when physical signs appear or in the absence of physical signs maximum age of *bulūgh* is different according to the opinions of jurists, varying from 15 to 19 years. The article gives opinions of classical jurists regarding admissibility of the child's evidence but the conclusion it draws is not based on the argument, for instance it says, "testimony of discerning child is heard without oath. It is *wājib*⁷⁶ for the court to hear a discerning child. The testimony of non-discerning child is however a matter of discretion of the court and the weight attributed to such evidence may not raise it to the status of '*bayyānah*'..." This conclusion is more in accordance with the Common Law, without discussing or even mentioning it, and not based on the opinions of classical jurists. The data for this research was collected and submitted before February 2014 therefore another contemporary writing could not be added to it. This is; Hafiz Shukri's paper, co-authored with Mohammad Khairul Hisyam Hassan, "Should a child be allowed to give Evidence? The Position of Child under Civil and Islamic Law of

⁷⁶ This was not established during discussion on jurists' opinions.

Malaysia". This paper was presented at 1st International Conference on 'Business, Economics and Social Sciences' organized by Indonesian College of Economics (STEI) Jakarta on 25-26 June 2014 and another article "Witness testimony-Some Perspectives from Shari'at Law"⁷⁷ by Justice Saleem Marsoof of Sri Lanka, is very general and not really relevant to this research. The paper mentions the general conditions of admissibility of the evidence under Islamic Law.

The study of evidence cannot be effectively done unless the concept of legal capacity or *Ahliyyah* is understood generally and legal capacity of a child particularly. *Kashf-al-Asrar 'un Usul al-Bazdawi* by *Al-Bokhārī* is the classical book on the subject whereas a contemporary scholar, *Al-Shaikhilī*'s book *'Awarid al-Ahliyyah bayn al-Shari'a wa'l Qanoon* published in Baghdād affords a great deal of understanding of *Ahliyyah*. These have maintained that a child bears deficient capacity and does not incur capacity of execution of rights or performance of duties, and thus not considered a *mukallaf*.

It is proposed that the gradual attainment of capacity in Islamic Law according to the developmental stages of a child, very well corresponds to the western concept of 'gradual emancipation' which has been studied through cases.

The issue of child testimony is not dealt in the direct texts of the Qur'ān and Sunnah therefore objectives of *Shari'a* and principle of public interest (*maslaha*) may be invoked. These concepts are studied in the famous work of Al-Ghazālī, Abū Ḥamid, *Al-Mustasfā min 'Ilm al-'Usul* and *Al-Mwafaqāt fi 'Usul al-Shari'a* by Abū Ishaq Al-Shāfi'ī. The contemporary works on the objectives are numerous but the research could

⁷⁷ Available at; www.academia.edu (Visited on; 12.8. 2015).

not be expanded to detailed study of objectives therefore four contemporary works were taken into account like; Ibn Ashūr's Treatise on *Maqāsid al-Sharī'a*, Yousūf Hamid Al-‘Alam's *Islāmī Sharī'at: Maqāsid aur Masalih* (trans. Muhammad Tufail Al-Hashmī), Muhammad Hashim Kamali's *The Objectives of Islamic Law* (an occasional paper) and Muhammad Nijatullah Siddiquī's 'Maqāsid-e-Shariat' all published by Islamic Research Institute International Islamic University, Islamabad. Secondary references of other contemporary scholars came forth occasionally. *Nazriyyat al-Maslaḥa fi'l-fiqh al-Islāmī* By Dr. Hussain Hamid Hassan, which affords rebuttal to the criticism of jurists on Imām Mālik's applying the principle of 'maslaḥa' in the admissibility of child testimony. Dr. Muhammad Khalid Masūd's *Shāfi'ī's Philosophy of Islamic Law*, which compares Shāfi'ī's concept of 'Maslaḥa' as understood and compared with other prominent classical philosophers'. The classical theory of objectives does not directly deal with the issue but it may be dealt by way of expansion of objectives.

A legal issue in the child's perspective cannot be studied effectively without having recourse to the Child's Human Rights Law. To understand how the Child's Human Rights emerged and developed one needs to understand the historical development and nature of human rights. Paul Gorden Lauren's 'The Evolution of International Human Rights', Second Edition (2003), published by University of Pennsylvania Press. It is historiographical study of the concept and development of International law. Jack Donnelly's 'International Human Rights,' Second Edition (1998). This was published by Westview Press, and 'Universal Human Rights in Theory and Practice', Second Edition (2003). This book was published by Cornell University Press. The author has

noted in his books that the treatment of states of their subjects have become a global concern and it is the duty of state to protect and implement the rights internationally recognized. He has also noted that the human rights have not only become standards of “political legitimacy of a government” but also “subject of bilateral and multilateral diplomacy.” A.H. Robertson and J.G. Merrills’ *Human Rights in the World*, Fourth Edition (1996) published by Manchester University Press. This work has provided a chronology of International Human Rights Instruments, their further development, implementation mechanism and role of regional institutions in this regard. A number of articles on the core principles of the Convention on the Rights of the Child 1989 have been studied in order to understand the standing of international human rights law on the right of a child to be heard. General Comments of the CRC Committee are also valuable to understand different concepts of human rights with reference to children. Other writings and contributions on CRC or the children’s rights include Michael Freeman and Philip Veerman (ed.) *The Ideologies of Children’s Rights*, this has been published by Martinus Nijhoff Publishers in 1992, as this was the era of debate on the International Law and the concepts of the rights of the child in the CRC (1989). The book in its articles explores the right of ‘participation’ and ‘expression of views’ and the children’s role in decision making, their own understanding of their rights and the issues pertaining to the child advocacy and having a political structure ensuring the children’s rights. But it generally contains the works written in the perspective of developed countries. The other work explored in this regard is Garaldine Van Bueren’s, ‘*The International Law on the Rights of the Child*’ published by Martinus Nijhoff Publishers in 1995, This work has explored first the definition of ‘childhood’, ‘child’

and ‘juvenile’ in the International Law. It has discussed in detail the right of expression, right of assembly and the juvenile justice at the International Law urging that most of the international juvenile justice law is in the form of “recommendations”, pressing upon the need of a uniform definition of the ‘child’ and ‘juvenile’ and change of certain terms related to the juvenile justice like “punishment” and “rehabilitation” with providing ‘service’ and ‘protection’ which is more aligned with the idea of “welfare” of the child. Trevor Buck’s *International Child Law* published by Routledge in 2007, this work examines different aspects of the children’s rights under the CRC and the history of drafting of this instrument. It urges that reporting mechanism is the only guaranty of the improvement of the children’s rights in the absence of any enforcement mechanism. Jean Zermatten’s “The Best Interests of the Child Principle: Literal Analysis and Function” *International Journal of Children’s Rights* 18(2010) 483-499, has termed the principle of “best interest” as one of the four principles of the CRC. The paper analyzed the principle in the light of different dimensions while stressing upon the need of interpretation of other articles in consideration of this principle. It urges upon careful understanding and interpretation of the principle of the “best interest” so that it may lead to the decisions truly in the best interest of the child.

The research projects conducted in the West suggesting procedures and methodologies of extracting truth from a child witness with main focus on child Abuse victims. Some of these studies are mentioned below:

‘Child Witness Project helping courts hear the evidence of children’ by Linda Stevens and Pamela Hurley, this project is child witness project providing assistance to the children and vulnerable witnesses to testify without undergoing trauma and reducing

fear of court process therefore it helps the courts to hear children's evidence. An IIP Journal's Article, "Interviewing methods and Hearsay Testimony in Suspected Child Sexual Abuse (CSA) cases, Questions of Accuracy" by Judith K Adams which has criticized interviewing and investigation methods used till 1991 as those could impugn reliability of witness. According to this article "Improper Questioning" can destroy the primary evidence (testimony of child) and suggests that hearsay evidence of children should be considered very cautiously. This article has also discussed Bruck & Ceci's *Jeopardy in the Courtroom; A scientific analysis of children's Testimony* (1995) at length. *Enhancing Child's Testimony through Courtroom Modification-Law and Science in Forensic Evaluation* by Susan R Hall and Bruce D Sales, 2008, American Psychological Association, Washington DC. It is noted that the 'Courtroom modifications' for young children is considered among issues of child testimony as less studied issue. The 'court-room modifications' can help elicit accurate statements of testifying children. Another book in this regard is; *The Evaluation of Child Sexual Abuse Allegations (A Comprehensive Guide to Assessment and Testimony)* edited by Kathryn Kuehnle and Mary Connell (2009) published in USA. The book basically deals with the assessment and evaluation of the children being sexually abused. In its eight parts and twenty chapters, it has discussed various issues ranging from the clinical evaluation of abuse victims, question of reliability, use of experts (mental health professionals), disclosure of the children's experience of abuse, recovery and accuracy of child's memory, developmental changes in a child's memory, forensic interviewing, interviewing techniques and use of designed interview protocols. In general the book

deals with the forensic aspect of a child's testimony. The techniques may aide a child's evidence and support the justice process.

These writings have not discussed competence or credibility of child witness but provided effective interviewing techniques. There are various articles dealing with issues like suggestibility, recovery of memory, effective interviewing techniques and bad interviewing etc. These are studied to infer 'model best practices' in this regard.

This research has been undertaken to explore the Islamic Law on the issue, gather and analyze the opinions of jurists and developing a consensus on the issue of admissibility of child testimony. The study is to explore common law concept of competency and weight afforded to child's evidence and then to propose and suggest an effective method of investigation, inquiry and extracting the trustworthy evidence from child witnesses by facilitating them and the courts based on best available practices in this regard. For this purpose the studies mentioned above are looked at briefly.

Important legislations in this regard; The Evidence Act 1872 and Qanoon-e-Shahadat Order 1984 will be studied to understand the competency of a child witness in Common Law and Pakistani Law with a number of decided cases not only of the Indian and Pakistani courts but also some other common law countries.

The present research is unique as it does not only take into account the Islamic law and Common Law but it is also guided by the international standards regarding facilitation and protection of child victims and witnesses in the judicial process. The research aims at filling the gap and gathering the information in a coherent manner to give a clear understanding of the capacity, competency and credibility of child generally and his

testimony as witness specifically. The research is an effort to suggest the domestic legislature and judiciary to fulfill their duty to incorporate those international instruments and reflect their provisions in municipal judicial practices in this regard. This research has explored all aforementioned sources touching upon the problem of admissibility of child testimony to propose a practical solution for the courts while dealing with young witnesses of tender age. At the end, the research has proposed a model interviewing protocol for effective eliciting of the truth from witnesses who are not yet considered to enjoy full legal capacity.

It is hoped that legal professionals will find this research useful while dealing with the cases where child witnesses are involved.

1.9. Limitations of the Research

Usually a child's evidence may be required in the cases of child abuse, neglect or custody cases or in any other matter where child is a victim or witness. In the early 20th century researches on child memory were focused on children as witnesses in the court. Most of these researches were conducted in Europe specially Germany and France. There was hardly any research in USA until 1980s. In some countries like America, Canada and Great Britain children were rarely permitted to testify. The child witnesses were generally understood as highly suggestible and vulnerable to commit serious errors in their court testimony. There were no significant researches until 1970s. But with the increase in the reports and allegations of physical and sexual abuse the trend of admissibility changed so much so that in some countries the requirement of

corroboration of children's testimony in sexual abuse cases was dropped. The questions of child witnesses' credibility, reliability and suggestibility became issues of interest for researchers.⁷⁸

Two extreme opinions of researchers regarding disclosure of abuse by children were described by Ceci and Bruck in 1989;

An emotional battle is being waged today in our courtrooms, universities and living rooms. This battle revolves around the credibility of children's testimony, particularly in sexual abuse cases. To listen to one side, you would think that everything child tells social worker or therapist must be believed no matter how bizarre the allegations, no matter how suggestive or coercive the techniques used to elicit them. The other side would have us believe that...we should always greet their disclosure with a large dose of skepticism. Child witnesses are depicted by this side as helpless sponges who soak up the interviewer's suggestions and regurgitate them in court.⁷⁹

During the research it is felt that the accuracy and credibility might be differently understood and dealt in case of children. As children lack vocabulary, sense of timings or estimation of duration until the age of 10-11. They may also confuse meanings of legal terms or other words used in a particular sense in the court room.⁸⁰

The frequently occurring cases of child neglect and abuse has rendered it necessary to rely upon victim's statement especially in child abuse cases where physical evidence is insufficient or not present at all. The legal professionals are, in these cases, left with only choice to reconstruct the event with the help of child victim, perpetrator and eyewitnesses but sometimes they need to rely on child victim's memory. The studies

⁷⁸ Brief History of Research on Child Witnesses (<http://www.ipt-forensics.com/library/images1.htm>) (visited on 18.10.2013)

⁷⁹ See generally M. Sauzier, "Disclosure of Sexual Abuse. For better or for worse" *Psychiatr Clin North Am.* 12 (2), Jun. (1989), 455-469. Available at; <http://www.ncbi.nlm.nih.gov/pubmed/2748447> (visited on 18.10.2013)

⁸⁰ Lindsay C. Malloy, Jodi A. Quas, "Children's Suggestibility Area of Consensus and Controversy" in Kathryn Kuehnle and Mary Connell (ed.), *The Evaluation of Child Sexual Abuse Allegations: A Comprehensive Guide to Assessment and Testimony*, (USA: John Wiley & Sons, Inc.2009), 275.

have developed extensive literature on 'memory development' including the general principles of 'memory development' in forensic cases where young children are involved.⁸¹ The present research cannot be extended to revisit those studies with the exception of occasional references made to those studies. Similarly a great deal of literature is present on the interviewing techniques and accuracy of children's reports of abuse. It has been observed through these studies that protocol interviews have better results than non-protocol interviews. The best result showing protocol about accuracy of child abuse reports so far is considered NICHD⁸² investigative interview protocol of 2007. ⁸³The present study aims at finding out law professionals' understanding of competence of a child witness and court practices in this regard therefore is not fit for an overview of all these psychological researches however occasional reference shall be made to those studies. Moreover other related issues such as an analysis of juvenile justice system in the light of International standards and the issue of 'witness protection' could not be dealt under this study.

1.10. Methodology of the Research

It is basically a descriptive qualitative research based on library and digital sources. The libraries at IIU, VUB and European Commission Library were explored. First, all the classical Islamic Law sources available in this regard were explored. Opinions of the jurists were studied, gathered, analyzed and a general theory based on those opinions

⁸¹ Ibid. 153,154 See J. Zoe Klemfuss, Stephen Ceci, " Normative Memory Development and the Child Witness."

⁸² National Institutes of Child Health and Human Development. This investigative interview protocol was prepared by M .E. Lamb, I. Hershkowitz, Y. Orbach, and P. Esplin.

⁸³ The matter is still debatable though. See generally Steve Herman, "Forensic Child Sexual Abuse Evaluations (Accuracy, Ethics and Admissibility)" in Kathryn Kuehnle and Mary Connell (eds.), 247-266.

was formed so that *Shari'a* (Islamic Law) standing on this issue could be understood in a comprehensive manner. Famous 'Theory of Objectives of *Shari'a*' was explored and the recent expansion of objectives was also studied.

The issue of testimony of child was studied in International Human Rights standards especially the Convention on the Rights of the Child (CRC) 1989 with special reference to its fundamental principles (the right of survival, development, protection and participation) and UN Model Law on 'Justice in Matters involving Child Victims and Witnesses of Crime 2009' was reviewed.

The Pakistani Law is based on Common Law and Islamic Law traditions, before going into the detailed study of admissibility of child testimony in Pakistani Law of Evidence the competence of child witness at Common Law was studied. A comparative study of case law of Pakistan and some of the Common Law countries was done.

While concluding the research it seemed pertinent that some important projects, researches and studies conducted to understand the reliability and accuracy of children's reports must be referred. In the light of foregoing research some model best practices provided by these studies were recommended for the support of legal practitioners and courts with the aim to facilitate the testimony of child and elicit the best available evidence.

1.11. Outlines of the Research

In the context of above mentioned methodology the following division of chapters seems appropriate;

The **first chapter** is ‘Introduction’ of the Research’. It states the significance, importance of the research. It sets the objectives of this research, frames the research questions and gives a road map to be followed during the course of present research. It gives sources and literature to be relied on developing the research while acknowledging the deficiency of these works in meeting the current issue thus indicating the need to carry out this study.

The **second chapter** is ‘Legal Capacity of Child in Islamic Law and its Impact on his Credibility as a Witness’. This chapter provides introduction to ‘child’ and discusses generally the ‘legal capacity’ and ‘age of majority’, enlists and analyses the opinions of Islamic jurists regarding child testimony and studies the issue of admissibility of child testimony in the light of objectives of Islamic law and the concept of public good. In the absence of clear texts the issue is liable to ‘ijtihād’ (exerting to find out a rule from the texts by applying analogous deduction) which cannot be done in isolation from ‘Objectives of Islamic Law’ (*Maqasid-al-Sharia*) and the principle of ‘public interest’ (*Maslaha*).

The **third chapter** is ‘International Human Rights Standards and Tools on Testimony of Child’. This chapter after narrating the historical developments of International Human rights law gives emergence and development of child human rights law. It discusses child’s rights and core principles of the Convention on the Rights of the Child (CRC) and explores child testimony in the international standards. It also reviews United Nation’s Model Law on ‘Justice in Matters involving Child Victims and Witnesses of Crime’. A study involving ‘right’ may not be done effectively without having recourse to international human rights law.

The **fourth chapter** is titled 'Testimony of Child in Pakistani Legislations'. The chapter provides historical background of evolution of the Evidence Law in subcontinent and in Pakistan with focus on the Evidence Law of 1872 and Qanoon-e-Shahadat Order 1984. The chapter discusses relevant provisions of the law on admissibility and competency of a child witness. The chapter has also provided a comparison of competency inquiry in the Common Law and Islamic law. At the end it affords an analysis of relevant article of the Qanoon-e-Shahadat Order 1984.

The **final chapter** is titled as 'Conclusions and Recommendations (based on studies and model best practices to facilitate child testimony)'. It answers the research questions and hypotheses set out in the introductory chapter, gives model best practices with the assertion of need for future research. At the end it concludes with the recommendations which are given especially to improve Pakistani judicial practices while dealing with children participating in the judicial process either as witnesses or victims.

Hence the titles of chapters, mentioned above, are as under:

Chapter 1. Introduction to the Research

Chapter 2. Legal Capacity of Child in Islamic Law and its Impact on his Credibility as a Witness'.

Chapter 3. International Human Rights Standards and Tools on Testimony of Child.

Chapter 4. Testimony of child in Pakistani Legislations

Chapter 5. Conclusions and Recommendations (based on studies and model best practices to facilitate child testimony).

The study is an integrated study of three disciplines; Islamic Law, International Human Rights Law and Pakistani Legislation which is a blend of Common Law and Islamic Law. The state is under an obligation by its constitution to promulgate laws in conformity and not in contradiction to Islamic Principles. Therefore the study is important to suggest practical solutions which are equally acceptable to current judicial practices and are in conformity with Islamic Legal norms.

No effort has been spared in making the research useful, productive and in accordance with the contemporary rules and practices of research. The qualitative research methods have been kept in mind during compilation of this research. Despite every effort of making the research appropriate it is, after all, a human effort and is liable to errors, all suggestions to improve this research work are welcome.

Samina Bashir,

(Feb. 2014, Islamabad).

Chapter 2

Legal Capacity of a Child in Islamic Law and its Impact on his Credibility as a Witness

Chapter 2. Legal Capacity of a Child in Islamic Law and its impact on his Credibility as a witness

Introduction

In this chapter, first of all 'child' and childhood is defined under International and national law. Competence and credibility of a witness is also defined. The concept of legal capacity is explored in different legal systems. The questions such as; what are the conditions for admissibility of evidence in Islamic Law and how the testimony of child is viewed by different classical jurists of Islam, are discussed. Various opinions collected from different schools of thought regarding child testimony are analyzed and molded in the theory of *Objectives of Sharī'a* and the concept of *maslaha* in Islam.

2.1. Introduction to child

The term 'child' is used in a number of contexts from unborn child to a full grown individual near adulthood for example it denotes to a boy or girl between birth and puberty, a baby, an infant, a human offspring and even an unborn child sometimes (Collins Concise English Dictionary). It is therefore a flexible term the meaning of which may be ascertained in each and every case. The persons described as children are treated under law according to their special circumstances and some restrictions are imposed for their benefit. For example, if a person attains the age of majority at eighteen years of age at law that person is considered minor until he/she attains that age with limited capacity to act. Similarly if the law says that unless a person acquires

certain age cannot be held liable for criminal responsibility, he/she may be considered not to be eligible to commit an offence. For the purpose of employment a person usually may not be employed unless attains certain age therefore below that age a person is considered 'child' in this regard. These and other restrictions imposed by law are, of course, for the benefit of children as it is considered that they are "not able to perform valid acts with legal implications."¹

2.2.Legal Capacity and Age of Majority in the Contemporary Legislations

The legal capacity may be defined as; "A person's capability and power under law to engage in a particular undertaking or transaction or to maintain a particular status or relationship with another."² Or in more elaborating way it is, "power provided under law to a natural person or a juridical person to enter into a binding contract, and to sue and be sued in its own name."³ The law recognizes that all persons, owing to one reason or another, do not possess the same capacity to enjoy all rights accorded to them.⁴ The absence of legal capacity restricts a person from freely engaging in a legal transaction.⁵ According to the definition above the legal capacity is an attribute present in a natural person as well as a juridical person. All human beings do not enjoy the same capacity. Those who lack this capacity sometimes become victims of abuse at the hands of those who possess the requisite capacity of execution of rights. Children, due to their

¹Bugalo Maripe, "The recognition and enforcement of children's rights in domestic law: An assessment of the child protection laws in Botswana in light of prevailing international trends". *The International Journal of Children's Rights* 9: 339-359, (Kluwer Law International 2001-2002), 341 (Printed in Netherlands& Available at: European Commission Central Library Brussels from where downloaded in May, 2011.).

² <http://dictionary.reference.com/browse/legal+capacity>

³ <http://www.businessdictionary.com/definition/legal-capacity.html>

⁴ Maripe, "The recognition and enforcement of children's rights", 341.

⁵ *Ibid.*

incapacity or lack of capacity, are more vulnerable and become victims of intentional or unintentional abuse or at least neglect at the hands of their elders.⁶

The age of majority in England and many other countries is eighteen. This has not always been so throughout the history, children came of age at twenty one. In England twenty one was the age of majority from thirteenth century to 1970.⁷

However a child had right in thirteenth and fourteenth century to possess the property but not to dispose it off until the age of 12-14. Children have always attained rights gradually with increasing age. The age of contracting marriage has now set for boys 18 and for girls 16 where as two centuries back it was 12-14. Age of voting also varies from country to country (16-21).⁸

There has always been a debate whether the children be treated differently than adults and is there a need for them to have their own human rights whereas they share these rights with adults, being human they are having the same rights. Whether in practical terms the children are dealt differently or to put it more rightly in a 'special manner'? Exception from adult law can be an advantage for instance being excepted from penalties on begging or being dealt in different courts than adults or being put in juvenile prisons etc. But the question remains whether this has helped children to be treated as special group different from their adults and is it practically possible in all terms? For instance in Norwegian Law there was principle of judging children less

⁶ Ibid., 339.

⁷ Anna Mamalakis Pappas, *Laws and the Status of Child* (United Nations Institute for Training and Research-UNITAR 1983), 2:603.

⁸ Ibid.

harshly than adults seven centuries ago, whereas even today the children of 14-15 years of age are tried by adult courts and put in adult prisons.⁹

The question remains still to be determined, "who is a child"? When one sees that there are children who need to support themselves at much earlier age than the age of work at law, there are children who have their own children and there are children who are active soldiers in armed conflicts. Can we say that childhood cannot be determined in terms of age it might be determined by circumstances of each child till the age he has other people to support and protect him and till the age he has not attained full responsibility? There has been a desire on the parts of adults that children should, according to maturation level, acquire some adult civil and social rights gradually. The question of appropriate maturity to acquire certain rights is somehow difficult to determine and the concept of maturity has also changed during the course of history as right from the time of Roman Empire and the middle ages even a century ago children of 6-8 were farm workers and girls of 8-10 were household servants. Even now we see children playing the role of adults in some respects like active soldiers at the age of hardly 12 or 13, street children supporting themselves or children taking care of their own children.¹⁰ Historically children were thought to be miniature adults and the aim of education was to transform them into adults as much as possible and as quickly as possible. Now it is observed that children are exposed to the information which was in

⁹ Malfred Grude Flekkoy, "Attitudes to Children" in Michael Freeman and Philip Veerman (ed.) *The Ideologies of Children's Rights* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1992), 143-147.

¹⁰ *Ibid.*

past shielded from them and this has given rise to the need of revisiting their needs and demands.¹¹

The question of competence might have reshaped itself so not to consider a child incompetent fully if he is unable to resolve a question partially. Perception of child has sometimes been influenced by needs, interests and perhaps expectations and it has seen historical shifts as well. Children as hope of future and tomorrow's adults are active and participating members of the society and their opinions and views are worth listening to and required by international human rights law to be given due weight to.¹² Recently a significant change in the image of child has occurred in law. The concept that children belong to a special social category is a relatively new social construct. In the legislations of some states the concept of competence with reference to child can be observed undergoing a gradual shift from the previous concept. The child is not only seen as bearer of children's and basic rights but also capable of implementing those rights. The International Human Rights Law indicates that child is to be respected as human being. Historically children were thought to be the property of their elders and were virtually denied all the civil rights and were in a state of powerlessness in determining their own matters and controlling their lives.¹³

Some actors are in favor of full autonomy and self determination for children. The idea of full autonomy may not correspond with the concept of 'best interest of child' however a child should be respected as human being and recognized as legal person so that his needs and rights may not be sacrificed to protect the interest of elders. The notion of "competence" is important to be discussed first while determining the power

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

of implementation of rights of children. The idea of children having the rights of their own like their elders (substantive law) was accepted long ago but to have the power of asserting those rights independently (procedural law) is still a point of discussion. Unlike conventional belief of incompetence of children the present trend seems to be that children acquire certain level of competence at much younger age of their life as was thought earlier so the age of majority might be brought down and children should be given the right of asserting their rights gradually.¹⁴ This approach is similar and very well corresponds to the general policy of Islamic law of gradual release of financial rights which will be discussed later in the following pages.

The Convention on the Rights of the Child was adopted on November 20, 1989 unanimously by the General Assembly of the United Nations. The significance of event is obvious owing to its binding character and that it reflects upon the consensus on recognition of the child as bearer of rights by the States Parties. The rights provided by the Convention such as freedom of expression, right to information and legal aid, freedom of association and public meeting, freedom of thought and liberty of conscience and religion¹⁵ are evidence of the acknowledgment of child's right of self-determination. It is not an instrument assigning rights directly to children but by way of State duties these rights have been ensured. Prior to which only protection rights were taken into consideration but these provisions together with other international and regional instruments such as European Convention on Human Rights are indicative of the evolution of interpretation of child's legal capacity. The legal, social and political

¹⁴Eugeen Verhellen, "Changes in the Images of the Child" in Michael Freeman and Philip Veerman (ed.), *The Ideologies of Children's Rights*, (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1992), 79-82.

¹⁵CRC articles 12,13,14,15 & 26.

rights provided in these instruments have been reflected in the national legislations and procedures and gave impetus to the evolution of the concept of capacity for instance in Belgium a minor can now take the legal action himself for demand of maintenance from parents and a minor may start legal procedure for permission of marriage from juvenile court when he/she wants to marry under the legal age of marriage which is 18 and his/her parents do not agree.¹⁶ Belgium is a civil law country where evidence law is part of procedural law. Under Belgian law a minor below the age of fifteen cannot be heard under oath however his/her statements are merely 'valid information' in both civil and criminal cases.¹⁷ Recently there was a debate (in 2010) to give right of euthanasia to minors. A minor can express his intention to oppose the removal of organs or tissues after death under the Organ Transplantation Law of Belgium¹⁸ and a minor may assert his right to social service if his representative does not do it for him.¹⁹ There are still some areas of law in which the child may be given the opportunity to be heard and given due weight to his opinions and views in the matters affecting him under article 12 of the Convention especially in the familial matters.

In English Law a judge decides whether he will hear a child whereas German Law obliges a judge to hear concerned child from the age of 14 and in Netherland and France it is an obligation to hear concerned child at the age of 12 and 13 respectively

¹⁶ Civil Code Article 145.

¹⁷ Code d'Instruction Criminelle/Wetboek van strafvordering (Criminal procedure Code) Article 79 and Gerechtelijk Wetboek/Code judiciaire (Judicial Code / Civil Procedure Code) Article 931

¹⁸ Organ Donation Law of June 13, 1986.

¹⁹ In Feb. 2014 the Belgian children have been given (the much debated) right to opt for euthanasia regardless to age limit. Previously such right was only available to the children of Netherland but for children over 12 years of age and that too with the parental consent. Robert-Jan Bartunek, "Belgium Extends right-to-die to terminally ill children" - Reuter 13/2/2014 <http://www.reuters.com/article/2014/02/13/us-belgium-euthanasia-idUSBREA1C0UF20140213> (visited on 14/2/2014)

& Heather Beasley Doyle, " Right to die: Netherlands, Belgium ignite debate on euthanasia" - Aljazeera 4/3/2014 <http://america.aljazeera.com/articles/2014/3/4/right-to-die-netherlandsbelgiumigniteglobaldebateoneuthanasia.html> (visited on 6/3/2014)

but the legislations are silent on any obligation to take into account minor's opinion or to give the opportunity to question the decision. Although the child has not been given full status of litigation and the issue of incapacity remains there but in some cases legal age can be reduced for instance in Belgian Law justice of peace may reduce legal age to 15 from 18 to convene the family council for convening the emancipation on the request of such minor when he has no parents.²⁰ A mentally ill person even a minor can lodge appeal against the judgments of the justice of peace. European Commission of Human Rights has also taken into account a minor's capacity in some cases and noted in a case, " a child of 12 developed normally, able to understand his situation and express his opinion clearly..."(the original text is in French).²¹

Interestingly, however the definition of child in the International Law directly or indirectly is related to age whereas "the term 'juvenile' does not correspond necessarily with the concept of child" as the term 'juvenile' defined in Beijing Rule 2(2) (a) is that, "a juvenile is a child or young person who under the respective legal system may be dealt with for an offence in a manner which is different from adult" seems that a 'juvenile' is to be defined by the national legal system. The child in this sense is a person who is not yet an adult. Several concepts denoting to childhood can be found in international instruments which though not clearly defined may overlap the very concept of childhood like; infant, juvenile, minor, youth and young person. The term juvenile is used in relation to judicial proceedings and administration of justice. The first reference of childhood is found in the preamble of the Declaration of the Rights of the Child 1959, "Whereas the child by reason of his physical and mental immaturity,

²⁰ The Civil Code Article 479. See generally Verhellen, "Changes in the Images of the Child", 79-94.

²¹ Ibid., Verhellen, "Changes in the Images of the Child", 79-94.

needs special safeguards and care, including appropriate legal protection, before as well as after birth." But the Declaration does not provide when the childhood ends. According to the Convention on the Rights of the Child, the child is "every human being under the age of 18 years unless under the law applicable to the child, majority is attained earlier" therefore by linking the international definition of childhood with the national age of majority the Convention has tried to accommodate the diverse cultural, religious, social and customary values which might be reflected in national age limit. Whereas the Hague Convention on Civil Aspects of International Child Abduction 1980 defines the child for the purpose of the Convention as being under the age of 16. Minimum age of marriage is left for the discretion of states under the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.²²

In some states age of majority and age to contract a lawful marriage may differ specially in many Islamic states where age of majority (for the purpose of contracting marriage) is considered the age of puberty. For instance in Pakistan age of majority is fixed at 18 for both genders whereas the age of marriage is 18 in case of men and 16 in case of girls.²³ Solemnizing marriage below this age is a punishable offence.²⁴ According to The Juvenile Justice System Ordinance of 2000 and Juvenile Justice Rules of 2001 (Pakistan) a person under the age of eighteen is considered a child for the purpose of law in this regard.

²² Geraldine Van Bueren, *The International Law on the Rights of the Child*, (Martinus Nijhoff Publishers, 1995), 33,36 and 37. See Article 2 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.

²³ Section 2(a) of The Child Marriage Restraint Act No. XIX of 1929.

²⁴ Section 5 of The Child Marriage Restraint Act No. XIX of 1929.

Under the United Nations Convention on the Rights of the Child (CRC) 1989 the States Parties are liable to establish laws specifying minimum age for the Purpose of administration of justice below which age a child will be presumed not to have the capacity to infringe the penal law.²⁵

It is strange that there is a wide disparity in the minimum age of criminal liability even in the same continent. "Does this mean that children mature at such different pace even in the same continent?"²⁶

As for as rights of children provided in the international instruments are concerned, the difference between having a right and being able to exercise it is not clear as a 'child' can be at one hand a very young one and on the other who is near adulthood.²⁷

The age of legal capacity varies in different states. The persons who lack legal capacity till a certain age are regarded as children. A child though dependant on elders have some duties as well such as; going to school, sometimes assisting his elders and sharing their responsibilities to some extent according to his age and maturity level. In some countries adolescents are treated as adults in some respect like they have to serve in army. Children are not self supporting until they reach the age of majority or emancipated by the family.²⁸

²⁵ Article 40 (3) of CRC

²⁶ Geraldine Van Bueren, *Article 40 Child Criminal Justice, A commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers,2006), 27 (referring to, Geraldine Van Bueren, "Child Oriented Justice-An International Challenge for Europe" *International Journal of Law and the Family* (1992) 6 (3) : 381-399, 387. DOI: 10.1093/lawfam/6.3.381)

²⁷ Ursula Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate Publishing Ltd.& Dartmouth Publishing Co. Ltd.1999),18.

²⁸ Yuri Kolosov, "The Rights of the Child" in Janusz Symonides (ed.) *Human Rights: Concepts and Standards* (Ashgate/Dartmouth and UNESCO publishing, 2002), 259.

The Convention on the Rights of the Child 1989 recognizes that a person below the age of 18 years is a child. The article 1 maintains the definition of child as a person below eighteen years of age provided that the domestic law which sets the age of legal majority below eighteen will not be compromised. It means that every such person is fully entitled of enjoying the rights given in the Convention but if the national law recognizes the age of majority less than eighteen years then these rights are available to a person under such age. Full legal capacity is enjoyed after attaining the age of majority however a person may enjoy partial legal capacity with respect to some rights as mentioned earlier the age of marriage or employment for instance might be different from the age of full majority. For example the marriageable age in different countries is not always 18 as in Austria it is 16 for women and 19 for men; in Romania it is 18 for men and 16 for women ; in Malta it is 16 for both sexes and in Pakistan it is 18 for male and 16 for female, in Japan 18 for boys and 16 for girls, in France it is 18 for boys and 15 for girls in El Salvador the national legislation allows the marriage at 14 in case the child has reached the age of puberty or where the couple had a child or the girl has become pregnant(CO El Salvador,2004), in Myanmar no minimum age of marriage is prescribed for boys but the girl of 14 is allowed to marry with the consent of parents(CO Myanmar,2004).Although the Convention does not demand from States Parties to fix the age of majority in their domestic legislations in consistent with the CRC but it has been observed that the differential definition of legal majority sometimes deprive older children the access to essential services and care which otherwise would have been available to them for instance, in Kyrgyzstan, the children having HIV/AIDS their families have been provided assistance in case these children

are less than 16 but the children of 16 or above have been sent to the adult psychiatric care(CO Kyrgyzstan,2004).²⁹

The Convention , however is to be interpreted and understood in context with all other relevant international and national norms as according to the article 41 of the Convention its provisions shall not preclude other norms which exist either in national or international instruments and are more conducive as for as the realization of the children's rights are concerned. As for example article 32(2) considers adoption of national laws with regard to the minimum age of employment whereas the International Labor organization's Convention No.138 has set the working age for most of the purposes at 15.³⁰ Therefore it is recommended that the stipulations of the Convention may be interpreted with a holistic approach in order to make its applicability more effective and universal. However it is obvious that the International community is still away from agreeing on a universal definition of childhood and this might be debatable whether a universal definition is desirable at all but childhood is distinguished from adulthood by one constant and agreed upon feature and that is "incompetence".³¹

The instances of gradual attainment and recognition of legal capacity among children is a corresponding phenomenon of recognition of their rights internationally. However non-agreement over the adulthood age leaves the question of 'competence' and 'legal

²⁹ Trevor Buck, *International Child Law* (Routledge.CavendishTylor&Francis Group, 2007), 57.
(CO El Salvadore (2004)Concluding Observation: El Salvadore's Second periodic Report, Committee on the Rights of the Child, CRC/C/15/Add.232,4 June2004. CO Myanmar (2004) Concluding Observation: Myanmar's Second Periodic Report, Committee on the Rights of the Child, CRC/C/15/Add.237,4June2004. CO Kyrgyzstan 2004) Concluding Observation: Kyrgyzstan's Second Periodic Report, Committee on the Rights of the Child, CRC/C/15/Add.2441 October 2004.

³⁰ Kolosov, " The Rights of the Child", 261.

³¹Geraldine Van Bueren *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, 1995), 38.

capacity' open for interpretation in different circumstances and affords flexibility in this regard.

2.2.1. The Definition of a Credible Witness and Credibility of a Child Witness

"A credible witness is one who is competent to give evidence and is worthy of belief."³² In order to decide upon the credibility of a witness there are certain facts to be considered. First of all the person testifying is capable of understanding and thoroughly knowing the thing or fact about which he is testifying. He/ she was actually present at the time of incident and paid sufficient attention towards it, therefore qualifies to report without deceiving or altering the truth by way of either suppressing it or making an addition to it.³³ It will be discussed in chapter 4 while discussing different that all witnesses, in general, are assumed to be competent including child witness unless he is unable to observe, remember and then report the past incidents.

Most of the former common law grounds of incompetency excluding the witness from testifying have been gradually replaced by statutory provisions and converted into grounds for questioning the witness's credibility. A witness is usually a competent witness if he/she is intelligent enough to understand the nature of oath. There is no provision excluding any person (including a child) from testifying in the court. A careful consideration, however, must be exercised to test his capacity to observe, remember and recount the past incident.

³² www.lectlaw.com/def/c328.htm and see legal-dictionary.thefreedictionary.com/Credible+witness (visited on; 2/2 /2014).

³³ *Ibid.*

The court permits a witness to testify in order to extract truth from him/her it, therefore, must test the witness's credibility. Generally a witness is not credible if he/she is proved;

- (a) To have made a statement of fact that is not true.
- (b) To be biased, hostile or having a personal interest in the case
- (c) To have a criminal record or bad reputation
- (d) To have made a statement previously and that is not consistent with the present testimony.
- (e) To have a defect having effect on the accuracy of evidence such as poor eyesight, hearing disparity or memory lapse.³⁴

2.3. Legal Capacity in Islam and Credibility of Child Witness

Ahliyyah or legal capacity in Islamic Law indicates ability to acquire and exercise rights and to accept and perform duties,³⁵ therefore the capacity is twofold i.e. the capacity of acquisition of rights and the capacity of execution of rights. The capacity can be complete or deficient. Deficient capacity is before puberty and in case of idiocy. Under deficient capacity a person may perform valid acts but is no way under an obligation to perform or in other words does not incur obligation of performance except in case of complete capacity.³⁶ Therefore, it may be said that a child possesses complete

³⁴ Jim Kouri , *Justice witness, competency and Credibility*(article) www.examiner.com/public-safety-international/justice-witness-competency-and-credibility

³⁵ Shamil Rasheed Yaseen, Al-Shaikhali ,*'Awarid al-Ahliyyah bain al- Shari'a wa al-Qanoon* 1st ed., (Baghdad: Matba'a al-'Ani,1974),18.

³⁶, 'Ala-ud-Din 'Abdul 'Azeez, Al-Bokhārī, *Kashf al-Asrār 'un Usul-e-Fakhr al Islam al-Bazdawī* (Beirüt: Dār al Kutub Al'ilmiyyah,1997) 4:350.

capacity of acquisition of rights and obligation but lacks the capacity of execution until the attainment of age of puberty.³⁷

Minority (*Sighar*) is one of the various causes of deficient capacity. It is the period between birth and puberty. In order to understand the concept of legal capacity in Islam and then legal capacity of a child there is need to elaborate further the childhood and minority in Islam and then the concept of legal capacity or *Ahliyyah* in detail.

2.3.1. Child or Childhood in Islamic Law (*Shari'a*)

The corresponding words for child in Arabic are; *saghīr*, *sabī*, *ghūlām* and *tīfl* and for childhood *sighr* that is state between birth and puberty. Whereas puberty is known in Arabic as *bulūgh*, linguistically it means 'reaching the goal' and 'attaining the excellence'. Literally it means; termination of the state of childhood and reaching the adulthood.³⁸ The Muslim scholars have mentioned three different stages from childhood to full maturity; the first stage of child which is without cognition starts from infancy to seven years, the second from seven to puberty with weak cognition and then third stage starts from puberty to full maturity and that is the age of full cognition.³⁹ However the discernment and cognition has no fixed age. The discernment can be seen in a child before the age of seven or may not be seen even after seven years depending upon the culture, health and intelligence of a child but jurists have given different stages of gradual attainment of discernment and cognition depending on the age of child for

³⁷ Ibid., Al-Bokhārī, *Kashf al-Asrār*, 4:350.

³⁸ Roohi Ba'albaki, Muneer Ba'albaki, *Al-Mawrid*, 4th ed., (Dār al-'Ilm Lilmala'een, 1999).

³⁹ 'Abdūl Qadir, 'Awda, *al-Tashrī' al-Jināt al-Islāmī*, (Cairo: Maktabah Dār al-Turāth 22 Shar'e al-Jamhuriyya n.d.), 1: 514-516.

uniformity of law and removal of ambiguity.⁴⁰ A child is considered non-discriminating before the age of seven and does not incur any liability neither criminal nor disciplinary punitive except for civil liability to compensate from his assets for damage caused by him to the property or person of others.⁴¹ Weak cognition begins at the age of discernment and that is seven years and continues till puberty which has been fixed by majority of jurists at fifteen years even if the child does not attain puberty actually and is liable to disciplinary punitive.⁴² The age of full cognition or maturity begins with the age of puberty with the difference of opinion mentioned earlier. At this stage a person is criminally liable and can be punished for his/crimes minor or major whether for *hadd*, *qisās* or *tazir*.⁴³

The reason that classical jurists⁴⁴ have differed on the maximum age of puberty is that they agreed that puberty of a person depends on certain physical signs like ejaculation in male⁴⁵ and menstruation in female and some other signs.⁴⁶ If these signs are not present then the matter is decided upon the age of a person. The jurists are not in agreement over the exact age of maturity. *Imām Abū Hanifa* says it is seventeen for female and eighteen and in another opinion reported unto him is nineteen years for male. *Maliki* school of thought is in agreement with *Abū Hanifa*'s opinion.⁴⁷ Umar, the

⁴⁰Ibid., 514.

⁴¹Ibid., 515.

⁴²Ibid., However upper limit of puberty has been fixed by other jurist differently for example eighteen by *Abū Hanifa* and this is popular opinion in *Maliki* school of thought and nineteen according to some others.

⁴³Ibid., 516.

⁴⁴The Jurists of classical *Sunni* schools.

⁴⁵Al-Qur'ān 24:59, and Hadith; "The pen has been lifted unto three; from a sleeping person until awakes, from a child until attains puberty and from an insane person until attains intellect"-Al-Būkhārī, *Bab al-Talāq*, (Cairo: al-Maktabah al-Salfiyyah 1400 H), 3:405. (*Būlūgh Al-Marām*, Hadith: 927).

⁴⁶Al-Qur'ān 65:4

⁴⁷Abdul Qadir, 'Awda *Al-Tashr'i al-jinā'i al-Islāmī*, 1:516.

guided caliph, would not inflict *had* punishment on boys who had no physical signs of *bulūgh*.⁴⁸ This difference of opinion among the jurists regarding the age of maturity suggests that it is a matter of *ijtehād*.⁴⁹

Regarding age of puberty and majority different opinions are found in Islamic *fiqh*. The puberty starts in the case of a boy at ejaculation and in case of a girl at menstruation but for the purpose of liabilities jurists have prescribed age of majority for instance ‘Umar b. ‘Abdul ‘Azeez wrote to his governors to implement obligations for boys at the age of fifteen as he received the report that the Prophet (peace be upon him) did not allow *Ibn ‘Umar* to fight in the battle of *Uhad* while he was fourteen years old but allowed him later when he was fifteen at the time when the battle of *Khandaq* was fought and he (‘Umar b. ‘Abdul ‘Azeez) said this (fifteen years) is distinguishing mark between child and adult. Qastalānī has mentioned Shāfi‘ī’s report that the minimum age of menstruation was seen in the women of *Tihamah* and that was nine years. Whereas there is a report of *Mugheera*’ having ejaculation at the age of twelve.⁵⁰ According to some reports *Uhad* was fought in third year of *hijra* whereas *khandaq* was fought in fifth year therefore he (*Ibn ‘Umar*) was sixteen years old at that time. If this is accepted then age of majority will be sixteen rather than fifteen years. It has been argued from this that when a boy completes fifteen lunar years from the moment of his birth he has attained majority, even if signs of puberty like ejaculation are absent, and is liable to

⁴⁸ Hafiz ‘Imad-ud-Din, *Ibn Kathīr*, *Tafsīr Ibn Kathīr*, (Urdu translation by Maktaba-e-Tameer-e-Insaniyat, Lahore n.d.), 1: 541.

⁴⁹ *Ijtehād* lit. meaning ‘effort’, in law it is used of individual reasoning, striving or exerting to form an opinion in a given case by applying analogy to the Qur’ān and the traditions of the Prophet. The opposite of *Ijtehād* is *Taqlīd* i.e. unquestioned acceptance of the rules of the established schools of thoughts. [The encyclopaedia of Islam, (ed.) P.J. Bearman and others, Index Volume (New Edition), (Leiden, Boston: Brill- 2009), 278].

⁵⁰ Shahabuddīn Ahmad b. Muhammad Al-Shāfi‘ī, Al-Qastalānī, *Irshād al-Sari li Sharhe Sahīh al-Būkhārī*, (Beirut: Dār al-Kutub al-‘Ilmiyyah n.d.) 6:121.

fulfill all obligations like '*ibadat* (rituals) and infliction of *hadd* and is entitled to the portion of booty of war. *Abū Hanifa* and *Malikiyyah* are of the opinion that age of majority in case of a boy is eighteen years and in case of girl it is seventeen⁵¹ as *Al-Qur'ān* ordained with regard to the property of orphans;⁵² Interpreted *Ibn 'Abbas* as eighteen and in case of girls reduced one year due to their expeditious growth and puberty.⁵³

The difference of opinion regarding the age of *bulūgh* has emerged mainly due to variations in the visibility of physical signs of *bulūgh* at different ages in different persons. This usually depends on the culture, environment, climate, nature of food and genetics of a person.⁵⁴

On careful study it is understood that there are two mainstream opinions of jurists emerged regarding age of majority; one is fifteen and other is eighteen. This difference is owing to the fact about maximum age of *bulūgh*.⁵⁵

The study of contemporary legislations and International law compared with Islamic law concept of childhood, maturity, cognition and gradual attainment of liability and variations of majority for different purposes has revealed that all these legal systems are compatible and are not very much different from each other in terms of these concepts. The need is that all these disciplines may come to one page and agree on one criterion and fix uniform age of criminal liability and age of majority as otherwise it may lead to

⁵¹Ibid., 122.

⁵² Al-Qur'ān 6:152

⁵³Al-Qastalānī, *Irshād al-Sari li Sharhe Saḥīḥ al-Bukhārī*, 6: 120-123.

⁵⁴ Sometimes children may undergo precocious puberty. It has been observed by experts that puberty is starting earlier in US than it did before. See <http://www.webmd.com/children/guide/causes-symptoms> (visited in May, 2014).

⁵⁵'Abdūl Qadir, 'Awda, *al-Tashr'i al-jinai al-Islami*', 1:517. ("*Bulūgh*" is puberty).

dangerous implication for instance when there is the question of awarding *hadd*⁵⁶ punishment or infliction of other liabilities.

2.3.2. Legal Capacity (*Ahliyyah*)

Legal Capacity or *Ahliyyah* is ‘ability of a person to acquire and exercise rights and to accept and perform duties.’ or in other words it is “Capacity of acquiring legal rights (for himself) and duties (towards others)”⁵⁷ This shows that the legal capacity in Islamic Law is twofold; capacity of acquisition and capacity of execution which are termed in Arabic as; *Ahliyyatu'l wujūb* and *Ahliyyatu'l Adā*.⁵⁸

The Capacity of acquisition enables a person to acquire the rights and duties whereas the capacity of execution enables a person to execute his rights and perform the duties and fulfill his obligations. *Ahliyyatu'l wujūb* is actually present with the birth of man and based on *Dhimmah* which is considered by the jurists as a pre-requisite for the existence of *Ahliyyah* or more appropriately it refers to a person as a ‘seat of obligation’.⁵⁹ A man is born with *Dimmah* appropriate for *Wujūb*,⁶⁰ and is referred to as the man’s holy covenant with his Lord:

“When your Lord drew forth from the children of Adam-from their loins-their descendants, and made them testify concerning themselves, (saying): “Am I not your

⁵⁶ *Hadd* punishments are fixed punishments pl. ‘*hudud*’ for crimes like; fornication, false accusation of fornication, theft, highway robbery, apostasy and drinking intoxicants.

⁵⁷ Al-Bokhārī *Kashf al-Asrār 'un 'Usul al-Bazdawī*, 4:335.

⁵⁸ *Ibid.*

⁵⁹ Baber Johansen, (Conference Paper) *The Legal Personality (Dhimmah) and The Concept of Obligation in Islamic Law* available at; www.econ.yale.edu/~egcenter/johansen_paper.pdf

⁶⁰ Al-Bokhārī, *Kashf al-Asrār li'l Bazdawī*, 4:336.

Lord (who cherishes and sustains you)?” They said: “Yes, We do testify.(This), lest you should say on the Day of Judgment. “Of this we were never mindful.”⁶¹

This refers to the eternal covenant of man with his Lord by way of which each soul is responsible and accountable for his acts. According to the traditions of the Prophet (peace be upon him) that at the time of creation of Adam, the whole progeny of Adam was gathered to testify that the Lordship is only attributed to Allah and no one else.⁶²

Ibn Kathīr has mentioned that Aswad b. Sar’ee fought four battles along with the Prophet and said that once Muslim fighters killed infidels and held their children. The Prophet (peace be upon him) disliked this act. Someone said; “O Prophet! Aren’t they children of *Mushrikīn*? The Prophet said; “among you many good people are children of infidels, there is no soul who is not born on Islam and remains Muslim until they learn the language of their parents and their parents make them Christian or Jew.”⁶³

The jurists have considered ‘*dhimmah*’ as an attribute *sharī’i* in a person holding *Ahliyyah* in both its forms i.e *Ahliyyatu'l-Wujūb* and *Ahliyyatu'l-Adā*. It is considered as an attribute or trust conferred on humans by their Lord as a result of the Covenant between Him and them. This shows that, in the light of classical opinions, *Dhimmah* or *Ahliyyah* can only be assigned to natural persons and not the juridical or fictitious person in contradiction to the Western Law (see definition of legal capacity 2.3). *Dhimmah* according to jurists is a collection of rights and obligations for and upon a person. It has the same meaning in language and *Shari’ah* and that is ‘covenant’ as mentioned earlier, that is why a non-Muslim living in Islamic state is said to be

⁶¹ Al-Qur’ān 7:172.

⁶² Ibn Kathīr, *Tafsīr Ibn Kathīr*, 2:255.

⁶³ Ibn Kathīr, Imām, *Tafsīr Ibn Kathīr*, 2:255-256.

‘*dhimmi*’ as he is promised by the state to be protected. ‘*Dhimmah*’ originated from the said covenant is cause of capacity of human to incur rights and make him liable of complete capacity of ‘*wujūb*’ (*Ahliyyatu'l Wujūb Al-kamilah*). Once it is understood that ‘*dhimmah*’ means covenant then it becomes ‘*manāt*’ (basis) of demand of right from the holder of ‘*dhimmah*’ therefore ‘*dhimmah*’ becomes a place of obligations whether fiscal or religious. According to jurists ‘*dhimmah*’ and ‘*ahliyyat al-wujūb*’ are strongly linked or even considered same but the jurists have gone one step ahead by saying that ‘*dhimmah*’ has real existence and it is not a matter of presumption.⁶⁴

However some jurists say that there is no need to assume an extra concept of *dhimmah* and instead of saying that a person’s *dhimmah* is engaged with such and such amount of so and so person we may simply say that a person owes an amount towards someone.⁶⁵

The complete capacity of acquisition is available to each human being right after the birth whereas complete capacity of execution is available to him after full maturity that is attaining of full mental development and discerning ability. This is when the person attains puberty and maturity. Only attaining the puberty as per physical signs of it may not be sufficient to consider a person having complete capacity of acquisition unless the puberty is accompanied with ability to sound judgment or *rushd*. According to the Qur’ānic verse the capacity of execution to orphans is delegated on their attaining the puberty and sound judgment;

⁶⁴ Shamil Rashīd Yasīn Al-Shaikhilī, ‘*Awarid al-Ahliyyah bain al-Shari‘a wa al-Qanoon* 1st ed. (Baghdād: Matb‘a al-‘Anī, 1974), 23, 24.

⁶⁵ *Ibid.*, 25.

“And try orphans (as regards their intelligence) until they reach the age of marriage; if then you find sound judgment in them, release their property to them, but consume it not wastefully and hastily, fearing that they should grow up, and whoever (amongst guardians) is rich, he should take no wages, but if he is poor, let him have for himself what is just and reasonable (according to his labor). And when you release their property to them, take witness in their presence; and Allah is All-Sufficient in taking account.”⁶⁶

It is obvious from the foregoing verse that the orphans' wealth will be transferred to them when two conditions are complied and found on their trial; one is *bulūgh* (*al-nikah*) and second is *rushd* that is age of marriage and sound judgment. As mentioned earlier the *bulūgh* is dependent on the presence of some physical signs in humans whereas *rushd* denotes to a mental state and according to the majority jurists it is capability of person to handle his financial matters. According to *Abū Yousaf*, *Imām Muhammad* and *Shāfi'i* the pre-requisite for transfer of wealth is *rushd* (but according to *Imām Abū Hanīfa* after *bulūgh* if *rushd* is not found the guardian of orphan may wait another seven years after this period the wealth may be transferred in any case but it seems appropriate that the matter should be referred to *qādī* to decide if the *rushd* is present otherwise he may arrange for supervision of such wealth.⁶⁷ Opposite of *rushd* is *safah* (foolishness);

⁶⁶ Al-Qur'ān 4:6

⁶⁷ Syed Abū 'l 'Alā, Mawdūdī, *Tafheem al-Qur'ān*, 33rd ed., (Dehli: Markazi Maktaba-e-Islamī, 1999) 1:323, 324.

“And give not unto the foolish your property which Allah has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice.”⁶⁸

It is, therefore, agreed upon view of jurists not to deliver the property to the person who has not yet attained *rushd* although he might have attained *bulugh*. *Abū Hanifa* is of the opinion that a person who might not appear to have *rushd* on such trial but has reached the age of twenty five years should not be subjected to interdiction and his property must be delivered to him. This opinion has been criticized as baseless and without any evidence from *Al-Qur’ān* or *Sunnah*.⁶⁹

Ahliyyatu'l wujūb is based on presence of *dhimmah*. When man is born he is said to be born with *dhimmah* capable of *wujūb*. Therefore basis of *ahliyyatu'l wujūb* or acquisition of rights is *insāniyyah* (being human). This capacity has nothing to do with age (*sin*), intellect (*'aql*) or sound judgment (*rushd*). *Ahliyyatu'l wujūb* is present in the child before birth and continues until death when his debts are cleared or when the child is born dead.⁷⁰ Therefore *ahliyyat u'l-wujūb* is dependent on the presence of soul in body and has nothing to do with intellect or discerning and is of two types; *Ahliyyatu'l-Wujūb naqisah* and *ahliyyatu'l-wujūb kamilah* means complete legal capacity and incomplete or deficient legal capacity. The example of first is an unborn child as rights

⁶⁸ *Al-Qur’ān* 4:5

⁶⁹ Muhammad, Abū Zahra, *Hayāt Abū Hanifa* trans. Ghulam Ahmad Hariri 3rd ed. (Faisalabad : Malik Sons Publisher, 1983), 665

⁷⁰ Al-Shaikhailī, ‘Awarid al-Ahliyyat, 21.

of progeny, inheritance and will and example of second is a living person capable of incurring pecuniary liabilities as bearer of *dhimmah*.⁷¹

Whereas *ahliyyatu'l-adā* or the capacity of execution or performance of duties is, "capability of a human being to be bound by his statements and to demand from other and other may demand from him to perform acts to which certain legal consequences and liabilities have been assigned due to contractual obligations."⁷² Some jurists have assigned it to both 'acts' and 'statements' whereas some others have either attributed it to 'acts' or 'statements' only creating legal impact. The *Ahliyyatu'l-adā* is of two types; *ahliyyatu'l-adā kamilah* (full capacity of execution) and *ahliyyatu'l-adā naqisah*' (deficient capacity of execution).⁷³ The deficient capacity is available in cases before puberty or age of maturity or even after puberty when a person's mental capabilities have not developed fully or he is suffering from idiocy. The main criterion for full capacity of execution is considered *bulūgh* or the age of puberty because at this stage a person may generally have balance of intellect and physical ability to act.⁷⁴ As it is said, "the pen has been lifted from a child until matures, an insane until cured and a sleeping person until wakes up" (*Hadith*). Meaning of 'pen' is accountability and there is no accountability without obligation of execution or *adā*.⁷⁵

'*Ahliyyahtu'l-adā kamilah*' is therefore attained with the completion of intellect combined with complete physical ability incurs '*wujūb al-adā*' it is *qasirah* or deficient/incomplete when either intellect or physical ability is lacking for instance a

⁷¹Ibid., 22, 23. 47.

⁷²Ibid., .67.

⁷³Al-Bokhārī, *Kashf al-Asrār*, 325.

⁷⁴Ibid., 350-351.

⁷⁵Ibid., 351.

child even although bears intellect lacks physical ability to carry out *hukm* (divine order) thus bears incomplete or deficient capacity of execution (*ahliyyahtu'l-adā qasirah*). Same is the case of a person having full physical capacity but lacking intellect or mental maturity *m'atū'* or idiotic bears incomplete or deficient capacity.⁷⁶

2.3.3. Legal Capacity of a Child

In the previous section the concept of legal capacity in Islamic Law has been discussed. The legal capacity of a child at Islamic Law (*Shari'a*) develops gradually. There are developmental stages of attaining the capacity in Islamic Law.

As mentioned earlier that *Abū Hanīfa* is against interdiction on a person who has reached the age of twenty five years although he might not possess *rushd*⁷⁷

A person passes through three stages while attaining full capacity of execution; the first stage is from birth to the age of seven years when the child is considered to lack discretion and does not possess capacity for execution, the second stage starts from the age of seven which is the age of discerning until the age of puberty this is the stage of deficient capacity and the third stage which is the stage of attaining complete capacity of execution and it commences from the age of puberty either actual or legal whichever is earlier however the complete capacity of execution is assigned to an individual if the puberty accompanies *rushd* otherwise the individual who possesses the puberty or *bulūgh* but does not possess *rushd* is put under interdiction (*hajr*) till the time he attains

⁷⁶ Al-Ansārī, Abdūl 'Ali Muḥammad bin Nizamuddīn Muḥammad, *Kitāb fowatih al rahmūt*, (Beirūt: Dār-al M'arifa'), 1: 156.

⁷⁷ Abū Zahra, *Hayāt Abū Hanīfa*, 69.

rushd or otherwise (according to the opinion of *Abū Hanīfa*) reaches the age of twenty five years.

The foregoing discussion suggests that a minor who has attained a degree of discernment (*sabī mumyyaz*) possesses deficient capacity of execution. Before proceeding further it seems pertinent that it may briefly be noted here, the nature of address of the Lawgiver and its types. The address or communication of the Lawgiver Almighty is termed as (*khitāb shar'i*) and is pertaining to criminal acts, civil acts and rituals. The communication pertaining to criminal acts is termed as *khitāb jināī*, to civil acts '*khitāb fi al-ma'amilāt*' and to rituals or acts of worship '*khitāb fi'l'ibadāt*'. An individual possessing complete capacity is subject to all forms of communications. A discerning child who is supposed to possess deficient capacity is not subject to all communications he may be subject to '*khitāb fi' al- moa'milāt*' but in a limited manner similarly he may be subject to '*khitāb fi'l'ibadāt*' but by way of recommendation or '*nadb*' and for training purposes and is not subject to punishment for non performance and finally he is not subject to *khitāb jināī* in any case, however the child may be subjected to discipline or *ta'dīb* in both these cases. A question arises here regarding the minimum age of criminal liability in International Law and national legislations as to how far it can go hand in hand with the Islamic Law? This will be discussed at its appropriate place.

2.3.3.1. Legal Capacity of minor in financial transactions and concept of interdiction (*Hajr*)

As mentioned earlier the liability of a discerning minor is limited. The deficient capacity of *ahliyyatu'l-wujūb* and *ahliyyatu'l-adā* is classified into rights of Allah and rights of man. With regard to the capacity of minor concerning rights of Allah there is a great deal of arguments and counter arguments of jurists⁷⁸ but what concerns this research is rights of man and capacity of child in '*khitāb fi'l mo'amilāt*'. The minor possesses limited capacity of execution. A person before attaining puberty goes through three different stages. At the stage of fetus only *ahliyyatu'l-wujūb* is present and not *ahliyyatu'l-adā*. The fetus is governed by the rule applicable to mother in some matters like slavery and freedom etc. Second stage is non-discerning child and that is after birth to seven years of age. At this stage child is devoid of *ahliyyatu'l-adā* and lacks discerning and cognition therefore is not *mukallaf* of *'ibadāt* or beliefs and is not responsible for his acts or statements. The third stage is on attaining seven years of age when child becomes discerning and bears deficient capacity of execution. The child at this stage is encouraged on performing *'ibadāt* which are accepted from him but is not *mukallaf* of anything in this regard. The child attains cognition gradually and his transactions are divided into three categories.⁷⁹

⁷⁸ See Al-Bokhārī, *Kashf al-Asrār*, 4:351, 352, 353, 354&355.

⁷⁹ See generally Al-Shaikhilī, 'Awarid al-Ahliyyah, 85-89.

The transactions of a child at the age of seven or discerning are of three types; those which are purely beneficial, or oscillating between beneficial or harmful and those having purely harmful effect.⁸⁰

Purely beneficial acts accepting gifts and *sadaqa* are acceptable from discerning child just like an adult bearing full capacity of execution. The transaction swaying between benefit and harm require guardian's approval for enforcement like sale, lease etc. Whereas purely harmful transactions are not enforceable even if guardian allows therefore are considered void.⁸¹

Interdiction or *hajr* is prohibition of transaction (in one's property) either verbally and not by way of act (as act cannot be reversed) for reason of minority or insanity or idiocy this type of *hajr* is from the Law (Lawgiver) but another type of *hajr* is by the order of a court like *hajr* in case of insolvency.⁸²

Is there any relationship between *hajr* and testimony in the court? There is an element of *wilayah* (which means undertaking an affair and having authority and right of disposition) in evidence or *shahadah* the purpose of judicial process is to end the litigation whether the subject matter is personal right like marriage, divorce or custody of a child, or a civil right like sale or a penal right like theft and murder etc in all these matters a judge is supposed to base his judgment on evidence in all its forms including testimony, admission and confession, documentary and circumstantial evidence etc. a minor subjected to interdiction does not possess *wilayah* on himself. It is quite obvious

⁸⁰ Al-Bokhārī, *Kashf al-Asrār*, 4:360,361. And Al-Shaikhailī, 'Awarid al-Ahliyyah, 89,90&91.

⁸¹ Ibid.

⁸² 'Ali, Abū'l Basīr, "Shahadat al-Sagheer wa Hujjiyyatuha fi'l-Fiqh al-Islāmī", *Mojallatu Jamiyyat al-Damishq li'l-ulūm Al-Iqtisadiyyah wal Qanūniyyah*, Volume.25, Number.1, (2009), 750. The evidence of *hajr* is found in Al-Qur'ān 4:6 and 2:282.

that he cannot possess *wilayah* on others.⁸³ Thus a minor may be unable to create a right by way of his statement or testimony.

2.4. ‘*Shahadah*’ (Evidence) and Child Testimony in Classical Islamic *Fiqh*

In Islamic Law the evidence is afforded great significance, so much so that false testimony is considered a great sin. It is also reported that the Prophet (peace be upon him) once said you should respect your witnesses because God gives “life” to the rights because of them.⁸⁴ The Quran says; “*Witnesses should not decline whenever called upon (to testify)...*”⁸⁵ This is in case when a person has undertaken to be a witness in any matter or transaction, he should not refuse to testify in proceedings related to that matter.⁸⁶

The word “*Shahadah*” is basically used to testify faith (*Imān*) when a person declares faith he says; “I bear witness/ testify that there is no lord except Allah and Muhammad is his Messenger”. Qur’ān has attributed ‘*shahadah*’ to the Muslim *Ummah* on the Day of Judgment, “*How (will it be) then, when We bring from each nation a witness and We bring you (O Muhammad) as a witness against these people?*”⁸⁷

This refers to the presenting of all people before Allah on the Day of Judgment when all prophets will testify that they have conveyed to their people all what was sent unto them and discharged their liability finally the Prophet Muhammad (peace be upon him)

⁸³Ibid., 751.

⁸⁴Shamsuddin al-Sarakhsī, *Almabsoot*, 2nd ed., (Beirūt: Dār al-M‘arifah li-al-Tab‘a wa al-Nashr), 16:112. The hadith was reported by Al-Khatīb and Ibn ‘Asāker from Ibn ‘Abbās. *Kanz al-‘Amāl fi sunan al-Aqwāl wal Af‘al*, chapter on Shahadāt 17733 (Beirūt: Mo‘assasatu al-Risalah), 7:12.

⁸⁵ Al-Qur’ān 2:282.

⁸⁶ Ibn Kathīr, *Tafsīr Ibn Kathīr*, 1:390.

⁸⁷ Al-Qur’ān 4:41.

will testify that he has conveyed and told all what was revealed unto him so to discharge his liability. The teachings of Islam indicate that his people are not only from his era but all people to come till the Day of Judgment as he is the last prophet.⁸⁸

It is suggested by foregoing verse (2:282) that it is a religious duty of a person to testify and thus assist the justice process in restoring the rights to their rightful claimants. As it is an obligation by way of *kifayah* to testify, the children are not duty bound in Islam. They are not having responsibilities or in other words, as established in the previous section, they do not have full capacity of execution or '*Ahliyyah al-adā'*.⁸⁹ The problem may arise when there are only children to have witnessed an incident or being victims of an offence, not admitting their testimony or statement may lead to injustice and non-vindication of rights. The examples of admitting the statements of the children are found in early legal history of Islam. Anas b. Malik (May Allah be pleased with him) has reported that a girl was found with her head smashed between two stones. People asked her, "Who has done this to you? Is it so and so or so and so?" till they mentioned a Jew whereupon she gave sign with her head (to affirm). The man was brought and he confessed. The Prophet (peace be upon him) ordered that his head be crushed between two stones (by way of retaliation/retribution).⁹⁰

The above mentioned *hadīth* is evidence of The Prophet's accepting the statement of child victim however the offence of murder was proved by the confession late.

⁸⁸ Mawdūdī, *Tafsīr ul-Qur'ān*, 33rd ed. 1:353.

⁸⁹ Al-Bokhārī, *Kashf al-Asrār li'l-Bazdawī*, 4: 351-355.

⁹⁰ Al-Hafiz Ibn Hajar, Al-'Asqalānī, *Bulugh al-Marām fi Adillat-al Ahkām*, Kitab al-Jinayāt hadith 999 (Riyadh Saudi Arabia: Dār al-salām n.d.), 373 (This hadith is agreed upon and reported in the words of *Muslim*)

Similarly 'Ali (may Allah be pleased with him) is reported to have accepted testimony of children in a homicide case.⁹¹

General view of the Classical Islamic Jurists regarding the testimony of children seems to be of non-admissibility except that there are certain details and conditions by way of exceptions to the general principle.⁹²

The classical Islamic jurists have prescribed certain conditions to be fulfilled in order to allow testimony of children to be admissible. This research aims at finding out the opinions of jurists, propounded in this regard, in detail and then to form an Islamic theory of admissibility of child testimony.

Early jurists of Islam have mentioned child witness while discussing the conditions for admissibility of evidence. No detailed writings dealing the issue of child testimony separately are found. The jurists have only mentioned it amongst their discussions on 'Puberty' or 'majority' and 'probity' of a witness while discussing generally conditions for the admissibility of oral evidence. They have all agreed that tendering evidence is obligatory by way of *kifayah*⁹³ and children are not liable for the performance of obligatory acts, although they may perform them by way of choice or as part of their training like obligatory prayers etc. The children may be encouraged to perform acts for

⁹¹ Imām Shams al-dīn Abū l-Farj 'Abd al-Rehman ibn abi 'Umar Muhammād b. Ahmad Ibn Qūdamah', *Al-Shārh al-Kabīr* , (Riyadh: Jami'at al-Imām Muhammād Ibn Sa'ud n.d.) 6:256.

92 Please see for example; 'Ala-ud-dīn Abū Bakar Ibn Mas'ūd Al-Kāsānī, *Bida'e al-Sana'e fi tartib-al-Shara'e*, (Beirut : Dār al-Kutub Al'ilmyah,) 6:226, , Shamsuddin Al-Sarakhsī, *Kitāb al-Mabsūt*,(Beirut : Dār al-M'arifa'littab'a wa al- Nashr) 6: 113, Abū 'Abdullah Muhammād Ibn Idrees Al-Shāfi'i, *Kitāb al-Umm* (Beirut: Dār al-M'arifa') 4:48, Ibn Ahmad ibn Sa'eed, Ibn Ḥazām, Al-Muḥalla (Dār al-Afāq al-Jadidah'), 9:420 Abū l-Walīd Muhammād Ibn Rushd, *Bidayat al-Mujtahid wa Niḥayat al-Muqtasad*, (Beirut: Dār al-Kutub Al'ilmyah,), 2: 462.

⁹³ That is required from a community of Muslims, if some people perform it the duty is discharged and rest of the people are not accountable for non-performance of the obligatory act, another example is 'funeral prayers'.

training and asked to perform obligatory prayers when reached at the discerning age and reprimanded on refusing to pray but they are in no way considered sinners if they opt not to perform these acts.⁹⁴

The Qur'ān proclaims that the one who conceals evidence his heart is abode of sin (2:283). According to a tradition of the Prophet (peace be upon him) the pen (liability/accountability) has been lifted from three; a sleeping person until wakes up, from an insane person until he is cured and from a child until attains puberty (majority).⁹⁵ This shows that the obligation of testimony is not directed to the children. Another argument which is generally afforded by the jurists in favor of non-admissibility of children's testimony is Qur'ānic verse which has ordained to make "thy witnesses whom you choose (consent)" and "make thy witnesses two out of your men".⁹⁶ It is argued that we do not choose (or consent to) the children to be our witnesses and that they are certainly not "men".⁹⁷ Other arguments include lack of ability to memorize the incident with accuracy and to recount with thoughtfulness and maturity, lying out of fear and no accountability for false testimony may render their evidence inadmissible.⁹⁸

Generally all the jurists agree that children's evidence cannot be accepted in cases of adults and it is only admissible when they testify in the matters in which only children are involved like hurt, injury and tearing clothes. It means those matters which they

⁹⁴ Al-Bukhārī, *Kashf al -Asrār* , 4:358.

⁹⁵ Abū 'Abdullah Muḥammad b. 'Isma'īl Al-Bukhārī, *Bāb-al-Talāq*, (Cairo: Al-Maktabah Al-Salafiyyah, 1400H), 405.

⁹⁶ Al-Qur'ān 2:282.

⁹⁷ Allama Abū Bakr b. 'Ali Al-Rāzī Al-Jassās, *Aḥkām al-Qur'ān*, trans. Abdul Qayyūm (Islamabad: Sharī'a Academy IIU), 2 : 472-473.

⁹⁸ Ibid.

might encounter during their play. Their statement is admissible before they leave the place of occurrence.⁹⁹ In this regard three statements are reported from *Aḥmad b. Ḥanbal*; one is that a child's evidence is not admissible until he attains puberty, second is that the one who is judicious and ten years old may testify this implies that a child's testimony may be accepted(even in the matters of adults) except for *Qisās* and *Hudood* cases, and third that their evidence is only admissible in case of hurts and murder and that too, when they testify before parting and leaving the scene of offence so that they may (testify while) remember¹⁰⁰(details).(This means that the children's statements must be recorded immediately. The same procedure is adopted in some western countries where the person/official to whom such statement is made immediately after the incident can reproduce it in the court later and it is admissible as an exception to the hearsay rule).¹⁰¹

According to *Shāfi‘ī* approach the evidence of children is not admissible as a general principle for the same reasons quoted earlier and they have also mentioned report of *Ibn ‘Abbas* and *Ibn Zubair*, that *Ibn Abi Malīka* wrote to *Ibn ‘Abbās* asking him about the evidence of children he wrote to him “Allah says, “...among those whom you choose” children are not among those whom we choose(to be our witnesses) whereas *Ibn Zubair* allowed their testimony in the matters among them regarding their injuries etc. before they part and leave the place of incident as there is likelihood of being tutored (by elders). *Al-Hasan* has allowed their testimony in injuries (*mawaddīha*) and tooth following *Ibn Zubair* in this regard. *Shāfi‘ī* has also argued against the children's

⁹⁹ Abū'l Hassan ‘Ali Suleman Al-Mardāwī, *Al-Insāf fi Ma‘rifat al-Raj‘e min al-khilāf ‘ala Madhab Al-Imām Ahmad b. Ḥanbal* , (Beirūt: Dār al-Turāth al-Arabi,1998) 12:29.

¹⁰⁰ Al-Mardāwī, *al-Insāf*, 28-29.

¹⁰¹ See also 'Fresh Complaint Doctrine' discussed in Chapter 4, on p.182-183.

According to the opinion of *Ibn Hazm* evidence of children is not acceptable whether male or female neither in the matters concerning children nor in the matters involving elders. On the other hand he has mentioned reports of 'Ali, *Muawyya* and 'Umar b. 'Abdul 'Azeez allowing children's testimony in their own matters. He has also mentioned report of *Masrooq* reporting the judgment of Ali in a case where two children were drowned and a group of children were accusing others and those in turn accusing the first group and 'Ali decided that each group is liable to pay *diyya* in proportion to the evidence available against them. *Abū Muhammād Ibn Ḥazm* has criticized those who allowed the evidence of children; first because no evidence from *Al-Qur'ān*, *Sunnah*, *Qiyās* (analogy) supports it, on the contrary it is refutable as they have distinguished between their evidence for or against adults and for or against minors, secondly *Mālik* distinguished between hurts and other matters and did not allow for instance in ripping of dress which might be of a price as low as 1/4th dirham whereas allowed in hurts and life, and third because they are not the ones whom we consent (the reference is verse 2:282) and do not have 'probity'. It is strange that those who allow their testimony do not allow the testimony of a slave who might be knowledgeable and pious and having 'probity' whereas they allow the testimony of children who lack sanity and (observance of) *Dīn*.¹⁰⁶

Perhaps it is only *Imām Mālik* who has dealt the issue of child testimony in some detail. He has instead disallowing it altogether provided eleven conditions¹⁰⁷ for the admissibility of a child's testimony by way of exceptions to the general principle of non

¹⁰⁶ *Ibn Ḥazm, Al-Mohalla*', 9 :421-422.

¹⁰⁷ *Abū'l Barkāt, Ahmad b. Muhammād b. Ahmad Al-Dardīr, Al-Sharḥ al-Saghīr ila Aqrab al-Masālik 'ala Madh'hab Al-Imām Mālik*, (Egypt: Dār al-M'ārif, 1974), 4:261.

admissibility for lack of probity and accuracy and it is only allowed, according to him, in specific matters due to necessity; the first condition is that testimony of child is admitted when it is given for or against children and not adults, second, it should be in hurts/injuries among children and life and not property (*māl*), third, that a child witness should be free (and not slave), fourth, the child witness should be Muslim (and not infidel) and a male child (not female), fifth, the child witnesses should be more than one, sixth, a child witness should not be a known liar this implies that witness should be judicious because non judicious child is not capable of recounting with accuracy and is not known either for truth or lie, seventh, that he should not bear enmity towards the person against whom he testifies, eighth condition is that he should not be related to one for whom he testifies like son of an uncle and aunt, ninth is that their testimony should be consistent and without contradiction, tenth is that the children have not parted and gone home after their assembly and the occurrence of incident as this has the likelihood of their being tutored and eleventh is that no adult should be present among them either before or after the incident this is again for the possibility of being tutored, that is obviously when the adult lacks probity but if he possesses the quality of probity and agrees with them their evidence is admissible otherwise not. When their evidence is admitted there will be no *qisās* but they will be liable for *diyya* in case of intentional as well as unintentional offence.¹⁰⁸ *Imām Mālik* has responded to certain illustrations presented to him by his disciples, these are reported in famous compendium 'Al-Mudawwanah Al-Kubra' for instance;

¹⁰⁸ *Ibid.*, *Al Sharh al-Saghir*, 4: 262-263.

- i- Evidence of children is admissible when it is relevant to their issues. This is acceptable in cases of hurt and homicide if testified two or more before they part or retire to their elders. In such cases only one child witness or a female child witness is not permissible. However one of his jurists *Al-Makhzūmī* has allowed evidence of children including females in murder.¹⁰⁹
- ii- Their testimony against or for adults is not admissible.
- iii- Their testimony will not incur '*qasamah*'.¹¹⁰
- iv- When a child is killed due to injury caused by another child two male children's testimony is sufficient to prove this. The punishment of '*diyya*' (blood money) is awarded (and not *qisās*).
- v- In case children have a chance to meet their family or go home after the incident they may lose the credibility unless their statement has been taken (recorded) previously. In such case their first statement is only reliable. This has been practiced by 'Ali, Shuraih, Abdullah b. 'Umar and 'Urwa b. Zubair among others.¹¹¹

Imām Mālik has been criticized for issuing fatwa of admissibility of child testimony (based on *maslaha*) without giving due regard to the Qur'ānic text¹¹² (Al-Qur'ān 2:282). He has based his *fatwa* following the precedents of 'Abdullah b. Zubair, 'Ali b. Abi Talib, Muawiyya, Sa'eed b. Musyyab, 'Urwa b. Zubair, 'Umar b. 'Abdul 'Azeez and

¹⁰⁹ Suhnūn b. Sa'eed Al-Tanūkhi on the report of 'Abd al-Rehman b. Qasim '*Al-Mudawwanah Al-Kubra*', (Dār al-Fikr li Tab'a wa'l-Nashr wa Tawz'ī), 4:84,85.

¹¹⁰ Oath taking (in a claim for murder) by fifty men from the people of the community where deceased was found and no evidence is available to prove the murderer and the relatives of the deceased do not suspect any specific person.

¹¹¹ Suhnūn, '*Al-Mudawwanah*' 4:84,85.

¹¹² Hussain Hamid Hassān, *Nazriyyat al-Maslaha fi'l-fiqh al-Islāmī*, (Cairo: Maktabat al-Mutanabi, 1981) 138. For criticism see Al-Jassās, *Aḥkām al-Qur'ān*, 2:473.

*Madinites*¹¹³ although he is said to apply doctrine of 'Maslaha' in this regard, this claim however has been refuted by Doctor Husain in his book '*Nazriyyat al-Maslaha fi'l Fiqh al Islāmī*'(1981) by saying that the verses on evidence are neither texts relevant to non admissibility of testimony of children (rather these are in context of evidence on debts) nor analogous to testimony of children on hurts among them.¹¹⁴

The foregoing discussion has led to three types of opinions regarding admissibility of child testimony; total rejection, partial acceptance and acceptance. However the view in favor of acceptance has further made it contingent to some requisites.

2.4.1. Analysis of the opinions of jurists

The foregoing opinions of the jurists present an opaque picture of the issue for a number of reasons first that the issue has not been addressed as a separate issue and there is not sufficient literature available in classical Islamic Law on this issue. Second because the issue has not been discussed on concrete grounds there are all possibilities depending on each case. However we will try in the following lines to make the picture as vivid as possible. Although the problem of the admissibility of a child witness has not been discussed in a systematic manner in the classical law but it does not mean that one is unable to find any guidance in this regard. It is a fact that Islamic Law presents a great deal of literature on children's matters. The system has its unique aspect in terms of children's rights and duties and is quite close to the natural development of children. The fact is that childhood, which is a state of human being after birth and before

¹¹³ Abū'l Waleed b. Khalaf b. S'ād b. Ayūb b. Waris Al-Bājī, (403-494), *Al Muntaqa Sharḥu Muwaṭṭā Imām Mālik* 3rd ed. (Lebanon, Beirūt: Dār al-Kitāb 1983), 5:229.

¹¹⁴ Hassān, *Nazriyyat al-Maslaha*, 139.

puberty, is a necessary stage in the growth of a human being and not an obstacle in the way of capacity. The jurists have divided this age into different stages for different purposes. A child under the age of seven years is considered non-discerning minor or *sabi ghair mumyyaz* and is considered not to bear capacity of execution although as a bearer of *dhimmah* and *manāt* holds the capacity for acquisition of rights. According to the jurists the minor is liable for the compensation of property destroyed by him, goods or services bought by him, for maintenance of relatives and even (according to some) for *zakāt* (obligatory charity levied) on his assets. The capacity of execution requires intellect or '*aql*' which a non-discerning minor does not possess because he is unable to understand the command of the Lawgiver. According to *Hanafi* school of thought a person whose mental faculties have not developed fully but has attained a degree of discretion bears deficient capacity for the purpose of some transactions therefore a minor or *sabi* who possesses discerning, cognition and a degree of intellect or '*aql*' may be assigned such capacity. *Hanafis* have fixed minimum age for such capacity over seven years and before the attainment of puberty. Such capacity may be exercised by the discriminating minor (*sabi mumyyiz*) in civil matters (*mo'amalāt*) on the ratification of the guardian. This has been discussed in the section on legal capacity. Owing to his deficient capacity is a child capable of creating right by testifying in judicial process? The opinions of classical Muslim jurists have been studied in the foregoing section. In this section the analysis of the jurists' opinions on the testimony of child will be done. Generally speaking three trends have come up on the perusal of these opinions. One is that children like any other person with defective capacity can bear the evidence but cannot testify unless the cause of defective capacity (childhood) ceases to exist and the

person attains complete capacity. Second trend seems to be that the child is not a credible witness due to the lack of probity and majority. Third is that a child's evidence is admissible in the matters of children and not elders. One opinion reported from *Ahmad b. Hanbal* is that testimony of child is acceptable (in all matters) except *hudūd* and *qisās* when he is ten years old.¹¹⁵

The set of arguments presented by the proponents of first and second opinion are briefly following;

- 1- "...And take two witnesses out of your men..."¹¹⁶
- 2- "... Such as you agree/consent for witnesses."¹¹⁷
- 3- "And the witnesses should not refuse when they are called (to testify)..."¹¹⁸
- 4- "And conceal not the evidence, for he who hides it, surely his heart is sinful."¹¹⁹

Although the verse no.282 of second chapter is a lengthy verse, it is considered to be the longest verse of the Qur'ān and is termed as '*Ayat al-Madayanah*'(verse related to debt transactions) and is in the context of contracts of debtor commercial contracts for a fixed period reduced into writing where scribing and evidence is required and daily at-the-spot transactions where there is no such requirement. Obviously these type of transactions take place between men and customarily men are found around who can be witness to a transaction when reduced to writing. Therefore, two female witnesses are required to substitute a male witness in case only one male witness is available.¹²⁰ This

¹¹⁵Ibn Qūdamah, *Al-Sharh al-Kabeer*, 6:256.

¹¹⁶ Al-Qur'ān 2:282.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Al-Qur'ān 2:283

¹²⁰ "...if there are not two men, then a man and two women, such as you choose..." Al-Qur'ān 2:282.

is not direct evidence on the non-permissibility of child witness. Though jurists have inferred through analogical deduction non admissibility of child witness from these texts the commentators agree that these revelations are in the context of debts or ‘*salam*’ transactions for a fixed period. The expression “of your men” means free Muslim men and not slaves. However Ibn ‘Arabi adds that it means “male adult Muslims”.¹²¹ Second argument is that the verse mentions that those should be taken as witnesses whom you agree or consent (“*Tardawn*” denotes both meanings) and people do not agree or consent to the child witness so he/she is excluded from the category of witnesses. Third is that witnesses are prohibited from refusing to testify when called for this purpose this shows a degree of liability on the part of witness and a child due to lack of capacity is not a subject of command. Fourth is that concealing evidence is prohibited and is a sin and a sin invites wrath of the Lawgiver (Allah) a child cannot commit a sin for the reason previously mentioned and this command is not directed to him/her therefore he/she cannot be a witness. Similarly a tradition of the Prophet (Peace be upon him) is presented as an evidence and argued from it the non-permissibility of child evidence, “The pen has been lifted from three; from a sleeping person until awakes, from a child until attains puberty, from an insane person until attains intellect.”¹²² This is an evidence of defective capacity of a child in the state of childhood until ceases when he attains puberty. It is also argued that the child does not possess *wilayah* rather is subject to the *wilayah* of another person (his guardian), whereas *shahadah* has an element of *wilayah* inherent in it. Usually a child is not a trustworthy witness because he does not understand and/or fear from the consequences

¹²¹ Ibn ‘Arabi, *Aḥkam al-Qur’ān*, 1:247. Ibn Kathīr, 1:335, *al-Tabarī*, 6: 61.

¹²² Al-Bukhārī, *Bāb al-Talāq*, (Cairo: al-Maktabah al-Salafiyya 1400 H.) 3:405. (*Būlūgh al-Marām* Hadith:927).

of lying. It is argued that even a child who is '*āqil* (having sufficient degree of intellect) is not capable of testifying as testimony requires memorizing and recounting with thoughtfulness which is normally lacking in children.¹²³

The proponents of third opinion who allow child testimony with certain conditions as were mentioned earlier among the opinions especially the conditions mentioned by *Imām Mālik*, they have also inferred it from various incidents of *Qadā* (judgments) of 'Ali¹²⁴, which has already been mentioned.

One may offer a rebuttal to the inference drawn from the verses on inadmissibility of child testimony by saying that the context in which these verses were revealed is different, however a general inference may give the impression that the testimony of child is inadmissible. According to the definition in Islamic Law a 'child' is every human being from birth to the age of puberty or majority (which is 18 years according to some and is in conformity with international and national legislations) or whichever is earlier. In the International Law and most national legislations of different states the child is every human being from birth to the attainment of majority that is 18 years. It means every person from birth to 18 years of age is a child, does that mean that a child of 14, 15 or 16 is unable to testify? It is not possible that the jurists intended that, as it does not seem reasonable. A general view that a child lacks the capacity does not either seem to be a fixed rule for every child in all circumstances. It has been mentioned earlier in these pages that a child may possess a limited or a deficient capacity of execution. Moreover, it is in contradiction with the general rule of gradual attainment

¹²³ Al-Kāsānī, *Bida'e-al-Sana'e*, 9:12.

¹²⁴ Cousin and son in law of the Prophet (peace be upon him) and fourth guided caliph.

of legal capacity with the developmental stages of childhood both in Islamic Law and Western legislations.

2.4.2. The conditions mentioned by the Muslim jurists for admissibility of evidence and testimony of child

Why the Muslim jurists have disagreed over the admissibility of child's evidence? The answer seems that as they have mentioned general conditions for the admissibility of oral evidence of a witness among which some are not in favor of a child witness. There are six conditions of admissibility of evidence given by these jurists. Let us take the conditions or pre-requisites of admissibility of evidence one by one and then try to understand why generally jurists have formed their view that the admissibility of child testimony is not favored by Islamic Law.

The first condition is *bulūgh* or majority, we have already discussed the age of majority or puberty, the evidence of this condition again is deduced from the verses mentioned earlier i.e. 282, 283 of *Al Baqarah*', the words mostly relied on are the *rijāl* (men) and *zawi-‘adl* (two males possessing probity), *mimman tardhawn* (whom you agree/consent). A rebuttal may be offered to this deduction by saying that these verses were revealed in the context of debt contracts reduced to writing.

The jurists have allowed the testimony of children by way of exception at least in matters related to children for example injuries during play to the person or property etc. That was probably because many centuries ago the children were foreseen only to be indulged in those cases. There were no incidents (or at least known incidents) of child abuse, physical or sexual, and no issues of child pornography which were to

emerge many centuries to come. There were, however matters of child custody between divorced parents. There are examples of Prophet's deciding the dispute of child custody by giving the child of seven years of age option to exercise his preference in this regard and giving the custody of the child to mother in accordance with his preference and giving the custody of younger children to mothers in the light of the welfare of child.¹²⁵ The question is; can the exception provided by these jurists be extended to contemporary situations? *Prima facie* there is no bar to it.

The second condition is '*aql*' or intellect, therefore testimony of idiot and insane is not acceptable but a person who suffers epilepsy may testify during the period of recovery. It is consensus of jurists that testimony of a person lacking intellect is inadmissible according to *Ibn al-Manzar*, no matter whatever the cause of it whether insanity, intoxication or childhood. Therefore it may be inferred that a child who is '*āqil*' or bears intellect may testify. As *Imām Ahmad b. Hanbal* has allowed testimony of a child of ten years in all matters except *hudūd* and *qisās*.¹²⁶

The third condition is speech, a dumb person may not testify even if he writes but according to some jurists it is admissible with legible signs. The condition, in the same manner, may also apply to the children being otherwise judicious and capable of understanding.

The fourth condition is Islam, testimony of infidel for or against a Muslim is not admissible except for the people of scripture, and their testimony is admissible in the cases of 'will' during travelling. When the testator meets his death during journey and

¹²⁵ See for example *Būlūgh al-Marām*, *Bab al-Hadāna*, Ahadith: 987, 988 and 989.

¹²⁶ *Ibn Qudamah*, *Al-Sharh al-Kabīr*, 6:256.

no Muslim is present and only available witnesses are non Muslims from the people of scripture. They may testify under oath as the *Qur'ān* has stated.¹²⁷ In the absence of male witness, female witnesses may substitute (*Al-Qur'ān* 2:282), in the case of non-availability of Muslim witness a non-Muslim witness may testify (5:106). A judicious Muslim child, it may be inferred, can also be a witness when a Muslim man is not available, or is not forthcoming.

The fifth condition is ‘memorization’, a person who is known for his forgetfulness cannot testify for untrustworthiness. A child capable of memorizing and recounting the events with accuracy may be an admissible witness in this sense.

The sixth condition is probity, which is another condition which might suggest that a child cannot be a credible witness. The dictionary meaning of probity is; complete and confirmed integrity, uprightness.¹²⁸ The literal meaning of probity or ‘*adala*’ is; steadfastness in religion, moderation in words and actions or following middle path. It is said that a just person or *al-‘adl* is one who is not dubious and two things are believed to be present in him one is righteousness in religion or *dīn* and that is performance of obligations and avoiding prohibitions. Second, neither he commits major sins nor insists on minor sins.¹²⁹

The question here is whether a child may also possess probity? *Ibn Qudamah* has reported Ahmad Ibn Hanbal’s opinion saying that a child may testify if he is ten years

¹²⁷ *Al-Qur'ān* 5:106.

¹²⁸ <http://www.thefreedictionary.com/probity> (Visited on; 8/8/2013)

¹²⁹ *Ibn Qudamah*, *al-Sharh al-Kabir* , 6:259. See also, *Muhammad Al-Khatib Al-Sharbini*, *Mughni 'l-Mohtaj li'l-M'āni' Alfāz al-Minhāj* (Dār al-Fikr) 4:441.

old and said “*mimmun huwa fi ahli'l-adalah*”¹³⁰ (from children the one who is the bearer of probity). It is not clear yet what exactly is probity of a child perhaps a child who is not known for lying, bears a good moral character, speaks truth, offers daily prayers and is obedient to his parents, in other words a child who seems to be a ‘nice boy’ may be said to bear a certain degree of probity and allowed to testify. We must not forget here that in Islamic Law of evidence a procedure of judging the credibility of a potential witness prior to his actually testifying in the court is to be carried out by the court or its commissioned person. Such procedure is termed as ‘*tazkiyyah al-shūhud*’.

2.5. The Objectives of Islamic Law and the Issue of Child testimony

The objectives or goals of Islamic Law termed as *Maqāsid al-Shariah*, according to *Ghazālī*, are five; faith, life, intellect, lineage and property. *Ghazālī* has termed these objectives as *Maqsūd al-Shār'i*.¹³¹ These objectives are pursued and protected by *Shār'i'a* as a matter of absolute priority. Public interest and objective of *Shār'i'a* have been key elements in discovery of rules of *Shār'i'a* even before *Ghazālī* for instance concept of *istehsān*, public interest and analogy based on wisdom and objective of a particular *hukm* in the methodology of *Imām Abū Ḥanīfah*, *Imām Mālik* and *Imām Shāfi'i*.¹³² The systematic study of objectives was proposed by *Ghazālī*. He developed the ideas of his teacher *Al-Jūwaynī*, *Imām-al-Haramayn* (d.478/1085), who is deemed to be the first to classify the *Maqāsid* into three categories which have been widely

¹³⁰ *Ibid.*, 6:256.

¹³¹ Abū Ḥamid al-Ghazālī, *Al-Mustasfa' min 'Ilm al-'Usūl*, (Beirūt: Dār al-M'arifa), 1:287.

¹³² Muhammad Najatullah Siddiqui, *Maqāsid-e-Shariat*, (Islamabad : IRI, International Islamic University, 2009), 6-7.

accepted; *daruriyyāt, hajiyāt, tahsiniyyāt* (essentials, complementary and desirable). Later on the list provided by *Ghazali* was increased in terms of number of *maqāsid* by different writers.¹³³ The writers who attempted to expand the list of *Maqāsid* include Ibn Taymiyya, Ibn Al-Qyyam, Al-Shāfi‘ī¹³⁴ and in the subcontinent Shah Waliullah.¹³⁵ Even contemporary scholars have made other additions to the list of objectives such as Muhammad Tahir b. ‘Ashūr, ‘Allāl Al-Fāsī and Ahmad Al Khamlīshī.¹³⁶

The contemporary scholars' inclination towards this addition has become stronger owing to the economic, political and international issues faced by Muslims. It has been felt that the traditional list of objectives should be enhanced with human dignity, freedom, social justice, elimination of poverty, individual rights, peace and tranquility and mutual cooperation at International level.¹³⁷ It seems that early jurists linked the objectives with *hudūd* or fixed punishments prescribed by *Al-Qur’ān* and *Sunnah* therefore they have restricted the objectives to those interests which *Shari‘a* have preserved by inflicting fixed punishments on infringement.

It is evident that *Shari‘a* is based on the benefit of individual and community and its laws aim at protecting those benefits especially those which are indispensible to maintain and protect the social norms and order of the society. These are the essential

¹³³ Muhammad Hashim Kamali, “The objectives of Islamic Law” (Occasional papers 33) *Islamic Studies* (1999) (Islamabad: IRI IIU), 12-13. also Available at; <http://www.sunniforum.com/forum/showthread.php?6176-Maqasid-al-Shariah>

¹³⁴ Siddiqui, *Maqāsid-e-Shariat*, 21.

¹³⁵ Shah Waliullah Dehlī, trans. Abū Muhammād ‘Abdul Ḥaq, *Hujjatullah Al-Baligha*, (Karachi: Nūr Muhammād Assāḥ al-Mutab‘e n. d.), 1:284. (Strengthening *Shara‘e* and striving to propagate these *Shara‘e*, elevating people’s condition and making their customs according to (the Islamic) civilization were added as objectives. However these are ways to promote the basic objectives).

¹³⁶ Siddiquī, *Maqāsid-e-Shariat*, 18-19.

¹³⁷ Ibid., 21.

-Recently a conference was held at the Kuala Lumpur University, Malaysia (Jan.2014) to promote better understanding of *Maqāsid* and their application to financial transactions and contracts and to propose a unified regime of compliance of *Maqāsid* to Islamic Financial Institutions.

interest. These interests are protected and preserved either by validating *jihād* to protect religion and to fight injustice, by declaring just retaliation or *qisās* as “life”,¹³⁸ by prohibiting and punishing theft, drinking, and committing adultery to protect property, intellect and lineage. Were these not protected it would have resulted into chaos and collapse of individual and society at large. These punitive measures have been taken to protect positive values of life. The interesting question might be are these only interests which *Shari‘a* aims at protecting or there are certain other interests too which might be taken into account? According to Dr. Muḥammad Hashim Kamali, *Al-Qur’ān* has singled out the most important purpose of the Prophet-hood of Muhammad (peace be upon him) as ‘mercy’ to mankind: “We have not sent you but a mercy to the world”¹³⁹ and purpose of *Al-Qur’ān* itself as: “a healing to the ailment of the hearts, guidance and mercy for the believers (and mankind).”¹⁴⁰ These two; compassion (*rahmah*) and guidance (*huda*) are upheld as the uppermost objectives and are “substantiated by other provisions, in the *Al-Qur’ān* and the *Sunnah* that seek to establish justice, eliminate prejudice, and alleviate hardship.”¹⁴¹ According to him compassion or *rahma* is manifested in the realization of benefit or *Maslahā* which in the consideration of ‘Ulemā is objective of Shariah and synonymous to *rahmah*. *Maqāsid* and *Maslahā* are used as interchangeable terms by the ‘Ulemā.¹⁴²

Modern scholar does not seem to confine and restrict the objectives of *Shari‘a* to those five objectives which have been inferred from the texts providing fixed penalties or

¹³⁸ *Al-Qur’ān* 2:179.

¹³⁹ *Al-Qur’ān* 21:107.

¹⁴⁰ *Al-Qur’ān* 10:57.

¹⁴¹ Kamali, “Objectives of Islamic Law”, 6.

¹⁴² *Ibid.*, 7.

hudūd. They have widened the scope of objectives by applying inductive method while considering the role of 'Aql in identifying an objective.¹⁴³

The text of *Al-Qur'ān* is goal-oriented. It points out to the purpose of an act or rule embedded in it. The text of *Al-Qur'ān* is expressive of the results that the *Shari'a* aims to achieve in the pursuance of a rule of law by giving 'illah of a rule for instance when it gives reason behind sending the apostles it says, "Apostles who gave good news as well as warning, that mankind, after (the coming) of the Apostles, should have no plea against Allah. For Allah is Exalted in Power, Wise."¹⁴⁴ And when it declares the purpose of sending the Prophet Muhammad (peace be upon him) it states, "We sent you not, but as a mercy to all creatures."¹⁴⁵ While prescribing rules it declares the 'illah behind it for instance about obligation of *Qisās* it gives the rationale; "in *qisās* there is life for you, o people of understanding"¹⁴⁶ even in the devotional matters or *ibadāt* while expounding the ritual of ablution and prayer it declares, "Allah does not intend to inflict hardship on you. He intends cleanliness for you and to accomplish his favor upon you"¹⁴⁷, "truly prayer restrains from shameful and evil deeds"¹⁴⁸ and with regard to *zakāt* or poor due it give the purpose of it by saying, "so that the wealth does not circulate only among the wealthy"¹⁴⁹ and in the mannerism and conduct when the believers are required to lower their gaze when encountering with opposite sex the

¹⁴³ Yousaf Hamid Al-'Alim, trans. Muhammad Tufail Hashmi, *Islamī Shariat: Maqāsid aur Masaleh* (Islamabad: IRI, International Islamic University, 2011), 122, 124. See generally Najatullah, *Maqāsid-e-Shariat*, 7-21.

¹⁴⁴ Al-Qur'ān 4:165.

¹⁴⁵ Al-Qur'ān 21:107.

¹⁴⁶ Al-Qur'ān 2:179.

¹⁴⁷ Al-Qur'ān 5:6.

¹⁴⁸ Al-Qur'ān 29:45.

¹⁴⁹ Al-Qur'ān 59:7.

purpose is declared, “for this will help you to attain greater purity”¹⁵⁰. From these and other texts of *Al-Qur’ān* and *Sunnah* and in the light of previously devised scheme of objectives, the contemporary scholars were able to see and infer more objectives and benefits to be added to the list of *maqāsid* suitable to the current challenges faced by Muslim *Ummah*. Therefore we can conclude that objectives are either known through directly stated ‘illah or by searching these reasons or ‘illat (plural of ‘illah) of rules and the evidences to those rules sharing the same purpose by way of induction while always considering the preference given to the objectives of Lawgiver rather than ‘Abd/Mukallif.¹⁵¹

The essential interests are protected and promoted by the secondary, complementary interests termed as *hajiyāt*, by way of removing the hardship for example the concessions granted in the performance of an obligatory act like shortening of prayer (*salah*) during travel, breaking the fast (*sawm*) during illness and travel, suspending the fixed punishment in case of doubt and validating certain contracts which otherwise would have been invalid due to the anomalies present therein like *ijarah* and *salam*.¹⁵² The secondary interest may be elevated to the rank of essential interest when it concerns the public at large although it is of the nature of secondary interest for an individual primarily. Similarly among conflicting interests lesser degree of interest is sacrificed to protect a higher degree interest and among various conflicting interests where no preference is apparently possible prevention of evil takes the preference over realization of any benefit.

¹⁵⁰ *Al-Qur’ān* 24:30.

¹⁵¹ See generally Hamid Al-‘Alim, (Trans.) *Islāmī Sharīat: Maqāsid aur Masalih*, 114-125.

¹⁵² Special type of sale permitted by way of necessity as an exception to the general principle of sale of deliverable commodity at the time of contract.

The desirable interests or *tahsiniyyāt* which aim at the attainment of beauty, perfection and refinement in the human conduct for example recommendations of supererogatory prayers besides obligatory prayers, cleanliness of body and attire, use of perfume while attending congregational prayers, being gentle to others, dealing others with *ihsān* (in a fair manner). The desirable interests can be related to all other interests in the pursuit of perfection for instance in offering daily obligatory prayers perfection may be sought through concentration and full attention or one may seek this perfection by giving alms and charity over and above the obligatory poor tax (*zakāt*). This third category of interests may be extended to other human conducts and affairs besides the implementation of rules of *Shari'a* like political, economic, social, cultural or commercial matters.

2.5.1. Expansion of Objective by Contemporary Scholars

Looking at the foregoing classification of *maqāsid* one may ask that what is the right way of identification of a *maqsid* or objective and is it possible to explore more objectives in addition to the five listed earlier? Initially three approaches in the identification of objectives surfaced. The first approach is that the *maqāsid* are only known from the clear text. This approach is maintained by the *Zāhirī* school of thought. Totally opposite approach is taken by the *Bātiniyyah* who held the opinion that the objective is to be found not only in the explicit terms of the text but also in the *bātin* or hidden meaning of it. Whereas the general approach of 'Ulama remained in between as they did not confine the identification of objectives to the clear text but were not in favor of encouraging further elaboration of objectives. The majority of 'Ulama consider

the text and underlying cause ('illah) accompanied with rationale of the text to identify an objective.¹⁵³

According to *Shātibī*, the chief exponent of the theory of *maqāsid*, the objectives are two-fold which refer to the objective of the Lawgiver and the other refers to the objective of the *mukallif*. The preference is given to the first category as these objectives have been laid to safeguard the interest of 'ibād in this world and in the Hereafter and the rest are details to the first purpose.¹⁵⁴

In early contributions on *maqāsid* was Saif al-Dīn Amīdī's identification of *maqāsid* as criteria of preference among conflicting analogies although he did not add to the list of five essential *maqāsid*. Later *Mālikī* jurist Shahab al-Dīn Al-Qarāfī (d.684/1285) added sixth objective; protection of honor (*al-'ird*) which was later endorsed by some other scholars. *Ibn Taymiyya* (d.728/1328) was first to provide a great deal of extension by adding almost all positive values and teachings in the existing list of limited number of objectives. His open ended list varies from the affairs of this world to those related to the hereafter like honoring the rights of neighbors, fulfilling the contract etc. and love of God, moral purity, trustworthiness and sincerity etc. This approach has been followed by the contemporary scholars. 'Allama Yousuf-al-Qardāwī has added to the list of *maqāsid*; human dignity, freedom, social support (*al-takāful*) etc. Some have proposed economic development and strengthening of R & D in technology and science to be included in the list of *maqāsid* as these are considered to be extremely important

¹⁵³ Kamali, *The Objectives of Islamic Law*, 10,11&12.

¹⁵⁴ Abū Ishāq Ibrahim Ibn Mūsa Al-Shātibī, (d.790 A.H.) *Al-Mwafiqāt fi 'Usul al-Shari'a* (Dār al-M'arifa' n.d), 2 :5.

for the standing of *ummah* among the community of other nations.¹⁵⁵ But the identification of objectives must be in the context of rules of Sharī'a.¹⁵⁶

Recently reform or *islah* has been proposed to be included in the list of objectives as “the world is apparently overwhelmed with injustice, oppression, corruption, duplicity, hypocrisy and disorder.” It is said that God does not reform people unless they themselves want to change and reform their condition as Al-Qur’ān states: “Surely, never will Allah change the condition of a people until they change what is in themselves.”¹⁵⁷ As Islam aims on the betterment of man’s physical and spiritual well being therefore reform is an all embracing concept. *Islah* or reform is not confined to devotional matters but it is related to all worldly matters of mankind as well.¹⁵⁸

Apart from consideration of elaboration and enhancement of the list of objectives depending upon the changing needs of the *Ummah* there has always been a concern over the issue whether a means to an objective should also be understood as part of that objective. Similarly a means to an injunction or prohibition is considered to be an integral part of that command and prohibition? Despite some disagreement there is a general agreement on consideration of a means to a command as an integral part of it also that an opposite of a command must be avoided. Therefore whatever is necessary for the performance of *wājib* is a part of that *wājib*. This is when the objective of an injunction is clearly known from the text but a general reading of texts may also contribute to the identification of an objective and this is known as the method of

¹⁵⁵ Kamali, *The Objectives of Islamic Law*, 10,11&12.

¹⁵⁶ Siddiqui, *Maqāsid-e-Shariyat*, 19.

¹⁵⁷ Al-Qur’ān 13:11.

¹⁵⁸ WaelShihab , Reform and Objectives of Shariah, <http://www.onislam.net/english/shariah/contemporary-issues/human-conditions-and-social-conduct> (visited on:16/12/2011)

induction in contrast to the method of deduction. According to *Shātibī* induction is the most important method in the identification of *maqāsid*, in fact the whole theme of *maqāsid* is known by way of induction as there is no clear text declaring that the *Shari'a* has been enacted for the benefits of people, this definitive conclusion has been drawn from reading the different texts of Al-Qur'ān to that effect. *Shātibī*'s inductive method is not restricted only to identifying the objectives rather it is extended to the commands and prohibition too which may in addition to the clear text be obtained from the collective reading of different texts. His understanding of benefits or *masalih* (plural of *maslaḥa*) is all inclusive which pertain to this world and the hereafter, individual and society, material and spiritual and present and future. All these benefits cannot be ascertained and identified only through the human reason without guidance of divine revelation. The classification of objectives into three categories is also based on induction even the rule of *Shari'a* that an act of devotion or 'ibadah cannot be validated or established by means of *ijtehad* is a conclusion drawn by way of induction. According to *Shātibī* the knowledge of *maqāsid* is prerequisite for the attainment of status of a *mujtahid*.¹⁵⁹ For reaching at the level of '*ijtehād*' one must possess two attributes; one that he has accomplished fully understanding of *maqāsid* and secondly that he is capable of extracting rules/ahkām based on such understanding.¹⁶⁰ Without having proper recourse to the purpose and objectives of a text one can be misled in his *ijtehād*. A *mujtahid* needs to take into account all relevant texts in order to reach to a

¹⁵⁹ Kamali, *Maqāsid al-Shari'ah: The Objectives of Islamic Law*, 15.

¹⁶⁰ *Shātibī*, *Mwafaqāt*, 4: 105,106.

right inference otherwise an approach which is rather “fragmented” and not all inclusive may lead to an erroneous conclusion.¹⁶¹

Maslaha or interest is defined by Ghazālī as ‘securing benefit and preventing harm.’ It is *maslaha* to protect religion, life, intellect, lineage and property. According to him anything that furthers these objectives is *maslaha* and anything which is in contradiction to them is *mafsadah*. Everything that aims at protecting the five objectives is *maslaha*.¹⁶² According to Shātibī ‘*maslaha*’ is all that concerns with subsistence and completion of human life.¹⁶³ And *Shari‘a* is based on the consideration of *masalih* (interests). *Masalih*, pl. of *Maslaha*, are determined only by the Legislator (God) and not by the subject (man). These interests may change according to changing needs of time, circumstances and people.¹⁶⁴

The concept of *maslaha* is supported by Qur’ānic verses, traditions of the Prophet (peace be upon him) and its application can be seen in the practice of his guided caliphs and companions. There might not be direct evidence in Al-Qur’ān supporting *maslaha* but many verses in support of lifting the hardship from believers are actually supporting the concept of *maslaha* like 22:78, 5:6 and many others. Many *ahadith* have been quoted by ‘ulemā in this regard like; *la darar wa la dirār* (no harm and no reciprocal harm), *Addarar yūzāl* (harm is to be lifted) and; Allah loves to see that his concessions are observed, and many others.

¹⁶¹ Ibid., see also, Hamid, (Trans.) *Islāmī Shariat: Maqāsid aur Masālih*, 114-115.

¹⁶² Al-Ghazālī, *Al-Mustasfa*’1: 286-287.

¹⁶³ Shātibī, *Al-Mwafaqāt*, 2 :25.

¹⁶⁴ Shātibī, *Al-Mwafaqāt*, (Dār al-Fikr al-‘Arabī), 4:106.

The guided caliphs and companions acted in pursuance of *maslaha* except for the issues of ‘ibadah and those which are based on specific injunctions. The compilation and distribution of authenticated copy of *Al-Qur’ān*, establishment of army, police, revenue department, prisons, levying agricultural tax, holding craftsmen and traders responsible for the compensation of loss of goods placed under their custody and issuing currency are some examples of their application of *maslaha*.

2.5.2. ‘Justice’ as an Objective and admissibility of Child Testimony

‘Justice’ is an attribute of God and is among the fundamental objectives of Islam. ‘Justice’ means placing things in their rightful place. The word ‘Islam’ literally means ‘peace’ and it is accepted notion that peace can only be attained through justice. *Al-Qur’ān* has stressed the need of holding the justice steadfastly and consistently and never compromising it.

“O ye who believe! Stand out firmly for Allah as just witnesses; and let not the enmity and hatred of others make you avoid justice. Be just: that is nearer to piety, and fear Allah. Verily, Allah is Well-Acquainted with what you do.”¹⁶⁵

According to *Al-Qur’ān*’s proclamation the prophets were sent to do and establish justice on earth;

“Indeed We have sent aforetime Our Apostles with clear signs, and sent down with them the Book and the Balance (of right and wrong) that man may stand forth in justice...”¹⁶⁶

¹⁶⁵ *Al-Qur’ān* 5:8.

“And if you judge, judge with justice between them. Verily Allah loves those who act justly.”¹⁶⁷

“...and I am commanded to judge justly between you.”¹⁶⁸

The foregoing verses indicate that all the scriptures, prophets and revelations were meant to establish God’s command of justice among the mankind without discrimination. God has enjoined justice for all without any difference. Therefore it is obvious that the ‘justice’ or ‘*adl*’ is high valued and well-established objective of Islam.

As it has been observed earlier initial list of objectives was most probably linked with the fixed prescribed punishments and therefore only enumerated five objectives; religion, life, lineage, intellect and property. Gradually the list was enhanced by other scholars. A *Mālikī* jurist, Shihab al-Dīn al-Qarāfī (d.684 AH) added ‘*ird* (honor) in the list of objectives and it was widely accepted as being part of protection of lineage however it can be separately dealt under the fixed punishment provided for false accusation of adultery or *qadhf*. *Ibn Tamiyyah* (d.728 AH) was probably the first jurist who deviated from the notion of confining the objectives to the previously agreed specific number.¹⁶⁹ Later, among the last century scholars, *Ibn ‘Ashūr* (d.1973) included preservation of the family as an objective of preserving the lineage, social order, human equality, protection of workers’ rights, wellbeing and righteousness of the community, Marketability to circulate the wealth, preservation and growth of wealth

¹⁶⁶ Al-Qur’ān 57:25.

¹⁶⁷ Al-Qur’ān 5:42.

¹⁶⁸ Al-Qur’ān 42:15.

¹⁶⁹ Najatullah, *Maqāsid-e-Shariat*, 12.

and many others among the objectives of *Shari'a*.¹⁷⁰ A very well-known contemporary scholar, Allama Yousaf al-Qardawi has included values like "human dignity, freedom, social welfare and human fraternity" in the list which are no doubt found and supported by the evidence of *Al-Qur'an* and *Sunnah*.¹⁷¹

"Allah commands justice, the doing of good, and liberality to kith and kin, and He forbids all indecent deeds and injustice and rebellion; He instructs you, that you may receive admonition".¹⁷²

While looking at the contemporary needs and inclination of scholars, past and present, considering important and significant aims and *masalih* (interests) to be included in the list of objectives of *Shari'a*, there is no doubt that 'Justice' or '*Adl*' is the most significant and high ranked intents of Islam. In fact the five objectives propounded and accepted by earlier scholar are based on '*Adl*' (justice). '*Adl*' is Arabic word means 'balance' and balance of society can only be maintained once these objectives are preserved. The core value is justice in all matters. Allah has pronounced that polytheism or *shirk* is a great injustice (*zulm*).¹⁷³

In the light of Qur'anic verses commanding the establishment of justice now it is agreed that 'justice' is a *maqsad* of *Shari'a* and that it should be taken as an essential objective of Islamic Law. To achieve this objective rules and *ahkam* have been given

¹⁷⁰See generally Muhammad Al-Tahir Ibn 'Ashur, , trans. Muhammad al-Tahir Al-Mesawi. *Treatise on Maqāsid al-Shari'a*. (abridged edition) (International Institute of Islamic Thought, 2013).

¹⁷¹WaelShihab, Justice and Objectives of Shariah- Critiques and Thought.<http://www.onislam.net/english/shariah/contemporary-issues/critiques-and-thought/454669-justice-and-objectives-of-shariah.html?Thought=> (Visited on:21/12/2011)

¹⁷² Al-Qur'an 16:90.

¹⁷³ Al-Qur'an, 31:13.

and *ijtehād* may also be done.¹⁷⁴ The necessary result should be that all the tools, ways, methods, conducts, manners and techniques adopted to achieve this objective either become essential, complimentary or embellishment as per application of the theory of objectives.

According to *Shāfi‘ī*'s division of objectives, these are necessary or obligatory, needed or complementary and desired or commendable.¹⁷⁵ A *dūrūrī* or necessary objective can be from the category of *Ibadāt* for protection of *Dīn* like prayers, poor due, fasting and pilgrimage or can be from *‘adāt* aiming to protect life, intellect, property and honor like hadd punishments to protect these *masalih* like retaliation to protect life, and *M‘uamalāt* which protect the life, intellect etc. but through *‘adāt* and *jinayāt*. *Hajiyāt* serve to provide expansion or removing the strictness and providing flexibility and operate in all *Ibadāt*, *‘Adāt*, *M‘oamalāt* and *jinayāt* whereas *tehsiniyyāt* or embellishments are best of *‘Adāt* or customs liked by all wise men for example cleanliness, covering of private parts, acquiring beauty of manners.¹⁷⁶

According to *Shāfi‘ī*'s Philosophy, *Shari‘a* deals with the protection of ‘*masālih*’ either in a positive manner or in a preventive manner.¹⁷⁷

Now coming back to the issue of child testimony, the early Islamic jurists have dealt the issue according to their contemporary needs and practices. Proof is essential for vindication of right and vindication of right is justice. Evidence is a tool by way of

¹⁷⁴ Najatullah, *Maqāsid-e-Shariat*, 25. (According to him Al-Juwainy, Izz-ud-Dīn b. ‘AbduL Salām, Ibn-e-Taymiyyah and Ibn al-Qayyim has included ‘*Adl* and Justice among Maqāsid-e-Shariat).

¹⁷⁵ Shāfi‘ī, *Al-Mwafaqāt*, (Dār-ul-Fikr wa Tab‘a wa‘l-Nashr), 2:2.

¹⁷⁶ Shāfi‘ī, *Al-Mwafaqāt*, 2 :8,9,10

¹⁷⁷ Muhammad Khalid Masūd, *Shāfi‘ī's Philosophy of Islamic Law* (Islamabad: IRI, International Islamic University,1995) ,151.

which one finds a proof which is essential in doing justice. To achieve the goal of justice, means of evidence have been devised. In the early legal history of Islam only oral testimony was a standard form of evidence whereas now other means of evidence are also admissible without any noticeable contradiction in this regard. The courts in Muslim countries are now admitting documentary proofs, video recordings, photographs, laboratory analysis and DNA tests as evidence without hesitation.¹⁷⁸ In Pakistan law of evidence termed as Qanoon-e-Shahadat Order 1984 permits production of evidence "that has become available due to modern devices and techniques."¹⁷⁹ These are all techniques and means of evidence helping the courts in doing justice. Children are the most vulnerable victims of injustice. In the present day scenario they are prone to many types of Abuses. The statistics show an alarming number of child Abuse cases where child is a victim and primary witness.¹⁸⁰ Familial cases also require views of child especially in custody and abduction cases. Hearing the child witness becomes indispensable for doing justice.

If we revisit the opinions of jurists regarding the child testimony we find out that *Mālikī* opinion on admissibility of child testimony in wounds and hurts cases accompanied a number of conditions to be observed while admitting their evidence. *Imām Mālik's* fatwa is criticized for being in conflict with clear text implicating the *Imām* to prefer *maslaha* (public interest) over *nusūs shar'iyyah* (Qur'ānic Texts). The texts mentioned

¹⁷⁸ See generally Kamālī, *The Objectives of Islamic Law*.

¹⁷⁹ Article 164, The Qanoon-e-Shahadat Order 1984.

¹⁸⁰ According to a report in 2006-07, 30,000 children were produced in the courts of United Kingdom as witnesses, this number increased in 2008-09 up to 48,000. Although the approach of courts, calling very young children to testify in the court has been criticized by some lawyers (Amelia Hill, Children and the law: new case may transform criminal courts' approach ([guardian.co.uk](http://www.guardian.co.uk/society/2011/may/12/courts-children-witnesses) May12,2011). <http://www.guardian.co.uk/society/2011/may/12/courts-children-witnesses> (retrieved on: 20/6/2011).

here are; “And get two witnesses out of your own men.¹⁸¹ “And take as witness two just persons from among you...”¹⁸²

The criticism is rebutted for a number of reasons. Apparently these texts do not bear evidence on prohibition of admissibility of testimony of children in cases of hurts. Some commentators have interpreted the word, “*rijālokum*”(your men) as ‘free Muslims’ and say that ‘probity’ or ‘justness’ and ‘agreeing’ is a matter related to the discretion of judge and depends upon the conditions and circumstances, perhaps *Mālik* ‘agreed’ to the testimony of children in hurts/wounds, secondly the verse is in the context of evidence in debt contracts. The jurists have equated the evidence in matters of debts to other than debts but *Mālik* did not do so. Evidence in matters of children’s hurts etc. is not analogical to the evidence in debt contracts due to effective diacritical preventing appendage thereto. Specifying element is not *maslaha mujarradah* but a *maslaha mulaymah* which is governed by the root principle of *Shari‘a* by way of induction from definitive texts and that principle is protection of life and admissibility of child testimony refers to that principle according to *Mālik*. It is according to *Malikyyah* among the essential interests (*masaleh*) on which rests protection of life and blood among children. Another specifying element is consensus of *Madinites* and that is according to *Mālik* equal in rank to the *hadīth* narrated through continuous chain of narrators (*mutawatir*). As he himself indicated by saying, “*al-amr mujtamiūn ‘indanā*.”¹⁸³ (the matter is agreed upon among us).

¹⁸¹ Al-Qur’ān 2:282

¹⁸² Al-Qur’ān 65:2

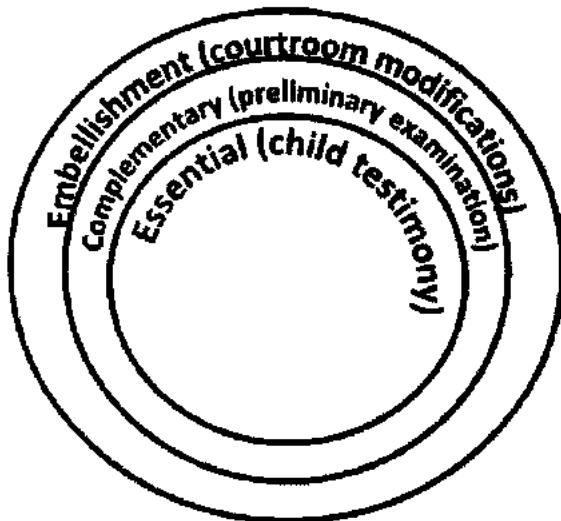
¹⁸³ Husain Hamid Hassan, *Nazriyyat al-Maslaha fi‘l-fiqh al-Islāmī*, (Cairo: Maktabah al-Mutanabbi, 1981), 138-139.

Although *Imām Mālik* has based his opinion on admissibility of child testimony on *maslaha* (public interest) but it is not in contradiction with any text of *Al-Qur'ān* or *Sunnah*. Anything necessary to carry out, protect and promote an essential interest may be elevated to the rank of essential interest just as leaving a desired interest or embellishment may lead to leaving of necessities or essential interest. Embellishments may be raised to the degree of necessities as these afford flexibility and remove hardships the presence of which may cause leaving an obligation.¹⁸⁴ When we say that doing justice is an essential interest, a fundamental objective and among the high intents of *Shari'a* then anything that is necessary to protect this objective become essential interest. Giving and admitting evidence is essential in the protection, promotion and establishment of justice therefore it is raised to the rank of essential interest. Following the same line of arguments provided for the admissibility and acceptance of child testimony in the cases mentioned earlier, this admissibility may be extended to other matters where in the view of court it becomes necessary to take the statement of child/children leads to the same result. The credibility, probity, justness and "agreeing" (or consenting to the child being witness) are in the discretion of judge.

The modern legislations have provided for examination of the child witness by judge by putting simple questions to decide the understanding and intelligence of child before actually testifying in the trial. Even the researches have suggested modes of interviewing child witness and technical aids provided in the courtroom used during the examination of child to avoid repeated testimony, confrontation with the accused, safeguarding the privacy of child victim or witness etc. Using the theory of objectives

¹⁸⁴ *Shāfi'i, al-Mwafiqāt* , 2: 22-23.

of *Shari'a* and accepting that the child testimony is essential in a particular case to provide justice we may depict it in the form of a diagram; the inner shape



represents the essential interest (child testimony), the second shape complimentary (preliminary examination of child witness) and third and outer most shape is embellishment (courtroom modifications).

A child according to law is a person between birth and the age of eighteen years and this period has various stages of intellect and understanding. The lawyers now seem to accept the fact that child of sufficient intelligence may be given right to be heard at a court's hearing. A child may express his/her opinion regarding the decisions that are going to affect his/her life. The issue of competence may be resolved according to the facts, circumstances and ability of child to understand in each case. Capacity of child, in Islamic law, is deficient but the childhood stages suggest that a child may possess limited capacity of execution in some matters with the consent of guardian. A child is

not barred from testifying in the court however exercise of a great deal of caution is required in allowing him/her to testify. An issue which is not dealt in the definitive texts of *Shari'a* may be looked at in the light of principles of public interest, juristic preference and objectives of Islamic law.

The rules regarding the admissibility of child's testimony propounded by the classical Islamic Jurists may not sufficiently deal with certain contemporary incidents but these can become more effective and operational if woven together and considered collectively in the light of *maslaha* and 'provision of justice' as an objective.

Chapter 3

International Human Rights Standards and Tools on Testimony of Child

Chapter 3. International Human Rights Standards and Tools on Testimony of Child

Introduction

The importance of child testimony, credibility of child witness, capacity of child in classical Islamic law has been discussed. The opinions of the classical jurists regarding the testimony of child were analyzed in the light of principle of *maslaha* and classical theory of objectives of *Shari'a* in the previous chapter. It is time to turn towards the International Human Right Law and see how the issue of the testimony of child has been dealt there-in and what guiding principles have been provided by the International Human Right Law to the States Parties in this regard. The application of guiding principles of International standards may enhance the credibility and weight of the child's statement.

Children have become victims of crimes against humanity since the last century. Millions of children died in armed conflicts. They were also recruited in armies. Being part of the armed conflict either as victim or witness of war crime can severely affect a child's mental and physical health and can also have long term impact on the life of a child and the community to which such child belongs. The brutalities carried out against children during armed conflicts compelled the international community not only to protect these children but to listen to the voices of those who have been brutalized. The children brought to the national or international justice system either as victims, witnesses or even defendants of war crimes. The examples are special court for Sierra Leone (SCSL), International Criminal Tribunal for former Yugoslavia (ICTY) and

International Criminal Tribunal for Rwanda (ICTR). In an effort to stop these human rights violations the Rome Statute was adopted in 1998 and came into force in 2002. The Rome Statute (RS) under its article 1 has established international criminal court (ICC) to prosecute the crimes that are of concern of the international community including child specific crimes. ICC provided mechanism for the protection of children as victims and witnesses during judicial process.¹

In this Chapter first of all the study of the very nature, history and development of human right law is to be done. The emergence and development of child's human right law is to be carried out briefly. This is to enlist all the guiding provisions from the relevant instruments with regard to the rights of victims and witnesses of crime and to find out how these should be reflected in domestic laws. A review of UN model law on the 'justice in matters involving child victims and witnesses of crime' 2009 is to be produced.

3.1. Nature and the Historical Development of International Human Right Law

What do we mean by 'human right'? 'Human rights' are special types of rights which are universal in nature as every human being has those rights. These are equal rights of all human beings. Having human rights means a person is generally enjoying dignity of

¹*Children and Justice During and in the Aftermath of an Armed Conflict* (Office of the Special Representative of the Secretary-General for Children and Armed Conflict. Working Paper No.3) http://childrenandarmedconflict.un.org/publications/WorkingPaper-3_Children-and-Justice.pdf
Erik Van de Sandt, *A Child's Story for Global Peace and Justice* (Master's Thesis, Netherlands: Leiden University, Nov.2008), 8.

life. The source of human rights is considered 'human moral nature'.² These rights are available in almost all legal systems of the world including International Law. The significance of their recognition by international law becomes more obvious when these rights are not guaranteed by national law. As a right creates a relationship between a 'right-holder' and 'duty-bearer' in case of human rights often states are duty-bearer who are to guarantee these rights to their subjects by effective law and practice. One must distinguish between basic human needs and human rights as only fulfilling basic human needs may not establish dignity of life these are based on but not necessarily reducible or considered equivalent to human dignity³ even 'cross-cultural consensus' cannot be a source of human rights as many cultures have sanctioned those practices which are now seen as serious human right violations. One wonders if the very idea of human rights is embedded in religion itself, or it is the nature which taught man about his 'rights'?⁴ I think we must leave this question for the reader's mental exercise.

All the major religions of the world have directed their followers to have the responsibility towards their fellow beings specially those who suffer and to direct their thoughts and actions away from self centeredness in favor of common good of mankind, however sometimes the human right violations were also committed in the name of religion. The concept of duty inherent in the religion has provided basis for discussions about rights for instance Judaism teaches the equal value to all human and

² Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Cornell University Press, 2003), 14.

³ Jack Donnelly, *Human Dignity and Human Rights* (2009), 11. www.UDHR60.CH (visited on: 14/3/2014)

⁴ See for general discussion on the nature of human rights Jack Donnelly, *International Human Rights*, 2nd ed. (Westview Press, 1998) and also see by the same author, *Universal Human Rights in Theory and Practice*, 2nd ed. (Cornell University Press, 2003).

Christianity has stressed upon demonstration of love and compassion for others, its famous ‘neighborhood concept’ extended to all in need and despair. Likewise Islam teaches justice, sanctity of one’s life and property, freedom for all, mercy, religious tolerance and co-existence and respect for all human beings. The Prophet Muhammad (peace be upon him) was also a statesman and government administrator therefore Islam is not perceived only as a religion but also a discipline of life. It is considered as a connection between faith and political community. It is not surprising that one finds detailed teachings of the Prophet safeguarding human rights in times of encounter with other people (the basic principles of humanitarian law were in fact laid in his time). Islamic teachings are very clear about rights. The Prophet (peace be upon him) said; “Indeed there is your Lord’s right on you, and the right of thy self on you and the right of your people on you so you should give each his due right”⁵ Other religions of the world like *Budhism* taught kindness, love and respect for all humans and Confucianism as a contemporary of *Budhism* has focused on human relationships and Hinduism the world’s oldest religion has enjoined upon it’s believers “correct action (*dharma*) and good conduct(*sadachara*) towards others in need”.⁶ These religious legacies were carried by the saints, *sufis*, *bodhisattvas* and *sadhus*. On the other hand the philosophers (sometimes without any religious orientation) in different times and places in the history have struggled to find out the “reciprocal relationship” of humans both as individual and as members of society. They saw human rights as natural rights for instance Greek philosophers claimed that a universal law of nature, which is above and

⁵ *Al-Bukhārī*, Chapter on *Fasting*, 1:492.

⁶ Compassion towards fellow beings is part of the teachings of Bhudism under its ‘eightfold path’. See Julia Hardy, *Suffering and the Problem of Evil* at: www.paihoses.com/library/budhism/beliefs/suffering-and-the-problem-of-evil (accessed on; 8/8/2015).

beyond the dictates of a particular society or state, governs every aspect of the universe pervaded all creation and that human conduct should be brought in conformity with that law. Plato, Zeno and Aristotle argued that there is a universal law which binds all and by which just and unjust can be recognized and (Aristotle claimed) that good citizens living in a good political order can perfect the human nature and that “what is just by nature is not necessarily just by the laws of men.” The Roman Stoic Philosophers followed the same ideas and conceived nature as a universal system of rules in both realms; physical and ethical and that it could be known through ‘right reason’ of human mind which, if properly understood and followed, can guide people towards perfection.⁷ Institute of Justinian proclaimed that “Justice is the set and constant purpose which gives to every man his due”.⁸ The Roman jurists developed *jus gentium* (law of nations) claiming that the law is derived from nature and is a source of certain duties and rights of all human beings as members of the world community. On the political side there were efforts to limit the powers of the rulers. King Hammurabi of Babylon created one of the earliest legal code and proclaimed the necessity of honoring the principles of justice. Cyrus the Great promulgated his famous “Charter of Cyrus” inscribed on Cyrus Cylinder (a baked-clay cylinder) in the Persian Empire in sixth century B.C. by which the rights of liberty, security, freedom of religious belief and movement, social and economic rights were recognized.⁹ It was described in 1971 as the first charter of human rights and was translated in all six languages of the UN.¹⁰ In

⁷See generally Paul Gordon Lauren, *The Evolution of International Human Rights*, 2nd ed. (Philadelphia: University of Pennsylvania Press, 2003) (see generally chapter 1), 4-36.

⁸ J. B. Moyle, D.C.L. (Trans.) *The Institutes of Justinian*, 4th Edition. (Oxford at the Clarendon Press, 1906) Book 1 Title 1, 3.

⁹http://www.iranchamber.com/history/cyrus/cyrus_charter.php (Visited on; 19/4/2011 at 12.23 PM)

¹⁰ Ibid.

thirteenth century ‘Magna Carta’ (1215) established that “kings must respect rights”, and that “liberties could be guaranteed by law” and in The Magnus Legaboters Landslov (1275) issued by King Magnus of Norway equality before law was promised.¹¹ Whereas today human rights are seen as a standard of political legitimacy and the governments protecting human rights are legitimate.¹² Although half century ago a state’s treatment of its own citizens was just seen as a matter of ‘domestic jurisdiction’ and mainly states have been considered sovereign, subject to no higher political authority, and a corresponding duty of other states is one of non intervention. “Everyone has a right”, internationally means that a state has the authority and responsibility to implement and protect that right.¹³ Some decades back human rights were not considered even to be an appropriate concern of foreign policy whereas today with 156 states parties to the six leading human rights treaties “human rights are standard subject of bilateral and multilateral diplomacy”.¹⁴ There are international bodies to monitor the state of human rights and voice their concern in case of violation of human rights by the states towards their inhabitants.

Gradual emergence and development of human right law can be traced back in the writings of natural law philosophers. Some philosophers both Muslims and Christians thought that justice and natural rights of man are inherent in the divine will like Al-Fārābi¹⁵ and Thomas Aquina and later by John Lock. Early ideas about human rights

¹¹ See generally Paul Gordon Lauren, *The Evolution of International Human Rights*, 4-36.

¹² Jack Donnelly, *Universal Human Rights In Theory & Practice* 2nd ed. (Ithaca and London: Cornell University Press,2003),12.

¹³ Jack Donnelly, *International Human Rights* 2nd ed. (Westview Press,1998), 3.

¹⁴ Paul Gordon, *The Evolution of International Human Rights*, 38.

¹⁵ Abū Muhammad b. Muhammad b. Tarkhen b. Awzlagh (Uzlagh) was born (260 A.H.) near Fārāb in Turkistān (d.339 A.H. 950 A.D.). He has been termed as “leading philosopher of all times” and also known as “al-mu’allam al-thānī” (the second great teacher after Aristotle) for his scholarly commentaries on

were shared by visionaries belonging to different rich cultures and expressed themselves in different ways. Even the communities who relied on oral traditions instead of written language also contributed with their concepts of human rights which had its share of contribution in the broader discussion of human rights for instance tribal communities' concept of distributive justice and not oppressing the weak through one's might and power etc. Eighteenth century philosophers inspired by Lock tried to establish that law of nature provides basic foundation of human society and tells what is just for all human beings. Thomas Jefferson, the initial drafter of the US Declaration of Independence, was also inspired by Lock thus writes;

[W]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive of those ends, it is the right of the people to alter or to abolish it and to institute new government.¹⁶

Lock's theory of natural rights inspired many declarations of bill of rights in America and France and also modern theory of Fundamental Rights and influenced greatly the subsequent history of political thought.¹⁷ And prior to this the English Bill of Rights 1689 also reflected John Locke's thoughts. The revolutionary leaders of France sought to have in 1789 the Declaration of the Rights of Man and Citizen which proclaimed in its first Article, "Men are born free and remain free and equal in rights." And its second

Aristotle and his work on the harmony between the views of Plato and Aristotle (al-jam'a bain ra'yai al-Hakim al-Aflaqi al-Ilahi wa Aristoteli) N.A Baloch, *Great Books of Islamic Civilization* (Islamabad: Pakistan Hijra Council, 1409 H/1989 A.D.)

¹⁶ Mazher ul Haque, *Political Science theory and practice* 9thed. (Lahore: Caravan Press, 1998), 257.

¹⁷ Ibid.

Article declares that, “natural and imprescriptible” rights of man are “liberty, property, security, and resistance to oppression”.¹⁸

Apart from the efforts of philosophers and visionaries mentioned earlier and recognition of general human rights as natural rights of man there were individual efforts which not only contributed to create awareness of the issue but also expanded the boundaries of understanding of human rights in a more inclusive manner by extending it to women and children. One of these worth mentioning efforts is , “A Vindication of the Rights of Woman”(1792) by Mary Wollstonecraft published in England and “ The Rights of Infants”(1779) a pamphlet by Thomas Spence.¹⁹

These efforts in the path of recognition of human rights were countered by many forces like traditional, cultural and some religious practices which were not easy to overcome and over and above all the concept of sovereignty was the most powerful element of confrontation. Throughout the course of history the rulers have argued that they and their territories were sovereign and thus were not subject to any scrutiny. Practice of slavery in the international trade based on racial discrimination was another hurdle confronting the notion of human rights. Despite these opposing traditional practices the consistent efforts of visionaries determined to bring a change, although were limited to regions or communities, were able to transform the idea of individuals from subject to citizens and were able to create NGO’s like Society for the Abolition of the Slave Trade in May 1787 London.²⁰

¹⁸<http://www.historyguide.org/intellect/declaration.html>(retrieved on 20/4/2011 at 2.19 PM) also see for general discussion Paul Gordon Lauren, *The Evolution of International Human Rights Law*, 2nd ed. 2003.

¹⁹ Paul Gorden Lauren, *The Evolution of International Human Rights Law*, 32-33.

²⁰Ibid., 32, 33 &36.

In short the international concern towards human rights is traced back to the movement of abolition of slavery in the early nineteenth century and the movement of humanizing warfare in the late nineteenth century.²¹ The fundamental change was brought by the signing of United Nations Charter in 1945 and human rights were considered to be the prominent issue in the post-war situation. Three years later the Universal Declaration of 1948 enlisted human rights. At that time the world was divided into western and eastern blocks the UDHR proved to be a remarkable common ground of acceptance for all. Then there was a series of treaties which were basis of modern human right law. Various regional and other instruments and United Nations Covenants took the task of defining human right. The regional instruments include the European Convention 1950, the American Convention of 1969 and the African Charter of 1981 whereas significant universal treaties include two United Nations Covenants of 1966; the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. These were land mark instruments in the evolution of the modern human right law whereas contribution of the other more specific instruments was also very significant like the Convention on the Elimination of All forms of Racial Discrimination of 1966 and the Convention on the Elimination of All Forms of Discrimination against Women of 1979 an important contribution towards the development of the law on discrimination and economic and social rights. The treaties and recommendations sprung from ILO generated effective code of international labor law and in the field of humanitarian law four Geneva Conventions of 1949, limiting the effect of armed conflict and protecting

²¹Ibid., See generally A.H. Robertson and J.G. Merrills, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights*, 4th ed., (Manchester University Press,1996).

those who are not taking part in the hostilities, were developed in two protocols of 1977.²²

3.1.1. Emergence of the Child's Human Right Law

The arguments regarding the idea of children having distinct rights than adults took over a century's time to be accepted in reality. The child rights supporters voiced their concern and were instrumental in the establishment of the institutions for children like juvenile court and compulsory education for children.

The earliest international human rights instrument on the rights of the child was League of Nations Declaration on the Rights of the Child passed in 1924 adopted by its 5th assembly. The Declaration showed concern about the material needs of children in the aftermath of the First World War formally called "The Great War" started in 1914 and lasted until 1918. This declaration was non- binding and only a few states incorporated it in their domestic law. However it was not first effort in recognition of children human rights prior to this Jenuusz Korczak²³ was preparing a declaration before the Geneva Convention of 1924 in which he surprisingly advocated more modern rights like right to respect, right to be taken seriously and over and above a right to resist to educational influence which is not consistent with their own beliefs.²⁴ It was followed by another declaration in 1959 however these ideas could not find their space into that declaration as well. In the Declaration of 1959 the emphasis was on the duties towards

²² Robertson and Merrills, *Human Rights in the World*, 4th ed., 325-326.

²³ It is pen name of Henryk Goldzmit, he was children's author, pediatrician and pedagogue.

²⁴ Michael D. A. Freeman , " Introduction: Rights, Ideology and Children" in Michael Freeman and Philip Veerman (ed.), *The Ideologies of Children's Rights* (Martinus Nijhoff Publishers,1992) , 4-6.

children though the bearer of the duties not specified generally though “mankind owes to children the best it has to give” it was a kind of “proclamation of general principles”. The declaration was not largely binding. The Declaration of 1924 was an “aspirational document” whereas the Declaration of 1959 “recognizes an entitlement to some rights” for children however the articles were somewhat vague.²⁵

The human right standards were applicable to children as individuals by virtue of the general principles of international law for instance Article 2 of the Universal Declaration of Human Rights. Article 25(2) of the Declaration and Article 23 and 24 of the International Covenant on Civil and political Rights and Article 10 of International Covenant on Economic, Social and Cultural Rights also speak of the rights of the child. The discourse on the human rights of children was taken up expeditiously in 1960s more so the courts of different countries and some of the legislations began to recognize the personality of children. In famous Gault case²⁶ Abe Fortas J. wrote in the decision of US Supreme Court that under the fourteenth amendment of United States Constitution a juvenile accused of crime in a delinquency proceedings is entitled to the right of same due process as an adult such as right to timely notification of charges, a right to counsel, a right to confront the witnesses and a right against self incrimination. In 70s a movement in favor of children’s civil, political and social empowerment emerged which resulted into consensus among states that existing international human rights instrument have addressed the rights of child inadequately. The period between 1959 Declaration and the Convention of 1989 is marked with growing consciousness towards the rights of children both at international and national levels. 1979 was

²⁵Ibid. 4 & 73-74.

²⁶387 U.S.1 (1967).

marked as International Year of children. The movement led to passing of The United Nations Convention on the Rights of the Child (CRC) in 1989 on the occasion of thirtieth anniversary of the Declaration of 1959 and then the World Summit of 1990. The Convention contains 54 articles on varying civil, political, economic, social, cultural and legal rights of children which must be respected, ensured and guaranteed by the states. The Convention has been ratified by all states of the world except United States and Somalia to this date.

Later the World Summit held in September 1990 and attended by 71 heads of states. The Summit adopted a Declaration on the survival, protection and development of children and a plan of action for implementation of the Declaration. The states also pledged “to work to promote the earliest possible ratification and implementation of the Convention on the Rights of the Child and to launch programs to encourage information about children’s rights taking into account the distinct cultural and social values in different countries”.²⁷ The World Conference held in June 1993 in Vienna also urged the states parties to ratify the CRC by 1995.

The objective of the movement of children’s rights was recognition of children’s rights as human rights and that the child may be recognized as an independent rights-holder. Due to this legal advancement in international human rights law, today, all states are bound to recognize, respect, protect and promote the human rights of children. This instrument (CRC) can be considered a significant legal achievement which not only has recognized but put the issues related to children’s rights among the mainstream human rights issues. The director of UNICEF (James P Grant) termed it as “*Magna Carta* for

²⁷<http://www.unicef.org/wsc/> (Visited on; 18/4/2011 at; 7.30 p.m.)

children".²⁸ The core concept of the CRC is the recognition of the child as an active subject of rights rather than being the property of the family or the object of the rights and ambitions of the adults and they are being awarded recognition of full members of the human community.²⁹

The child specific international instruments in chronological order include; UN Minimum Rules for the Administration of Juvenile Justice: The 'Beijing Rules' (1985), UN Convention on the Rights of the Child CRC (1989), UN Guidelines on the Prevention of Juvenile Delinquency; The 'Riyadh Guidelines'(1990), UN Rules for the Protection of Juveniles Deprived of their Liberty: The JDLs (1990), UN Guidelines on the Administration of Juvenile Justice: The Vienna Guidelines: ECOSOC Resolution 1997/30 (1997), UN Guidelines on Justice in Matters Involving Child Victim and Witnesses of Crimes: ECOSOC Resolution 2005/20 (2005) and UN Committee on the Rights of Child General Comments No. 1- 13 (2001- 2011). None of these instruments except The UN Convention on the Rights of the Child (1989) is binding on the States Parties.

The Committee on the Rights of the Child issues and publishes its interpretations of the contents of human rights provisions in the form of general comments. The Committee has so far published its general comments on thirteen subjects from 2001 to 2011. Its

²⁸ Deirdre Fottrel, "One step forward or two steps side ways? Assessing the first decade of the United Nations Convention on the Rights of the Child" in Diedre Fottrel (ed.), *Revisiting Children's Rights ,10 years of the UN Convention on the Rights of the Child* (Kluwer Law International,2000),1.

²⁹ Yuri Kolosov, "The Rights of the Child" in Janusz Symonides (ed.), *Human Rights: Concept and Standards* (Ashgate/Dartmouth and UNESCO publishing,2000) ,262.

general comment no. 10 is on “Children’s Rights in Juvenile Justice” was published in 2007.³⁰

3.2. The Survival, Development and Protection of the Child in International Human Rights Standards and Tools

The Declaration of 1959 provides for the need of “special safeguards and care, including appropriate legal protection” for the children in its preamble and also states in the article 8 “The child shall in all circumstance be among the first to receive protection and relief.”³¹ The preamble of the Convention on the rights of the child states that the states parties to the convention take due account of the “importance of the traditions and cultural values of each people for the protection and harmonious development of the child.”³²

The Convention has set out the rights of children in 54 articles and two optional protocols. It is a unique document and has received unprecedented ratification since its adoption in November 1989. It has given the children equal status as adult human beings and acknowledged for them equal inherent values. Children are vulnerable and need special care and protection. In order to provide them necessary protection while considering the right to equal values is rather a tricky job and well handled by the Convention by providing the concept of the “best interest” by proclaiming in the article 3(1);

³⁰<http://www.juvenilejusticepanel.org/en/standardsoverview.html> and <http://www2.ohchr.org/english/bodies/crc/comments.htm> (Retrieved on 21/4/2011 6.40 PM)

³¹ Declaration of the Rights of the Children adopted by General Assembly Resolution 1386 (XIV) of December 10, 1959.

³² Convention on the Rights of the Child adopted by General Assembly resolution 44/25 20th of November 1989.

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

And what actually is in the best interest of the children can be known if they are given the right to express themselves and their views are valued therefore the principle of best interest gives importance to the principle of expression of views thus the article 12(1) proclaims;

“States Parties shall assure to the child who is capable of forming his or her own views freely in all matters affecting the child, the views of the child be given due weight, in accordance with the age and maturity of the child.”

These rights should be available to all children without any discrimination of gender, race, color or religion etc. as enshrined in the Article 2(1);

“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”

Unless these principles are supported by a strong political will of the governments these will otherwise be reduced to mere “well intended rhetoric” therefore the States Parties are required to take political measures to ensure practical implementation of these principles in the Article 4;

“States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in this Convention. With regard to economic, social, and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.”

So the emphasis is on the State Parties to review their existing legislation and ensure the effective application of Convention by making their domestic laws consistent with it.³³

The four core principles of CRC are the right to life, survival and development, non-discrimination, devotion to the best interest of the child and respect for the views of the child. The convention has embarked upon setting standards to protect children’s rights in health care, education, legal, civil and social service. It has also ensured children’s right to survival and development to the fullest and being protected from harmful abuse and influence and exploitation and to be able to participate fully in family, cultural and social life. The convention provides a “mixture of idealism and practical realism” as for instance some of its articles provide practical details like article 28 on education, schooling and dropout rates whereas Article 3 and 12 indicate a rather philosophical approach towards capacity and autonomy of a child.³⁴

³³ Bob Franklin (ed), *The Handbook of Children’s Rights- Comparative Policy and Practice-* (London and New York: Routledge,1995), xi, xii.

³⁴ Jane Fortin, *Developing Law and Children’s Rights* (Cambridge University Press,2005), 37.
See also, CRC Committee’s General Comment No.12, 20 July 2009 p.20 (CRC/C/GC/12) <http://www.coe.int/t/dg3/children/participation/CRC-C-GC-12.pdf>

The right to life is inherent right in CRC. The duty of states parties to support 'survival' and 'development' have always been underlined by the CRC committee and International conferences. The CRC Committee's guidelines for reporting require from the states parties to provide information particularly in respect of three general principles along with other rights. These three principles are considered fundamental towards understanding of the CRC. These principles are; right to non-discrimination (Art.2), the right to life, survival and development (Art.6) and the right to participation or to be heard according to evolving capacities of child.³⁵

The childhood is a varying experience as internationally child is a person from birth to the age of eighteen therefore it cannot be termed as fixed, uniform and single universal experience. Children experience different stages in their lives. Their evolving capacities and gradual development require different degrees of protection. The Article 5 of the convention acknowledges a child's right to 'direction and 'guidance' which off course should be consistent with the evolving capacities of the child and cultural and or customary requirements and implications.

By ratifying or acceding to the convention the States Parties have committed themselves to protect and ensure children's rights and they are obliged to develop and undertake such actions and policies which ensure the best interests of the child. The governments are accountable in this regard before the international community.³⁶ More so the children in modern societies are growing up in the communities that are multicultural therefore states parties in the light of greater recognition of children's

³⁵ Trevor Buck, *International Child Law* (Routledge.Cavendish,2007),58-60.

³⁶ <http://www.unicef.org/crc/>

rights and changing expectations may ensure the principle of best interest and non discrimination while taking into consideration the local circumstances and changing practices. The states parties are under an obligation to ensure to maximum possible extent the survival and development of the children right from their early childhood. The principle of best interest (Art.3 of the convention) is inherent principle in all the articles of the convention and is applicable from measures taken in early childhood to adolescence and from decision making by parents or other authorities to giving opportunity to children to express their opinion in matters concerning them.³⁷

The World Declaration on the survival, protection and development of children 1990 enumerated challenges to be met by the political leaders of the world with reference to children. Among these challenges the most significant is the large number of children are “exposed to the dangers that hamper their growth and development” like being victims of violence, wars, cruelties, exploitation, discrimination and neglect. By this declaration the world leaders committed themselves to work for the optimal growth, development and protection of children.³⁸ For this purpose it was agreed to promote ratification and implementation of the Convention on the Rights of the Child 1989 at its earliest. It was agreed in general to work to eliminate the factors causing difficulties and obstacles towards the survival, protection and development of children like poverty, social disadvantage, discrimination, apartheid, displacement, illegal child

³⁷See generally Eva Maria Belser , Karl Hanson and Alexandra Hirt (ed.) *Source book on International Children' Rights* (Brussels: Stämpfli Publishers Ltd Berne and Bruylant Ltd. 2009),129-132.

-It was held in Hosain v. Malik 671 A.2d 988 (Md.Ct.Spec.App.1996) 'best interest' is to be seen in the light of custom and cultural relativism of a society.

³⁸ World Declaration on the Survival, Protection and Development of Children agreed at the World Summit for Children on 30 September 1990. (<http://www.un-documents.net/wsc-dec.htm>)

labor, exploitation, armed conflicts etc. Apart from UN systems, international and national organizations children were also appealed to participate in this task.³⁹

3.3. The Child's Right of Participation or to be Heard

The convention's Article 12 recognizes the right of child to express his views and binds the states parties to afford to the children the opportunity to express their views and to be heard in any judicial and administrative proceedings.

The right to be heard is considered as fourth general principle of the convention. The other three principles are; right to life and development, right to non discrimination and the child's best interest as primary consideration in all relevant matters. The right to participate or express views can only be effective when those views are respected and given due weight. The article 12 thus states;

- 1- "States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child given due weight in accordance with the age and maturity of child."

The International Law recognizes the right of individual to hold an opinion.⁴⁰ Holding an opinion can neither be regulated by the law nor controlled by the state. An expression, which is manifestation of opinion, is subject to some restrictions without impairing the right of freedom of expression. The Convention's Art.12 (1) makes it the duty of state to ensure the participation and involvement of children in matters affecting them by affording them the opportunity to express their opinion. The views of children

³⁹ Ibid.

⁴⁰ Article 19(1) of the International Covenant on Civil and Political Rights, Article 19 of the Universal Declaration of Human Rights.

should be considered seriously and given “due weight” according to their age and level of maturity.⁴¹ The article reinforces the right of young children as well to participate actively in “the promotion, protection and monitoring” of their rights. In its general comment no.7 the Committee emphasized that article 12 applies equally to both younger and older children. Children are not passive recipients of rights rather they are holders of rights and even the youngest children are entitled according to this article (12) to express their views however the due weight to these views should be given in accordance with their age and maturity.⁴²

The Committee urged the states parties in its general comment no.7 to take measures to promote and ensure the concept of child as a right holder and possessor of freedom of expression and to implement his/her right to be consulted in matters affecting him/her from the earliest stage in an appropriate manner according to his/her evolving capacities while ensuring the right of protection from harmful experience. The Committee also urged the need to introduce and anchor the right of expression right from within the family, extended family (if necessary), local community and other authorities in relation to health, education, legal proceedings, development of policies with regard to children and provision of services either by way of consultation or research. The Committee desired that the states parties should take steps to promote active involvement of parents and other responsible persons in this regard and provide

⁴¹ Geraldine Van Bueren, *The International Law on the Rights of the Child* (London: Martinus Nijhoff Publishers, 1995), 136-137.

⁴² Eva Maria Belser, Karl Hanson and Alexandra Hirt (ed.) *Sourcebook on International Children's Rights* (Brussels: Stämpfli Publishers Ltd. Berne and Bruylant Ltd., 2009), 132.

training etc. for adults to attain such skills which are necessary in achieving the children's right of participation in their best interest.⁴³

A child's right to be heard is mentioned in the context of other provisions of the Convention in case of separation of a child from his/her parents all interested parties are given the opportunity to express their views and that includes child under Article 9 (2) also in case of adoption under Article 21(a) and in case where a child is deprived of his liberty under Article 37(d) and in the court proceedings under Article 40 (b) (vi). The right to be heard is applied in all matters affecting the child either by way of action or neglect and it has been declared by the first Committee on the Rights of the Child, which was established under Article 43 of the Convention in 1991, not merely a right of the child but a principle of the Convention like other principles of the Convention such as 'life and development', 'right to non-discrimination', 'consideration of the best interest'. The 'right to be heard' is understood according to the general comments of the Committee as a juridical term and the legal system of a country may define the conditions under which this right is realized. Generally the person has to be informed about the matter in which his views are expected so is the case with a child. The child should be appropriately informed about the matter in which his/her views are expected, the manner in which the hearing will be conducted and also the impact of the views and possible consequences. The child should be informed about the procedures of

⁴³Ibid., 132-133.

complaint and remedy available to the child in case the child is not willing to accept the consequences.⁴⁴

Whether it is child's duty to prove that he/she is capable of expressing his /her views? And whether there should be an age limit introduced by the state law to exercise this right? The Committee clearly stated that it is not the duty of the child to prove his/her capability or capacity to express his/her views it is rather the duty of adults to develop sensitivity towards child's ways of communication. The Committee not only recommended that the States Parties should avoid introducing the age limit either by way of law or practice which might restrict the right of the child to be heard but also insisted that even if the age limit is set for judicial and administrative proceedings, the younger children should be afforded opportunity to be heard in order to find out whether their views can contribute towards a better solution of the situation. Even if the child lacks understanding or is too much involved emotionally or scared his/her statement may contribute in the solution. According to the Committee's insistence the weight of the statement may be decided on case to case analysis.⁴⁵

The right to be heard is available to the child in all matters including administrative and judicial proceedings. Article 12 (2) of CRC states;

"For this purpose [mentioned in para.1], the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body in a manner

⁴⁴ Ibid., 198. See also Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime adopted by Economic and Social Council resolution 2005/20 of 22 July 2005. See generally guidelines 19, 21 and 40.

⁴⁵ See generally Lothar Krappmann, "The Weight of the child's view (Article 12 of the Convention on the Rights of the Child)" *International Journal of Children's Rights* 18(2010): 501-513.

consistent with the procedural rules of national law.” In its General Comment¹⁰ has stated that it is obvious that the right to be heard provided for a child, who is an alleged accused or known to have infringed the law, is fundamental for a fair trial but it is also obvious that the child has a right to be heard directly and not only through the representative or appropriate body if that is in the best interest of child. And this right must be observed and implemented right from the beginning of the trial through all stages of it even at the pre-trial stage in front of the police, prosecutor and investigating judge. As the right of silence is available to the child in this regard he/she has full right to express his/her views freely without any restriction and those views must be given due weight. Effective participation of the child in the proceedings can be attained by informing about the charges, juvenile justice process and possible measures. Active engagement of the child in judicial process can contribute into positive results. The requirement of a fair trial is that the child should be given opportunity to participate effectively, therefore he/she needs to comprehend the charge and possible consequences in the form of penalties. and to make it possible for the legal representative of the child to provide an account of events, to challenge the witnesses, to decide appropriately about the testimony, evidence and measures to be imposed. Under Article¹⁴ of the Beijing Rules the proceedings should be conducted in a manner and atmosphere of understanding as to allow the child to participate and express freely. Considering the age and maturity level of the Child (witness or victim) modified courtroom procedures and practices may be required.⁴⁶

⁴⁶CRC/C/GC/10, 25 April 2007 in Eva Maria, Karl Hanson, Alexandra Hert (ed.), *Sourcebook on International Children's Rights*, 197-198.

Article 12 cannot be observed effectively unless the national law of the state party and corresponding procedures are there to facilitate the implementation of the article. Articles 37, 39 and 40 of the Convention have laid down the duties of the states parties to take steps towards the legislation and administration of the juvenile justice system to conform their national legislation to the Convention. The right to be heard and express must be fully implemented in all stages of the juvenile justice. In its general comment no.12 the committee proposed five steps to implement the article 12 and realization of child's right to be heard in a given context. These steps include;

- Preparing the child for hearing and it means that the child must be informed about his right of 'expression' or 'to be heard'.
- The right of 'expression' or 'to be heard' may either be exercised by the child himself or through a representative.
- The child must be informed about the possible consequences of expressing his views whether it is in a judicial or administrative proceedings or any other setting.
- The child must be prepared about the place, time and participants of hearing and
- The child's views in this regard must also be taken into consideration.⁴⁷

Among other steps, the willingness of adults to listen to the child and giving due regard to his/her views must be brought into the knowledge of the child whether these adults are administrators, decision makers or specialists. The mode of hearing should be in a talk like manner rather than one-sided examination and preferably in

⁴⁷ CRC/C/GC/12 20 July 2009.

confidentiality not in an open court.⁴⁸ The assessment of child's capacity to form his views, if indicative of reasonableness and independence of forming his/her views, such views may be considered significant in the settlement of issue. The states parties are required to develop good practices to assess the capacity of child in this regard.⁴⁹ The decision makers should inform the child how his/her views were considered and what was the outcome based on those views so that the child may prefer to give another proposal or prefer an appeal in case of judicial and administrative proceedings. Proper legislation must be in place to redress any violation of child's right to be heard.⁵⁰

3.4. International Human Right Standards and Child Testimony

The provisions of CRC related to the issue of child testimony though does not suggest any details but when looked at with consideration of other international instruments' relevant provisions the objective of the international human right law thus may be understood as summarized in the following lines.

Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime adopted by a resolution 2005/20 were drafted with the intent to provide guidance to the states parties to develop effective mechanism to provide improved responses to child victims and witnesses of crime. In this way the children and their families will be more willing to disclose instances of victimization and to be more supportive of the justice process. The justice for child victim and witness must be assured while safeguarding the rights of accused and convicted offenders and make sure that child victim and witness receive equivalent protection in all countries. Article 12 and Article 40(iv) of

⁴⁸ Ibid.

⁴⁹ Ibid., Good practices will be discussed in concluding chapter.

⁵⁰ Ibid.

CRC are direct on the evidence of child. A child delinquent, victim or witness has the right to express his views, opinions and beliefs and to contribute especially to the decisions effecting his or her life including those taken in any judicious process and that those and views should be taken into consideration according to his or her abilities, age, intellectual maturity and evolving capacity. For the purpose of testimony of child International Law does not seem to be concerned about the age or capacity of a child witness except for the maximum age of child which is 18 so as the age of criminal liability is left for the states parties to decide so is the case with the minimum age of the competence of child witness or capacity to be a witness should be decided by the national law of a state party or may be decided by the national courts depending upon the capability and maturity of child witness in each case. The fact is that there is no specific age limit for testifying as witness, "the person who testifies at a trial must be able to understand the duty to tell the truth and be able to communicate..."⁵¹ The guideline 18 clearly states that the age of child alone should not be a deciding factor of the invalidity or untrustworthiness of his/her testimony. While affirming a child witness's (and victim's) right to be heard and express himself freely the guideline 21 (b) also provides to accommodate the concerns of such child not only regarding the safety in relation to the accused but the manner in which they prefer to provide testimony. Under guideline 19 it is required that the child witness (and victim) should be informed regarding timings and manner of testimony and questioning and also should be informed about the support mechanism available to such children. Under guideline 25 professionals are required to develop and implement measures to make it

⁵¹ Judy Hails, *Criminal Evidence* 6th ed., (Wordsworth Publishing,2009), 144. Available at: <http://books.google.com.pk/books?id=M-drzV5milC&pg=PA104&dq=perjury+chai> (retrieved on 26/4/2011)

easier for children to testify or give evidence and to improve communication and understanding at the pre-trial and trial stages and 25 (b) provides that support persons, including specialists and appropriate family members, to accompany the child during testimony. All these measures should be taken into consideration having recourse to “child’s best interest” (while also safeguarding the rights of accused or offender) and in a “child sensitive” manner and for this purpose the professionals working with the child victims and witnesses are required under guideline 40 to be properly trained and according to guideline 45 they should know the utilization of guidelines, necessary laws, tools and protocols which are developed to assist child victims and witnesses. As mentioned earlier a child witness (and victim) under Article 40 (2) b (vi) of CRC and Beijing Rule 7 cannot be compelled to give testimony (or confess guilt) specially when it is self incriminating. The children are not held liable for giving false evidence. It is inferred from the measures proposed by these instruments that a child victim or witness should be protected from secondary victimization. Any mental harm or financial drawback caused by the criminal proceedings is termed as ‘secondary victimization’. A victim may suffer harm even by loss of time or may suffer harm or be threatened by the accused. It might also be caused by repeated examination or aggressive techniques of interrogation and, particularly in the case of sexual abuse, intrusive medical investigation or when the child faces removal from the family. Sometimes very act of testifying may result into secondary victimization. However protection of child victim and witness should not erode fair trial of defendant.⁵²

⁵² See generally Bernd Schunemann, “Protection of children and other vulnerable victims against secondary victimization: making it easier to testify in court” *ERA Forum* (2009) 10: 387-396 (Accessed on: May 11, 2011). Doi:10.1007/s12027-009-1030-7

The issue of child and justice still needs a lot of clarity both in national and international justice systems. A child victim, witness and even perpetrator need to understand his/her right and responsibility in the access to justice. This issue has been highlighted more vividly when the children were brought to justice after or amidst an armed conflict. The children both male and female, even at very young age have been recruited in the armed conflicts. They have either witnessed, have been victims or perpetrators as child soldiers. They have been molested, abused, raped, maimed and even used as frontline combatants either to kill or to be killed.⁵³

The optional protocol to UN Convention on the Rights of the Child on the Involvement of the Children in Armed Conflict prohibits compulsory recruitment of children below the age of 18 years. The International Criminal Court (ICC) was established under Rome Statute⁵⁴ which discourages the direct participation in hostilities and declares the recruitment of children under 15 as war crime for the jurisdiction of ICC. The ICC cannot prosecute persons under 18 therefore the children can only participate as victims and witnesses of crime. The Rome Statute not only defines the nature of crimes with regard to children but the rules of procedure and evidence include special provisions with reference to the protection of children during investigation.⁵⁵ Prior to Rome Statute the Geneva Convention and Optional Protocol of CRC has prohibited⁵⁶ child

⁵³ *Children and Justice During and in the Aftermath of Armed Conflict*, Working Paper No.3 (UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict, (September 2011) www.un.org/children/conflict

⁵⁴ Article 1 of the Rome Statute For ICC.

⁵⁵ Emma Bonino and Carol Bellamy, *International Criminal Justice* (September 2002), 15, www.unicef.org/emergencies/files/ICJC.pdf .

⁵⁶ CRC Optional Protocol on the Involvement of Children in Armed Conflict urged the states parties to take measures to ensure that the persons who have not attained the age of eighteen should not compulsorily be recruited in their armed forces, or take direct part in hostilities as the person under the age of eighteen are entitled to special protection (Articles 1,2 &3).

recruitment and the African Charter on the Rights and Welfare of the Child has reiterated the same.

The following international bodies have either tried or trying the war crimes;

- The International Criminal Court (ICC),
- The International Criminal Tribunal for former Yugoslavia (ICTY),
- The International Criminal Tribunal for Rwanda (ICTR),
- The Special Court for Sierra Leon (SCSL),
- The Truth-Seeking and Reconciliation Commission (for Sierra Leon).

CRC is a universally accepted and ratified by all countries except two⁵⁷ it has provided a comprehensive set of rights for children. Its principles are widely accepted. The right of 'best interest' for instance can be inherently present in all decisions effecting children. The right of 'expression' should also be present in all judicial or administrative proceedings with regard to children. The right to be heard during judicial proceedings must not jeopardize child's sense of self respect, dignity as a human being and his/her mental and physical health. International legal standards require that all judicial proceedings involving child victim and witness must be based on the 'best

⁵⁷ USA and Somalia has not ratified the Convention. Both the states have signed it though. The US has signed it in 1995 and Somalia in 2002, which is not devoid of legal effect. The United State's non-ratifying of this instrument is attributed to its family laws being subject to the "competence" of the states. Owing to some "structural and constitutional difficulties" there is fear of federalizing the family law if the Convention is ratified. There might be some other reasons too including threat to "parental rights". (See Trevor Buck, *International Child Law*, 77-78).

interest' principle of CRC therefore all possible steps to minimize the harm, risk or re-victimization of the child victims and witnesses must be taken.⁵⁸

The right of participation and other rights in the CRC clearly suggest that children are not mere passive receivers of the rights but they are assigned active role to participate and express their opinion in all matters affecting them. The right of participation or to be heard in judicial proceedings whether a child is a victim or witness of a crime can effectively be achieved only through a mechanism which is child friendly, supportive and based on the measures designed especially for children keeping into consideration their developmental stages and evolving capacities. Testifying in the court can altogether be a different experience for a child than an adult. Questioning a child needs special skills and procedures. The international standards indicate that for this purpose a criminal justice system must be in place.⁵⁹ Many countries including Pakistan lack child friendly procedures and rather the criminal justice system is designed to deal with juvenile offenders only.⁶⁰

The truth and reconciliation commission (TRC) for Sierra Leone was urged to work seeking guidance from CRC and other legal standards including the African Convention on the Rights of the Child while taking into consideration the best interest policy of CRC for children.⁶¹ During the proceedings children's right to protection

⁵⁸ Judy Hails, *Criminal Evidence*, 46, 51.

⁵⁹ CRC Article 40 (3).

⁶⁰ See Juvenile Justice System Ordinance(2000) of Pakistan.

⁶¹ Natali Mann and Bert Theuermann, *Children and the Truth Reconciliation Commission for Sierra Leone* (A report based on a technical meeting on children and the TRC organized by UNICEF and others), (Leister Peak, Freetown, 4-6 June 2006,), 1. Available at; <http://www.unicef.org/emergencies/files/SierraLeone-TRCReport.pdf> (Visited on; 8/8/2013)

should be ensured by maintaining their privacy and confidentiality.⁶² Child witnesses at special court for Sierra Leone testified via video link. The task of child witness protection has been multifaceted for the special court; the child witnesses are to be protected not only from re-victimization, re-traumatization, “renewed psychological harm” but also from learning their evidence from adults like interviewer, support person or those who assist them as they sometimes give an account which they feel the elders want to hear.⁶³ However in case of Special court of Sierra Leone the fear of re-traumatization etc. was marginalized due to the fact that the former child combatants cum witnesses were now adults at the time of trial. However they under-went certain negative developments during war time and showed tendency to lie. They were disrespectful to authority figures and were rule-breaking.⁶⁴ Facing the court procedures can cause anxiety and going through trauma can affect the memory of a child (so a child may not be as reliable witness as an adult).⁶⁵ For the purposes of special court of Sierra Leone the child witnesses with parental support and those who are stable, settled or well-adjusted were preferred to be confirmed witnesses whereas those showing vulnerability to re-traumatization, lack of family structure or support or those who could not be located easily due to mobilization were dropped even after confirmation as witness and were not called to appear before the court. Dropping the witnesses was considered in the ‘best interest’ of the child.⁶⁶ For participation in court proceedings

⁶²Ibid., 6.

⁶³ Kyra Sanin and Anna Stirnemann, *Child Witness at the Special Court for Sierra Leone* (California: War Crimes Studies Center University of California Berkley, 2006), 8 Available at; http://wcsc.berkeley.edu/wp-content/uploads/documents/ChildWitnessReport_000.pdf (Visited on; 9/8/2013).

⁶⁴ Ibid.

⁶⁵ Ibid., 9. (Via email from former court psychologist).

⁶⁶ Ibid., 21.

consent of child and/or his parents was required but sometimes parents were not available due to the displacement of child combatant. Being witness of war crimes at an International forum is quite different than being witness in other national court proceedings and can often stigmatize the child again in society therefore some children's families did not support the cause.⁶⁷ Determination of age of witness to testify was not focal point rather the veracity, reliability or otherwise vulnerability of a child witness were only point of concern for the prosecution. Unless the matter was to be determined for a procedural requirement for instance whether the testimony should be allowed via video link or not, the age of witness did not matter. In the light of special court's guidelines the prosecution kept the number of child witnesses minimum and preferred adult witnesses whenever possible due to the fact that they could not be influenced easily however the adult witnesses could not provide first-hand information about being a child soldier therefore the prosecution ended up relying upon the testimony of expert witnesses "involved in the Demobilization, Disarmament and Reintegration efforts."⁶⁸

The ICC has provided mechanism to implement existing standards of child protection. This mechanism is a furtherance of CRC and its Protocols. It criminalizes the act of conscripting and enlisting of child soldiers under the age of fifteen. It provides procedures to protect the rights of children during their interaction with the court as victims and witnesses. It requires from the prosecutors to be sensitive to the interest of children and their protection⁶⁹ and to make special arrangements for child witnesses to

⁶⁷ Ibid., 22.

⁶⁸ Ibid., 14.

⁶⁹ Article 54 (1) (b) of Rome Statute.

testify in private without impairing the right of the accused to a fair trial.⁷⁰ The Rome Statute provides for the establishment of victims and witnesses unit to provide protective and security measures and other support for victims and witnesses appearing before the court.⁷¹ The Rome Statute takes into consideration the interest of child and his right to express his views⁷² in furtherance of the core principles of the CRC i.e. ‘best interest’ principle⁷³ and ‘right of expression or to be heard’ in all matters administrative and judicial affecting the child.⁷⁴

The drafters of Rome Statute and other standards dealing with the crimes against humanity perhaps could not at that time imagine that in future the children would not only be recruited as child soldiers but they will be used as suicidal bombers to kill civilians. Can they be termed as ‘perpetrators’ or ‘victims’ of crimes against the humanity?

3.5. A Review of UN Model Law, “Justice in Matters involving Child Victims and Witnesses of Crime” (2009):

The UN Model Law on ‘Justice in Matters involving Child Victims and Witnesses of Crime’,⁷⁵ was drafted to assist the States Parties keeping in view the obligation under the ‘UN Convention on the Rights of the Child’ (adopted by the General Assembly in its resolution 44/25 of 20 November 1989 which entered into force on September 2, 1990) and the Optional Protocols and also considering the Economic and Social Council

⁷⁰ Article 68 (1),(2) R.S.

⁷¹ Article 43 (6) of R.S.

⁷² Article 68(3) of the R.S.

⁷³ Article 3 of the CRC.

⁷⁴ Article 12 (1), (2) of CRC.

⁷⁵ http://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf

resolution 2005/20 of 20 July 2005, which includes as an annex the Guidelines on 'Justice in Matters involving Child Victims and Witnesses of Crime'.

The Law has been drafted bearing in mind a combination of rights provided in the Convention on the Rights of the Child and the 'Guidelines' such as; the right of 'protection', 'best interest', 'expression', 'non-discrimination', these rights are considered CRC's fundamental principles. The other rights include; right to privacy, to be informed, protection from hardship during judicial proceedings, effective legal assistance, safety and compensation.⁷⁶

The Law has been drafted with the view of protection of the children involved in the justice process. It is considered that "improved responses" for such children and their families will make them more supportive of the justice process and more conveniently disclosing their victimization and thus resorting to the justice system for seeking relief, as mentioned in the preamble of the Model Law.⁷⁷

The UN Model law and its related commentary is a product of The United Nations Office on Drugs and Crime (UNODC) with the support of UNICEF and the governments of Canada and Sweden. It has been provided with the commentary elaborating its provisions and indicating also the measures taken in this regard by different states and governments to improve their justice system with regard to the child victims and witnesses. The law is comprised of a preamble, four chapters and 35 articles. The provisions are *mutatis mutandis* applicable to the civil law matters. There

⁷⁶ See Preamble of the UN Model Law on, 'Justice in Matters involving Child Victims and Witnesses of Crime.'

⁷⁷ Ibid.

are optional provisions to suit the civil law countries as the model law has been drafted to suit both common and civil legal systems.

The first chapter provides definitions for the purpose of Model Law that are either derived from international instruments or national legislations of different countries such as “child victim or witness” which means a victim of crime or a witness thereto who is under the age of 18 years, “Professionals” mean those persons who by way of their work are in contact with child victims and witnesses and are responsible to address the needs of such children in the justice system including also prosecution and defense lawyers, “support person” a concept incorporated in the legislations of different countries means a person specially trained to assist a child throughout the justice process so that a child may not be subjected to duress or “re-victimization” and “secondary victimization”. These terms are defined and explained as situations where a child suffers more than one criminal incident over a specific period of time and victimization which may occur through response of institutions and individuals towards a child victim.

According to the second chapter from Article 1-8, the child victim or witness has a right that his/her ‘best interest’ should be given prime consideration while safeguarding the rights of accused as well. Article 2 provides general provisions regarding the non discrimination during the proceedings, safeguarding the child’s privacy and not disseminating any information which may identify the child victim or witness except with express permission of the court and child’s right to freedom of expression and contribution in the decision taken in the course of justice which may affect his/her life. Article 3 provides that it is the duty of teachers, doctors, social workers or any other

appropriate professional categories to report to the concerned authorities suspected child victim or witness to crime and assist such child until he/she gets professional assistance. The article does not suggest any punitive measure to be taken on the willful neglect of such duty. The subsequent article (4) provides that a person who has been convicted in a final verdict of an offence against a child should not be employed in an association or institution providing service to children so that such person may not come into contact with children. The competent authority should make violation of this a punishable offence. Articles 5 and 6 give details regarding establishment and functions of an authority for the protection of child victims and witnesses. Article 7 makes it the duty of the members and officials of the authority apart from the general duty to maintain the privacy and confidentiality of information about such children which have been acquired during the performance of their duties. The violation of confidentiality requirement is to be a punishable offence. Article 8 provides that the professionals working with the child victims and witnesses should be trained in; assisting the child victims and witnesses, human rights law and its principles, child sensitive communication skills, interviewing skills and protection and presentation of the evidence. They must have the knowledge of developmental stages of child and must be aware of the social and ethnic issues with reference to children.

The foregoing article seems quite general but important as it emphasizes the importance of the role of professionals working with the child victims and witnesses. These professionals must be aware of the importance of their role as well as equipped to perform the same, as mishandling of children can lead to very serious consequences. Their role demands high quality of professionalism, confidentiality and sensitivity

towards children's issues therefore it is very important that they should undergo appropriate training for their task.

The third chapter includes Articles 9-34 and is divided into five parts (A-E). The first part 'A' Article 9-12 is "General Provisions". Article 9 extensively provides the right of child victim or witness. The child's and parents or guardian, lawyer, support person should be informed by the competent authority (the establishment of which is given in the preceding chapter) about the stage of the legal process, manner and time of testimony and interview to be conducted, availability of support mechanism, rights of the child victim and witness, how to obtain compensation, whether any "restorative justice scheme" is available, the stage, progress and outcome of the case and the status of the accused.

Articles 10-12 generally provide that legal assistance should be provided by the state to the child free of charge. The child should be provided with the safety and protection measures so that the accused may not have direct contact with the child. The court may be requested for house arrest or pre-trial detention order for the accused with 'no contact' bail condition, protection order for the child by police or any other relevant agency or an order to safeguard the information regarding the whereabouts of the child from being disclosed. The state should also provide interpreter free of charge to the child if need arises and the courts should ensure that the proceedings are in a language understood and comprehended by the child. Articles 13-19 are the provisions applied to all the national authorities involved in the investigation of a case where a child victim or witness is involved. These provisions aim at protecting the child from "secondary victimization" or "re-victimization". Under Article 13 a specially trained investigator

should be appointed to interview the child. Repeated interviews have been discouraged and a “child sensitive approach” has been emphasized. According to Article 14 any medical examination or bodily sample taking of the child must be done with the authorization of the court and in the presence of parents or guardian or support person. During the investigation child’s mental and physical health is to be taken care of and it should be ensured that the child receives a competent medical care and treatment. Under Articles 15-19 support person’s role is elaborated. The support person is to be designated by the competent authority to assist the child throughout the proceedings of the case right from the investigation to the final verdict of the case. The support person should be trained and should bear professional skill to communicate with the children and to provide them assistance. The support person must be kept informed about the proceedings. The functions specified in Article 17 make the support person very important during the whole legal process but there is no provision to safeguard the quality of evidence so that the child may not be influenced or tutored by the support person. The support person must be informed by the competent authority in case of release of the accused from custody or pre-trial detention, whatever the case may be, and the support person shall inform the child his/her parents or guardian and the lawyer and shall assist the child in requesting the protection measures.

The articles 20-28, are the most important part dealing with the competence, procedure and mode of testimony of a child witness. According to Article 20, unless proved otherwise, a child is considered a competent witness. The testimony of child is not to be invalidated due to his/her age if he/she is capable of giving “intelligible and credible” evidence. The Model Law suggests that a child witness is a competent witness

regardless of age unless it is proved otherwise though the weight given to this testimony will be according to the child's age and maturity level. The testimony for the purpose of this article includes testimony of child given with communication aids or the assistance of a specialized person who is expert in communicating with children. The child's views concerning the case and safety of the child should be accommodated or otherwise he must be explained the reason for not doing so. The child shall not be required to testify against his will and without the knowledge of his parents or guardian but in fact the parents or guardian will be invited to accompany the child during testimony except when such parent or guardian is himself perpetrator of offence against the child, the child does not want to be accompanied or when the court is of the view that it is not in the best interest of child to be accompanied by his parents or guardian. The competency examination of a child witness may be conducted, according to article 21, in order to ascertain whether the child can understand the questions put to him/her or has the knowledge and understanding about the importance of telling the truth. Only age factor should not be a reason to conduct such examination. The court shall only allow the competency examination if there are compelling reasons to do so and will record such reasons. The competency examination is either conducted by the court on the basis of questions submitted by the public prosecutor or defence lawyer. The court may appoint an expert to examine the child. The persons to be present at the examination may include the magistrate or judge, the prosecutor, the defence lawyer, the child's lawyer, a court reporter or clerk and the child's parents, guardian, guardian *ad litem* or any person whose presence in the court's view is necessary for the child's welfare. The article, however, discourages the repetition of competency examination

and especially any psychological or psychiatric examination to assess the competency of child unless there are really compelling reasons to do so. According to article 22 it is the discretion of judge to allow a child's unsworn evidence, if in his opinion the child does not understand the nature of oath, on the promise of telling the truth, however the child shall not be subjected to prosecution for giving false evidence. Under article 23 before inviting the child victim or witness to court, the competent magistrate or judge shall verify that the child is receiving the assistance of support person otherwise the judge will appoint a support person with consultation of child or his/her parents or guardian and will afford sufficient time so that the support person may familiarize and liaise with the child. The support person will be informed by the court about the date and venue of the trial.

The Model Law does not provide any measure or system of check as to the role of support persons neither it provides any rules of conduct for them. The fact is that the children are easily influenced. Their testimony may be influenced or tutored by such persons especially when the support person is appointed with the consultation of child and his family as provided in article 23 and article 25 where it is provided that the support person shall be allowed by the judge to remain with the child throughout the trial, in addition to the child's parents or guardian, for emotional support of the child. In the absence of any provision as to the age of child when he/she needs the support person's assistance it seems that this facility is generally for children regardless to age.

The article 24 and 26 are with regard to material facilities provided to the child victim and witness for example waiting area should be separate from adult waiting area. The children waiting room should be equipped in a child friendly manner. The child should

not be visible or accessible to the accused or other persons known to have committed a criminal offence. The child should also be facilitated likewise in the court room according to his physical and emotional needs. Under article 27 cross examination of a child shall not in any case be allowed by the accused. The child's cross examination shall be undertaken by the defence lawyer under close supervision of a magistrate or judge who may prevent the lawyer from asking any question which might expose the child to hardship, intimidation or duress. Article 28 provides the procedure to protect the privacy of child during the court proceedings. In order to protect the child's privacy and safeguarding his/her well being like; assigning a "pseudonym" or "number", Striking out from public record any details which might disclose the identity of the child, ensuring the confidentiality with regard to child's identity, use of electronic devices during testimony for the protection of such child and affording flexible schedule and time of examination and recording of testimony.

All aforementioned measures shall be taken either on the request of the child, his parents, guardian, support person, any other appropriate person designated to provide assistance or on the courts own motion keeping always into consideration the best interest of child and the rights of the accused.

The articles 29-33, deal with the "post trial period" and right of information of the child. In case of the existence of 'the state victims' fund', it is the duty of court to inform the child victim, his/her parents or guardian and lawyer about the procedure to claim the compensation in accordance with the national law. The child, his/her parents, guardian and the child's lawyer should be informed by the competent authority if the restorative justice measures are considered for the child about the availability and

access of such programs also the possibility of seeking any compensation or restitution from the court if such restorative program fails to achieve an agreement between the child victim and offender. The court shall inform about the outcome of trial to the child, his/her parents, guardian and the support person and invite the support person if necessary to provide help and emotional support to the child so that he/she can come to terms with the outcome of trial. These persons will also be informed about the child's right to express his views in case the offender is granted a parole. The role of support person is not limited to the proceedings of the trial but his/her role is extended even after the conclusion of the trial. Article 32 provides that the support person immediately after the conclusion of the trial will liaise with the appropriate agencies and institutions to provide the child victim or witness for further counseling (if necessary) and in case the child is to be repatriated, with the competent authorities for preparations in this regard. In case of the release of convicted person, the competent authority is under a duty, according to article 33 to inform the child, his/her parents or guardian through the child's lawyer or support person at least one day prior to the release.

According to article 34 the provisions of this (model) law shall apply to all matters pertaining to a child victim or witness *mutatis mutandis* including civil matters. Whereas article 35, is optional provision for the civil law countries.

In a nutshell it may be said that the UN Model Law is intended to cover all children who are either victims or witnesses of the crime and are under the age of 18. It covers all victims and witnesses either in conflict with law or not. The law has been drafted taking into consideration different legal systems and drafting traditions. It provides a guideline to the states in order to draft such law keeping in view their own drafting

tradition and national requirement in the light of the international instruments especially the UN Convention on the Rights of the Child 1989.

Modern day human rights law has a long struggle of international community at its back. These rights still have to gain widespread recognition. CRC is universally ratified instrument and provides all sorts of rights to children of the world. Unless the state parties take measures domestically to conform the national law to the human rights standards and to reflect the provisions of CRC and other relevant instruments in their national legislations the rights of children provided in these instruments will go unattended at large. Depending upon the fact that a state is either adhered to monist or dualist tradition, once the international human rights conventions have been ratified and formally validated in domestic legal system by a state, these must be applied by the domestic courts. There are two ways to achieve this purpose either to make necessary legislation to that effect or to familiarize the national courts with international human rights law.⁷⁸

Pakistan has ratified the Convention on Rights of the Child in 1990 with reservation which provided that; "Provisions of the Convention shall be interpreted in the light of the principles of Islamic Law and values."⁷⁹ Later Pakistan withdrew the reservations on

⁷⁸ Benedetto Conforti, 'National Courts and the International Law of Human Rights" in Benedetto Conforti and Francesco Francioni (ed.) *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff Publishers, 1997), 7.

⁷⁹ <http://www.unhchr.ch/htm/menu2/8/stat1.htm> (visited on; 10.9.2012).

July 23, 1997.⁸⁰ In Pakistan 'dualism'⁸¹ is the accepted norm. An international agreement signed by the country can only be enforced through legislation.⁸²

Islam has stressed upon human rights and dignity of mankind. Islamic Law (*Shari'a*) is the source of these rights. These rights cannot be suspended or taken away by any power as the source of these rights are divine revelation. No ratification or legislation is required to implement these rights "their observance (is) an act of worship and their neglect or violation (is) an abominable sin..."⁸³

The Muslim World League held a symposium on human rights in Islam on February 25-27, 2000 in Rome which resulted into the Declaration of Rome on Human Rights in Islam. In his message to symposium then the Secretary-General of the UN, Kofi Annan, stated; "Human Rights are the expression of those traditions of tolerance in all cultures that are the basis of peace and progress. Human Rights properly understood and justly interpreted, are foreign to no culture and native to all nations."⁸⁴ The symposium prescribed six principles to safeguard the rights of man that include linking the human rights with religious beliefs.⁸⁵

It is not that the law in Pakistan is silent over children's rights. The constitutional guarantees available to all citizens are available to children as well. The constitution of Pakistan guarantees the protection of "marriage, family the mother and the child."⁸⁶ The constitution imposes a duty on the state to discourage all forms of discriminations and

⁸⁰ http://www.bayefsky.com/html/Pakistan_t2_crc.php (Visited on; 11. 9. 2012).

⁸¹ Dualism is to regard the international law and municipal law as separate and distinct systems.

⁸² Ms. Sheila Zia and others v. WAPDA, PLD 1994 S.C. 693,710.

⁸³ Preamble of Cairo Declaration 1990 of OIC.

⁸⁴ <http://www.saudinf.com/main/x0041.htm> (Visited on; 3/1/2012).

⁸⁵ <http://isesco.org.ma/english/publications/humanrights/page8.php> (Visited on; 5/1/2012).

⁸⁶ The Constitution of Pakistan 1973, Article 35.

prejudices,⁸⁷ to guarantee the right to equality and equal protection,⁸⁸ right to life, human dignity and privacy of home,⁸⁹ right to liberty,⁹⁰ right to fair trial,⁹¹ prohibition of extracting evidence through torture,⁹² safeguarding against arbitrary arrests and detention,⁹³ right to freedom of expression,⁹⁴ right to freedom of religion,⁹⁵ right of all children to free education⁹⁶ and right to freely access public places and resorts without any discrimination.⁹⁷ These rights and guarantees provided by the Constitution of Pakistan correspond to and are analogous to the rights provided in the international human rights law. Moreover there are a number of legislations, both federal and provincial, specific to children.⁹⁸

The Convention on the Rights of the Child (CRC) is widely ratified and legally binding international instrument. Its provisions are reflected in other standards dealing with the children's right. Except for minor issues raised in the reports submitted by the Muslim countries the provisions of CRC can be interpreted in the light of *Shari'a*. The 'best interest' principle and child's right of 'expression' or to be heard provided in the Articles 3 and 12 of CRC respectively are such rights if recognized by the state law can ensure children's (or juvenile's) right to be heard and given due weight to their statements in all matters affecting them except that in Islamic state exercise of these

⁸⁷ Ibid., Article 33.

⁸⁸ Ibid., Article 25.

⁸⁹ Ibid., Article 14.

⁹⁰ Ibid., Article 9.

⁹¹ Ibid., Article 10-A.

⁹² Ibid., Article 14.

⁹³ Ibid., Article 10.

⁹⁴ Ibid., Article 19.

⁹⁵ Ibid., Article 20 and 22.

⁹⁶ Ibid., Article 25-A.

⁹⁷ Ibid., Article 26.

⁹⁸ Like The Guardians and Wards Act 1890, The Child Marriage Restraint Act 1929, Juvenile Justice System Ordinance 2000 and other legislations regarding Orphanages, Borstals and Child Labor etc.

rights may not challenge the rightful authority of parents or guardians.⁹⁹ A child's right of expression in all matters affecting him especially in judicial matters or proceedings should always be implemented in the light of best practices given in international standards more specifically when child is either a victim or witness of crime, as children are vulnerable to pressures and re-victimization they must be protected. The effective implementation of children's rights can only be ensured when administration of juvenile justice system is in place. The judicial machinery and all persons involved in the juvenile justice system or other matters relevant to children should be sufficiently informed and trained in this regard. The children should also be educated about their rights and mechanism of implementing those rights.

A comprehensive approach may be adopted. The International Standards, Constitutional Rights and other national legislations may be given effect. Consolidating impact of these provisions may take its course in the judicial practice for the effective implementation of children's rights in the domestic judicial processes involving child participation.

⁹⁹ Except where parent or guardian himself is a perpetrator. In Islamic Law the state is guardian and vests guardianship (*wilaya khāssa*) by way of delegation to natural guardian (Muhammad Fadel "Reinterpreting the Guardian's Role in the Islamic Contract of Marriage: The case of the Mālikī School" *The Journal of Islamic Law* Vol.3:1 (1998),19). When parents either fail to exercise their role as guardians or no guardian is present then the state may intervene in the best interest of the ward. In that case *parens patriae* will prevail over *patriae potestas*. This has been provided by the tradition of the Prophet(Peace be upon him) " *al-Sultān walīun man la walī lahū*" (The Ruler/State/Qādī is guardian for the one who has no guardian (al-Tirmidhi, 1103, Subul al-Salām, 921, Bulūgh al- Marām 836).

Chapter 4

The Testimony of Child in Pakistani Law

Chapter 4. Testimony of Child in Pakistani Law

Introduction

In the previous chapters the Islamic Law standing regarding admissibility of child testimony was explored, discussed and analyzed. The International Human Rights standards as guiding principles on the rights of child witnesses (and victims) were studied. The fact is that the Evidence Law of Pakistan is based on Common Law tradition and Islamic legal principles. In the following pages we shall find out how the present law of evidence evolved, how does common law inquire into competence of a witness and how does it treat a child witness in this regard? It will be seen whether the competency test at common law holds any similarity with the Islamic law. The *Qanoon-e-Shahadat* 1984 permits indirectly a child witness to testify, the article, doing so, of this law will be discussed in length and the practice of Pakistani courts regarding admissibility of child testimony will be ascertained with the help of case law.

4.1. Evolution of Evidence Law in Pakistan.

The legal system of Pakistan is based on English common law and Islamic law. The Islamic Law is more influential in personal and criminal laws whereas the common law seems to be more influential in commercial law. The repugnancy clause of 1956's constitution was kept and strengthened in future constitution.¹ The abrogated constitution of 1956 was given the name of 'Islamic Constitution' for it had certain Islamic provisions like; only a Muslim was qualified to be the president of the state and that no law which is repugnant to Islamic injunction could be passed and existing laws

¹ Repugnancy clause provided that no law repugnant to Islam may be enacted and that the existing laws would be amended accordingly (www.law.emory.edu/ifl/legal/pakistan.htm).

should be brought in conformity with Islamic injunctions. The preamble of this constitution was a copy of the Objective Resolution of 1949 which was passed by the first constituent assembly. Although the preamble was not considered to be the part of constitution but it definitely set the path and indicated the sources of the law and stated the objectives to be achieved including rights of the minorities to be safeguarded and that the Muslims should be facilitated and provided to 'fashion their lives according to the teachings and requirements of Islam.' The Directive Principles of the State-Policy require from the state to enable them to order their life according to the *Al-Qur'an* and *Sunnah* and for this purpose to make the Qur'anic education compulsory, to promote observance of Islamic practices and to prevent activities repugnant to Islam.²

The Constitution of 1962 like the Constitution of 1956 reiterated in its preamble that the sovereignty belongs to Almighty Allah and the authority exercised by the people is a sacred trust.³ Similarly the Constitution of Pakistan 1973's preamble starts with the following words;

"Whereas sovereignty over the entire universe belongs to Almighty Allah alone and the authority to be exercised by the people of Pakistan within the limits prescribed by Him, is a sacred trust..."

The Constitution of Pakistan is based on *grund-norm* that the legal authority over the entire universe belongs to Allah Almighty and the authority is exercised by the people within the frame work of limits provided by Him. The legal authority exercised by the people is a sacred trust. This norm is immutable and has been enunciated in the

² Syed Mehmood-un-Nasir, *Constitutional History of Pakistan* (Lahore: Mansoor Book House-Katchery Road, 1984), 51-55.

³Ibid. ,84.

Objective Resolution passed by the constituent Assembly on March 1949. The Article 2A was added to the Constitution by Presidential Order 14 of 1985 making Objective Resolution substantive part of constitution by which Holy Al-Qur'ān and Sunnah of the Prophet Muhammad (peace be upon him) supreme law of Pakistan and the courts are obliged to enforce and implement it by interpreting the present laws with such adaptation while upholding the injunctions of Islamic provisions.⁴

The popularity and unfailing support of the Objectives Resolution is due to its enshrinement of the ideals and the wishes of the people of Pakistan, the goals they desire to pursue. It equally sets out in clear terms what the people of Pakistan share with the humanity and what is distinctive to their identity as a nation.⁵ It unequivocally declares that Islamic State is not a state with inherent right of authority rather the authority has been delegated to it and restricted with the limits prescribed by the Real Sovereign (Almighty Allah).⁶

While retaining other Islamic provisions the Constitution also provided for the constitution of the Council of Islamic Ideology to provide recommendations to the parliament to enable Muslims to fashion their lives according to Islam and to ensure that no laws repugnant to Islam may be passed by the parliament. The constitution also defined 'Muslim' as a person who believes in the oneness of Allah and the finality of the prophet-hood of Muhammad (peace be upon him).⁷

⁴ M. Mehmood, *The Constitution of Islamic Republic of Pakistan, 1973* (Lahore: Al-Qanoon Publishers, 2013), 205.

⁵ "Documents- The Objective Resolution" *Islamic Studies* 48:1 (2009): 89.

⁶ Ibid., (from the speech of Maulana Shabbir Ahmed Usmani at the occasion of moving the Objectives Resolution, March 9, 1949), 113.

⁷ The Constitution of Pakistan, 1973 (Article 260).

In 1977 the civil elected government faced the charges of rigging in elections, held in the same year, by the opposition party which led the political situation in the country towards complete chaos and some quarters felt that the country was at the verge of civil war. This situation resulted into military coup and the civil government of Mr. Zulfiqar Ali Bhutto was replaced with the military regime of General Muhammad Zia-ul-Haq for eleven years to come. The period from 1977-88 is marked as 'Islamization' period. Since independence the Islamic spirit and sentiments were always present among the people of Pakistan and Islamic provisions in the Constitutions were reflection of the same. The Objective Resolution⁸ was made part of the Constitution of Islamic Republic of Pakistan 1973 and enacted in Article 2-A. Although the general has been criticized for using the religion for his own purpose but many concrete steps were taken towards Islamization during his regime. A number of Islamic laws were introduced like *Zakāt* and *Ushr* ordinance and (the most controversial) *hudūd* laws.⁹

The Evidence Law of 1872 was replaced by the *Qanoon-e-Shahadat* of 1984 although retaining many provisions of the previous law in letter and spirit which were not considered repugnant to Islamic Law injunctions.¹⁰

In British India, prior to the Evidence Law of 1872, there was no systematic law on the subject rather some indefinite rules and vague customary law was prevalent in the

⁸ The Objective Resolution was presented by the Prime Minister Liaquat Ali Khan and adopted by the Constituent Assembly on March 12, 1949. The resolution enjoyed national consensus and despite the fact that a number of constitutions were enacted, amendments were made but the Objective Resolution was always retained. ("Documents- The Objectives Resolution" *Islamic Studies*, 48:1 (Spring 2009), 89, 89-118. Also available on URL: <http://www.jstor.org/stable/20839154>.)

⁹ *Islamization Under General Muhammad Zia-ul-Haq*, <http://storyofpakistan.com/islamization-under-general-zia-ul-haq> (visited on 5/2/2013)

¹⁰ Khalil-ur-Rehman, *Principles and Digest of The Qanun-e-Shahadat* Vol.1 (Lahore: PLD Publishers, 1991) Preface to the 5th edition.

courts except in presidency towns.¹¹ Since their constitution the courts in presidency towns followed rules of English law of Evidence which were devoid of any statutory sanction until 1726.¹² In the presidency towns some rules of English law of evidence based on the Common Law and Statute Laws were introduced for the courts established under Royal Charter in 1726. Although the first complete enactment of evidence law in British India was the Evidence Act of 1872 there were fragmentary enactments to reform the evidence law from 1835 to 1853 in the shape of Acts passed by the Indian Legislature. The most important enactment surfaced was the Act of 1855 but still lacked the complete and systematic body of rules of evidence law rather it was a supplementary to already prevalent rules of English and customary law. The *mofussil* courts were governed by these enactments and not a complete set of English rules of evidence. The need for a complete and uniform law of evidence was felt and a Draft Bill of law was prepared by the Indian Law commissioners, which was later dropped for being “unsuitable” for the needs of the country. A distinguished jurist and legislator, Mr. James Fitzjames Stephen prepared a bill based on the English Law, this bill was passed in 1872 and is known as ‘precise’, ‘meaningful’ and ‘first complete’ enactment of the Evidence Law in British India.¹³

The Act of 1872 was really a path-breaking judicial step which brought uniformity in the Indian evidence law and introduced a standard set of principles of evidence which were to be observed by the courts in the sub-continent. The law was now, on any point, to be ascertained from the enactment based on its true construction rather than to be

¹¹ Calcutta, Madras and Bombay.

¹² Khalil-ur-Rehman, *Qanun-e-Shahadat* (Preface to the 5th edition).

¹³ Naseer A. Malik, *The Law of Evidence* (Irfan Law Book House, 2012), 1-2.

searched from the authorities. It was now same for all groups and communities living in India.¹⁴

The Objectives Resolution (passed by the Constituent Assembly in March, 1949 was made substantive part of the Constitution of 1973 via Revival of Constitution of 1973 Order of March 1985) which declares that the sovereignty belongs to Allah and the authority delegated to the state and people must be exercised by them within the limits prescribed by Him. It further demands that "the Muslims should be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'an and Sunnah."¹⁵ The necessary implication was to bring all existing laws based on English legal system either replaced or brought in conformity with the tenets and injunctions of Islam by way of amendment and modification. After the independence in 1947, the Evidence Act of 1872 continued to be the law of the courts of Pakistan until repealed by the Qanoon-e-Shahadat Order of 1984. Most of the provisions of the Act of 1872 which were not repugnant to Islamic Law were retained in the new law. The Qanoon-e-Shahadat Order of 1984 is spread over 13 chapters and 166 articles.¹⁶

In the next section we will see the competency clause of the Qanoon-e-Shahadat Order 1984. It will be explored whether the law considers a child witness competent to testify in the court and under what conditions a court may admit a child's evidence.

¹⁴ Ibid., 2.

¹⁵ The Objectives Resolution. (www.pakistani.org/pakistan/constitution/annex_objres.htm)

¹⁶ Khalil-ur-Rehman, *Qanoon-e-Shahadat*, 2-3.

4.2. *Qanoon-e-Shahadat* Order 1984 and Admissibility of Child Testimony

The *Qanoon-e-Shahadat* Order 1984, which replaced the Evidence Act of 1872, contains 13 chapters and 166 Articles. It has been divided into three parts; the first part, 'Relevancy of Facts' contains six chapters, the second part is 'Proof' which contains two chapters and third part, 'Production and Effect of Evidence' contains five chapters.

As the object of the *Qanoon-e-Shahadat* 1984 was to bring the former law of evidence in conformity with the injunctions of Al-Qur'ān and Sunnah it necessarily implicates that the interpretation of the articles of this law must be done in the light of those injunctions rather than blindly following the previous interpretations however where doubt or ambiguity is cast upon such interpretation the court may benefit from Common Law for ascertaining the true meaning of the article.¹⁷

The substantive law defines that certain facts either constitute a right or a liability. The facts which constitute a right or liability must be ascertained first to pronounce the existence of those rights and liabilities. The set of rules and principles by which this inquiry into the facts is regulated is called 'law of evidence'. The law of evidence can thus be defined as, "system of rules for ascertaining controverted questions of fact in judicial inquiries." The law of evidence is part of the law of procedure prescribing rules and procedure to record the evidence.¹⁸ The *Qanoon-e-Shahadat* Order 1984 introduced uniform rules of practice in this regard. The law is imperative and the courts are to follow it in recording the evidence however they are not barred to adopt a fair rule of

¹⁷ Nafeer A. Malik, *The Law of Evidence*, 8.

¹⁸ *Ibid.*, 6.

evidence which might be absent in the statute and yet is governing a particular situation.¹⁹

The Qanoon-e-Shahadat Order governs all courts of Pakistan. The main principles provided in this law can be enumerated as follows;

- i- The best evidence must be given,
- ii- It must be confined to the matter-in-issue and,
- iii- Hearsay evidence must not be admitted.²⁰

The Qanoon-e-Shahadat Order 1984, Part 1, Chapter 2, Article 3 (to which corresponding section in the Evidence Act is 118) 'Who may testify' is a competency clause and reads as follows;

"All persons shall be competent to testify unless the court considers that they are prevented from understanding the question put to them or from giving rational answers to those questions, by tender years, extreme old age, disease, of body or mind, or any other cause of the same kind..."

A general rule for the test of competency provided in this article seems very simple. The only test is that the witness is not prevented, by tender years or any other cause, from understanding and giving rational answers to the questions put to him/her. The Article has three provisos. The third proviso is directive about the determination of the competence of a witness by the court must be done in the light of the qualifications prescribed by Al-Qur'an and Sunnah but where such witness is not forthcoming the evidence of an available witness may be taken by the court. Similarly Article 17 (1) states;

¹⁹ Ibid.

²⁰ Ibid.

“The competence of a person to testify and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Qur’ān and Sunnah.”

Here the requirement is two-fold; competence and number of witnesses required for the proof of a fact must be determined in the light of the Injunctions of Islam whereas the previous law (the Evidence Act 1872) in its section 134 provided, “[n]o particular number of witnesses shall in any case be required for the proof of any fact.” The numerical requirement for the proof of a fact was not only sought under Common Law and Roman Law but in the times of Anglo-Saxons and Normans, the party producing greater number of witnesses prevailed. The rule enacted in the Evidence Act 1872 indicates that the quality and not the quantity of evidence is more important. The same rule is followed in England except where single witness is unacceptable under a statute.²¹ As our current domain of research demands to confine our discussion to the competence of a witness in general and a child witness in particular therefore we shall leave the ‘numerical requirement’ of witnesses for a future research.

The competency test of a witness only requires that a witness has the capacity to understand the questions put to him and to provide rational answers to those questions. A witness may lack this capacity due to infancy, old age, bodily or mental disease like insanity, unconsciousness or drunkenness etc. Mere defective memory and lunacy, unless prevent a witness from understanding and giving rational answers to the questions put to him, do not render a witness incompetent.²² According to the

²¹ Khalil-ur-Rehman Khan, *Principles and Digest of the Qanun-e-Shahadat* (Lahore, Pakistan: P.L.D. Publishers NABHA ROAD, 1991), 1:200- 201.

H.S. Ursekar, *Chief Justice M. Monir's Law of Evidence -Short edition-* (The University Book Agency, Allahabad, 1994), 617.

²² Ibid., Ursekar, *Chief Justice M. Monir's Law of Evidence*, 540, 541.

explanation of the Article 3 of Qanoon-e-Shahadat and corresponding Section 118 of the Evidence Act of 1872 a lunatic is not incompetent if he (during his lucid intervals) understands and gives rational answers to the questions put to him it may also cover a person who is partially insane but otherwise can perfectly understand and provide rational answers to the questions put to him. Religious beliefs, knowing the consequences of telling lies or understanding what is the nature and obligation of taking oath is immaterial in determining the capacity and competency of a witness. However the competency of a witness does not make him compellable or even admissible in all cases.²³ Therefore every person is *prima facie* competent to testify unless in the consideration of court they are unable to understand the questions put to them or unable to give rational and proper answers to those questions.

As far as accused is concerned until 1898 in England he was considered to be incompetent to testify, this practice however was either abolished through statutes or Common Law decisions.²⁴ Similarly husbands and wives of the parties were, both in civil and criminal cases, incompetent to testify unless the action was brought by one of them against the other.²⁵

The Article 3 of the Qanoon-e-Shahadat Order while considered a competency clause may well be considered incompetency clause as well. Therefore, incapacity to understand and being unable to give rational answers to the questions put to him/her renders a person incapable of testifying as a witness whether this incapacity is due to infancy, old age or any disease of mind and body. The article does not suggest any

²³Ibid. , 540-543.

²⁴Ibid. , 540.

²⁵ Ernest Cockle, *Leading Cases and Statutes on the Law of Evidence*, 2nd edition, (London: Sweet and Maxwell, Limited,1911), 205.

minimum age of capacity in the case of infancy. Though at one time the age of child witness was quite material in deciding the competency of a child but there was no fixed age for the purpose. Generally a child under nine could not be admitted as a witness and a boy of twelve was not considered to be of tender years.²⁶ But here the only criterion of competency is intelligence of a child to understand and give rational answers to the questions put to him/her.

No age of child witness is thus fixed by the law to accept his evidence. Evidence given by an eight year old rape victim in a coherent and intelligent manner was admissible. The witness was cross examined and it was held that she was a competent witness.²⁷ Every witness is competent unless there is something in law to prevent him from appearing in the court and giving evidence. Before examining a person as a witness he must be competent to testify. The law has thus not fixed any age to testify or not to do so in case of infancy. The words 'tender years' do not specify any age for rejection of a witness merely based on tender age rather only valid test of competence have been the intelligence of a child and capacity to understand the questions put to him and being able to give rational answers to those questions. A *voire dire* test or preliminary examination of a child witness by the judge/presiding officer is always recommended. It is highly desirable that the judge may ask the child questions and record the answers which show that the child is intelligent enough to be a witness. These answers which are not actually part of the evidence must be recorded in writing as they will be helpful later for the Court of appeal in determining that the trial judge

²⁶ Khalil-ur-Rehman (J), *The Qanoon-e-Shahadat*, 75.

²⁷ PLD 1984 Lah. 509.

either held rightly or erroneously that the child is a 'competent witness'.²⁸ It seems that the courts even after the enactment of the Qanoon-e-Shahadat have been following the same practice followed by them under previous law (The Evidence Act 1872). The preliminary examination of a child witness, although highly desirable, if not conducted will not render the child's testimony inadmissible. The purpose of preliminary examination is to save the time of court so that it may not proceed further with recording of the evidence of a child who is not competent within the meaning of the Article 3.²⁹ Therefore the preliminary examination of a child witness to ascertain his capacity to understand questions and give rational answers to those questions and recording such answers is followed as a 'rule of prudence' so that the Court of Appeal may reach to the conclusion that the child witness was a competent witness to be deposed in the case.

Under The Oath Act (X) 1873, Section 5 all witnesses, who are being examined by the court, shall be administered oaths or affirmations except for a child under twelve who may not understand the obligation under oath but clearly understands the importance and obligation of speaking the truth. The non administration of oath or affirmation will not render the evidence inadmissible but it will also not forego the duty of the witness to speak the truth.

Whether a child is aware of his duty to state the truth during evidence and understands the consequences of telling lies can also be ascertained during preliminary examination by asking simple questions to that effect but the child's incapacity to define the abstract

²⁸ Nafeer A Malik, *The Law of Evidence*, 112, 113 and 131.

- Ram Hazoor Pandey v. State (A.I.R 1959 All. 409)

²⁹ Ibid., Citing 2003 YRL 806 (SC) AJ&K.

Khalil-ur-Rehman (J) *The Qanoon-e-Shahadat*, 76.

notions, truth or lie, will not render his evidence inadmissible. Despite all care exercised by the court and recording the fact that the child is intelligent enough to understand the questions put to him and provide rational answers to those questions, he either understands the meaning and implications of an oath or affirmation or understands his duty to speak the truth, a conviction cannot be based on a child's evidence. Great care must be exercised before relying on the evidence of a child witness. Although there is no rule of law that the evidence of child cannot be acted upon unless corroborated but a bulk of case law indicates and has become a hardened rule of law that the judge's mind must be very clear about it and consider it as a matter of judicial prudence that no conviction should be based only on the child's evidence unless corroborated.³⁰ The rule of prudence (and not law) requires strong corroboration of such evidence.

In Razia v. The State³¹ decided by the Supreme Court of Pakistan. The appeal from the judgment of Lahore High Court dated 3.7.2003 was granted by the court filed for reappraisal of the evidence and reduction of sentence of the female convict who had been convicted on the ocular testimony of two child witnesses (her children aged 12 and 10 years). The accused charged with murder of her husband with another male accused was convicted on the basis of ocular testimony of two out of her five minor children. The Lahore High Court dismissed the first appeal confirming the trial court's judgment. The Supreme Court while granting the appeal upheld the judgment except that her death sentence was converted to the life imprisonment under S. 382-B, Cr.P.C. and as far as the testimony of children is concerned the court recorded;

³⁰ Law of Evidence (In India and Pakistan) 11th edition (Law Publishers, India Pvt. Ltd.1990), 5: 4495-4499.

³¹ 2009 SCMR 1428.

...[T]he mere fact that a witness was of tender age does not *ipso facto* make his evidence unreliable. It is true that before acting upon the evidence of child witness, close and careful scrutiny is required which in the instant case was duly adopted by the trial court and a note to that effect was also recorded by the trial court about his satisfaction. The two witnesses indeed had given a consistent account of the occurrence and the participants who were present at that time doing away with their father. This was not all, their ocular testimony derived strength and corroboration from the other evidence including the post-mortem report. The cause of death tallied with their testimony. It cannot be lost sight, that these two eye-witnesses were related to the deceased (their father) and the appellant (their mother). They had no reason whatsoever for implicating their mother falsely. A very lengthy cross-examination was conducted which they faced but on all material aspects they remained consistent and undeterred...Some minor discrepancies or even contradictions having no material bearing do not result in vitiating the findings recorded by the two courts on proper appreciation of the evidence.

Very comprehensibly the court has given its findings. It seems proper that we analyze the points on which the court has based its decision;

The first point noted by the court is that the trial court had taken all possible steps towards the proper and careful scrutiny of the evidence before acting upon it and that the intelligence and maturity of the witnesses was judged before recording their evidence and not only that but a note to that effect was recorded by the court. Although no legal provision binds a judge to administer a preliminary examination of a child witness in order to test his/her maturity and intelligence but as a proper practice of court a child witness may be submitted to preliminary questions in order to determine his understanding and compatibility.³²

The second point noted by the court is that the child witnesses gave a consistent account of occurrence while facing a lengthy cross-examination thus remained undeterred. This is a test which an adult eye witness has to go through as well. The court took into account the fact that the evidence was consistent and no material

³² Ursekar, *Law of Evidence*, 540-541.

contradiction which could affect the reliability of their evidence was noticed. Another interesting fact was pointed out by the learned court that the children as were related to both (deceased father and appellant mother) they had no motive to falsely implicate their mother. It means that the court may give consideration to the possible motive of the child witness if he/she is mature enough to have one during testing the reliability of his/her evidence.

The third and very important point to be noted is that the court gave due regard to the fact that the evidence of child witness was corroborated by other evidence mainly by the post-mortem report which strengthened their evidence in terms of cause of the death.³³

So in the absence of any restricting provision a child, under article 3 of Qanoon-e-Shahadat, may testify as a witness provided he shows sufficient intelligence that he/she understands the questions put to him/her and can give rational answers to those questions. As to the question of corroboration of child evidence before actually convicting there is no provision in the law to this effect although case law suggests that the courts should satisfy itself that sufficient corroborating evidence to the child's evidence is available before convicting the person in *Ulfat Hussain v. The State*³⁴ the supreme court set aside the verdict of trial court maintained by High Court where accused was convicted under S. 302 (b). P.P.C. The plea for, reappraisal of the evidence, taken was that the conviction was based solely on testimony of child which was neither corroborated by medical evidence nor by weapon of offence and no evidence was available on record to corroborate testimony of child. Statement of the

³³Ibid., 540.

³⁴ 2010 SCMR 247.

child witness was that the deceased was struck by blunt weapon (*ghotna*). The medical evidence showed four injuries ante-mortem which were due to blunt weapon. The doctor stated in the court that the skull was cut but not with a sharp weapon and in the same breath "she self destructively admitted that the injury could be from sharp-edged weapon" therefore evidence of doctor casted serious doubt on the story of prosecution solely based on child testimony besides the weapon of offence was recovered after 2-1/2 years which was neither reported to bear blood stains nor was sent to chemical examination. The prosecution could not prove the case beyond reasonable doubt so the conviction was set aside. Though in principle conviction could be based on the testimony of intelligent and understanding child but despite his/her intelligent disposition, in practice the courts have generally preferred to adopt settled principle of prudence and rule of care attached to sole testimony of child witness.³⁵

If one looks carefully at the law commentaries of the Qanoon-e-Shahadat 1984 and the Evidence Act of 1872 and the case law under both enactments the issue of child testimony is mainly treated, understood and incorporated in the case law according to the Common Law rules and practices of competency and credibility of witness. In the next section we shall try to understand and explore the modes of competency inquiry at Common Law and Islamic Law with special reference to child witness. For this purpose we shall also see some common law countries' legislations and some decided cases in order to understand whether any special arrangements are made or any exceptions to the generally accepted principles of the evidence have been granted while admitting a child's evidence in a case.

³⁵ Ibid., See also Amjad Javed v. The State 2002 SCMR 1247, Mohammad Jamal v. State 1997 SCMR 1595 and Amir Khan and others v. The State PLD 1985 Lah.18.

4.3. Competency Inquiry in Common Law and Islamic Law with reference to Child Witnesses

Before embarking upon our search into ‘competency inquiry’ in both disciplines it seems pertinent that one must keep in mind definition of evidence and some basic rules of oral evidence which are of course taken from common law. The term evidence bears the same meaning at law as in the popular language. “Evidence is an outward sign or an indication.” It is “something, especially a fact, that gives proof or reasons for believing or agreeing with something, specific information used e.g. by a court, to arrive at a truth.”³⁶

“The word ‘evidence’, considered in relation to law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation”.³⁷

The general rule of oral evidence is that it must be ‘direct’. The evidence is ‘direct’ when it refers to the fact which could be seen then the witness must state that he/she saw it, when it refers to the fact that could be heard he must say that he/she heard it, when it refers to the fact which could be perceived through any other sense he must mention the manner in which he/she perceived it and when it refers to an opinion then the opinion must be of an expert, this excludes ‘hearsay’ evidence and it is termed as “the best evidence Principle” however the cardinal rule is that ‘the best available evidence’ must be brought before the court.³⁸

³⁶ New Penguin Dictionary, (Penguin Books,2000).

³⁷ Ratanlal & Dhirajlal, *The Law of Evidence* 22nd ed., (Nagpur: Wadhwa 2007), 29.

³⁸ Ibid., 799- 800.(Sec. 60 of the Indian Evidence Act 1872).

When a witness testifies about a fact which he or she has not witnessed or experienced but about what someone else has said. According to hearsayrule, which is English Common Law rule emerged in the seventeenth century , out-of-court-statements are not admissible however there are some exceptions to the general rule of hearsay evidence like dying declaration and spontaneous utterances³⁹.

The word ‘competent’ when used with reference to witness it means, “legally capable of being a witness.” The early Common Law rules of evidence were thought to be influenced by the ecclesiastical law. This influence is manifested in the competence of witness required to testify in the court. The rules of competence of a witness aim at extracting the truth and preventing the commission of perjury. A person having interest in the case is excluded to testify as a witness as he is considered to have a motive to lie. Generally children, before certain age, were ruled to be incapable of testifying as they did not understand the nature of oath.⁴⁰

Historically the Common Law was quite suspicious about the competence of child witness. As it was an established rule of evidence at Common Law that no testimony can be received except on oath therefore a child’s testimony could only be received if he could answer the questions demonstrating his understanding of the nature and consequences of an oath. It was believed that a child who does not understand the nature and meaning of oath or does not swear an oath may not be capable of appreciating and speaking the truth. Therefore, a child should not be permitted to testify

³⁹ Alison Cunningham & Pamela Hurley, *Hearsay Evidence and Children*, (2007), 2. (www.lfcc.on.ca) .

⁴⁰ www.law.wisc.edu/evidence/ch02.html

in the court.⁴¹ Gradually the system evolved and the witnesses having more knowledge of the facts were allowed to testify thus permitting those having interest in the case, children, victims and accused.⁴²

Traditionally children usually testified about their own victimization, abuse or family violence. Their competency inquiry have been a critical initial challenge for the courts as in most common law countries the children could only testify when in preliminary examination they could correctly demonstrate their knowledge about the vague and abstract concepts like "promise"(to tell the truth),"truth", "lie", "oath" etc. Later via psychological research it was established that such inquiry can be confusing, the children's ability to correctly answer the questions about these concepts does not necessarily implicate that they will actually tell the truth and failing to answer such questions may prevent otherwise a competent child from testifying. Therefore a child's commitment to tell the truth is not related to his cognitive ability to answer correctly the questions about these abstract concepts.⁴³

The Common law perception of child witnesses has been of "dangerous witnesses" who can be taught, tutored, and can often mistake imaginary incidents as real. They are usually influenced by the fear of punishment and hope of reward and can glibly repeat what they have heard from others as their own knowledge but on the other hand case law suggests that the evidence of a girl child as young as six years of age being only eye witness of the case could not be rejected in the absence of any ground of not relying upon such evidence when it is given without hesitation and without any

⁴¹ Nicolas Bala, Kang Lee, R.C.L. Lindsey and Victoria Talwar, "The Competency of Children to Testify: Psychological Research Informing Canadian Law Reform", *International Journal of Children's Rights*, 18, (2010) 53-77 DOI 10.1163/157181809X458544 (Martinus Nijhoff Publishers).

⁴² Malik, *Law of Evidence*, 8. See also , Ursekar, *Law of Evidence* , 540.

⁴³ N. Bala et al.,18.

likelihood of being tutored. The English Law standing is that such evidence must be corroborated. It is considered unsafe to convict a person on the uncorroborated testimony of a child.⁴⁴

Ironically a child witness was not only required to demonstrate his knowledge of the concept of oath but also to be able to explain his religious belief in God and that a liar (under oath) will be punished by Him with the hell fire. Thus the inquiry into the competency turned into the inquiry whether a child is religiously trained? The inquiry into child's religious beliefs was gradually abandoned by the judges in some leading cases. Moreover the erroneous perception at common law regarding children that they are the most untrustworthy witnesses (especially girls who were considered to be prone to fantasy) was a product of some biased case observations and methodologically unsound researches of late nineteenth and early twentieth century.

In England the Criminal Law Amendment Act of 1885 introduced amendment in child witness law and allowed the testimony of a child who testifies unsworn or is unable to demonstrate an understanding of the concept of oath. Later the United States while citing English Law precedents chalked out American Common Law position by saying that competency of a child witness only depends upon the capacity, intelligence and his understanding of the difference between truth and falsehood accompanied with the sense of duty to tell the truth.⁴⁵

English example of modifying the common law treatment of child witnesses was also followed by Canada. It was the time when child protection agencies to provide assistance to the victim of abuse and abandonment were being established, in 1893, the

⁴⁴ H.S. Ursekar, *Law of Evidence*, 118-119.

⁴⁵ N. Bala et.al.18.

statutory provisions concerning child witnesses were enacted permitting child witnesses to testify unsworn as long as they “possessed sufficient intelligence” and understood the “duty to speak the truth.” Under Canadian law the judges were required to inquire the child witness about his understanding of oath but if the child could not give satisfactory answers he was permitted to testify on demonstrating his understanding of the “duty to speak the truth” but the judges would caution the jurors about “inherent frailties” of child’s testimony until 1967. Later section 16 of Canadian Evidence Act was amended thus permitting the child’s testimony if he showed the “ability to communicate” upon “promise to tell the truth.”⁴⁶

The Canadian Law of Evidence which is based on common law tradition has been reformed and amended with regard to the competency inquiry in case of a child witness. The new law was enacted in January, 2006. A child under the age of fourteen is presumed to have the capacity to testify and does not have to take oath or testify under solemn affirmation only what is needed is that the child can understand and respond to the questions posed to him/her. The party challenging the capacity of proposed child witness is under the burden to satisfy the court that the proposed child witness is unable to understand and respond to the questions after which the court will conduct an inquiry, before permitting such person to give evidence, whether such person is able to understand and respond to the questions. The court before permitting the child witness to give evidence will require him/her to promise to tell the truth but he/she will not be asked by the court whether he/she understands the nature of promise

⁴⁶ Ibid., Citing Canada Evidence Act, S.C. 1893, c.31,s.25 this became section 16 after consolidation of the Act in 1908. The section was later amended in 1988. Also see R. v. Horsburgh, [1967] S.C.R. 746. -Canada Evidence Act R.S.C. 1985c. C.5 S.16.1, 2005 C.32 S. 27. Available at; <http://laws-lois.justice.gc.ac/eng/acts/c-5> and also http://www.oas.org/juridico/mal/en/can/en_loi_premue.html (last seen on 14.4.2011 at 1.52 pm).

to tell the truth. The evidence received from a person under fourteen will have the same effect as if it were taken under oath.⁴⁷ However the court may exercise “caution” in the case where child witness does not understand the concept of truth, falsity and a duty to tell the truth but this would not render the testimony of child inadmissible but will merely affect its weight.⁴⁸ The law also provides for an order made on application either by the prosecutor or the witness for the presence of support person while the witness is tendering the evidence in the court and he is under 18 years of age. Such support person can be any person close to child including a parent unless in the court’s view it will interfere with the proper administration of justice (S.486.1).

It is a general rule at common law that a witness is competent and compellable. Usually the persons who are competent are compellable exception to this rule include children, persons of unsound mind and (sometimes) defendant and his/her spouse.⁴⁹

In English law oral testimony in both civil and criminal cases should be given under oath or affirmation. In case of child testimony the court should consider two questions one is whether a child is allowed to give testimony and second whether the child’s testimony is sworn or not. The first question is resolved by the test showing that the child is intelligent enough to give evidence. When a child witness is capable of understanding the nature of oath he may be sworn in but if he does not understand the nature of oath the court may allow the evidence after examining the child to ascertain

⁴⁷ Ibid.

⁴⁸ Nicholas Bala, Joanne J Paetsch, Lorne D.Bertrand and Meaghan Thomas, *Testimonial Support Provisions for Children and Vulnerable Adults (Bill C-2): Case Law Review and Perception of the Judiciary* (A report prepared for the Department of Justice Canada) 2011 Available at; http://justice.gc.ca/eng/pi/rs/rep-rap/2010/tr10_vic3/p2_213.html (last seen on 14.4.2011 at 2.00 pm modified on 17.10.2012)

R v.S (M) unreported August 31, 2006 (Port Coquitlam, File No. 7740) cited by N. Bala et.al.(above)

⁴⁹ Ernest Cockle, *Law of Evidence*, (1911), 205.

that he/she is sufficiently intelligent to give evidence and understands the “solemnity of occasion” and can appreciate and understand special duty to tell the truth which is off course different from an ordinary and general duty to tell the truth in everyday life. Unsworn evidence of child is admissible under English law of evidence but cannot result into the conviction unless corroborated by another material piece of evidence.⁵⁰

In the courts of USA in the absence of any restrictive provision a child testimony can be admitted at the discretion of judge if the child is considered to be a competent witness. The test of competency is whether the child is intelligent enough to give testimony worth hearing and feels a duty to tell the truth and that he/she is capable of observing, remembering and recounting with accuracy. There are two categories of judicial proceedings involving child, one is where child appears as a witness but is not having any interest in the matter, for example when he is called to give an account of an incident, here only requirement is child's competency as mentioned earlier, second type of proceedings is where the child's interest is directly affected such as in case of juvenile delinquency and similarly where the child's substantial interest is affected by the outcome of proceedings such as the cases of guardianship, adoption, custody of person and property, separation and divorce proceedings and judicial determination of medical treatment having irrevocable effects on the life of a child.⁵¹

Common Law competency test on child witnesses has been applied in South Africa as well. South African Law does not impose any age limit for child witnesses however

⁵⁰ Eric Cossill & John Clegg, *Evidence Law and Practice*, 3rd ed., (UK :Longman Group 1990,Reprint 1991), 47, 53 and 54.

- Stuart Bell M.P. *Children Act 1989* (Shaw's Annotated Acts) (Shaw & Sons Ltd.1990),244-246.

- Richard May, *Criminal Evidence*, (London: Sweet and Maxwell,1986),230-232.

- The Children and Young Persons Act 1933 s.38 (1).

⁵¹ Anna Mammalika Pappas (ed), *Law and The Status of The Child* (UNITAR,1983), 2:725-726

presumption of incompetency always applies therefore child witness needs to undergo a test to show that the child is capable of communicating intelligibly and also capable of distinguishing between true and false and that the child has to be admonished to speak the truth.⁵²

Indian and Pakistani law of evidence is also based on common law tradition. The Indian Evidence Act declares "all persons to be competent to testify, unless they are in the opinion of the court unable to understand the questions put to them or to give rational answers to those questions."⁵³ According to this law a child is a competent witness but a *voir dire* test (or a preliminary examination), although not a legal requirement, is conducted to determine the level of understanding.⁵⁴ When child demonstrates this understanding but is unable to understand the nature of oath he can be examined on simple affirmation.⁵⁵ The corroboration of evidence of child is not required by any rule of law but it is considered to be a matter of prudence for a judge not to convict a person without corroboration. This has been held in a bulk of case law and has hardened as a rule of law.⁵⁶ Moreover there is no age limit prescribed by law or precedents as to when a child is permitted to testify on the contrary the law as well as precedents suggest that only criteria to be a competent witness is to understand the questions and give intelligent and rational answers,

⁵² Flip Schutte, *Child Witnesses in the Criminal justice System in South Africa: An overview of proposal for reform* www.childwitness.org/index.php?option=com_rubberdoc...id..., 20 . (Visited on 12.12.2013).

⁵³ Indian Evidence Act 1872, S. 118.

⁵⁴ Ram Hazoor Pandey v. State (A.I.R 1959 All.409).

⁵⁵ Law of Evidence (in India and Pakistan) 11th edition, (Law Publishers (India) Pvt.Ltd.1990), 5: 4495.

⁵⁶ Ibid., 5:4495 (also citing; Santana Bhindhani v. State (1972) 38 Cut. L.T.428 at 434-435 & Balavantappa v. State of Karnataka (1982) 1 K.L.C.108) Kazim Hussain alias Qazi v. The State FSC 2008 P Cr L J 971, Muhamm Raheem v. The State 2010 Pesh. YLR 2400, Mst. Parveen Akhtar v. The State 2011Kar.YLR 1899, Umar Zaman v. The State 2013 Pesh. P Cr. L J 708.

“...Under art.3 of Qanoon-e-Shahadat, 1984, a child in the age of 8/9 years, if gave statement which indicated that said witness understood the questions and gave answers intelligently and rationally, then same could not be ignored merely due to tender age of the witness.”⁵⁷

The ‘presumption of genuineness’ of the record of evidence under article 91 of Qanoon-e-Shahadat Order 1984 may also be invoked in case of child testimony and more weight may be afforded to the testimony recorded soon after the occurrence of incident but a mechanism of early recording of evidence of vulnerable witnesses including children can strengthen the justice process by protecting the evidence from being contaminated or elicited after the witness have been tutored.

In Pakistan the law of evidence is now governed by Qanoon-e-Shahadat Order 1984. The Qanoon-e-Shahadat after its promulgation in 1984 replaced the previous law i.e. Evidence Act 1872. However the provisions of the Evidence Act which were not repugnant to Islam were retained. The natural result of this is that the courts continued interpreting those provisions in the light of common law tradition. This in my opinion affords a considerable flexibility to the law because the law can still be interpreted while keeping in view a great deal of precedents and bulk of cases decided by the courts since the enactment of the Evidence Act 1872.

The Article 3 of Qanoon-e-Shahadat Orde1984 and its corresponding section 118 of the Evidence Act 1872 deal with the competence of a witness. The child is a competent witness under both clauses. A child below twelve years of age need not to be sworn in but he must understand the difference between truth and falsehood. Competency is

⁵⁷ Mudassar Ali Shah v. The State 2011 Lah.MLD 873.

distinct from credibility. When a witness is administered with either oath or affirmation the court need not to enter into the enquiry of his religious beliefs.⁵⁸

The Objective Resolution, as mentioned earlier, was adopted by the first constituent assembly in 1949 and continued to appear with minor changes in the Constitutions of 1956, 1962, interim constitution of 1972 and finally of the 1973. Its opening words indicate ideology and object of the state;

“Whereas sovereignty over the entire Universe belongs to Allah Almighty alone, and the authority which He has delegated to the state of Pakistan through its people for being exercised within the limits prescribed by Him is a sacred trust.”

This document was made substantive part of the constitution by inserting a new provision i.e. Article 2-A. If this would not have been done it would only serve as any other preamble that it would not control the substantive part but would be looked at only to ascertain the intent of the law maker in case of doubt.⁵⁹

The Objective Resolution provides; “the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur’ān and the Sunnah.”

It was necessary, for achieving this objective, to suitably modify and amend the existing laws to bring them in consonance with the injunctions of Islam. Therefore a process of Islamization of laws began. It also resulted in the promulgation of the Qanoon-e-Shahadat Order 1984 thus replacing the Evidence Act 1872. The order

⁵⁸ Prabhas C, Sarkar, *Sarkar's Law of Evidence*, 13th ed. (S.C Sarkar and Sons Private Ltd, 1981), 2:1197.

⁵⁹ Ziaur Rehman Vs. The State PLD 1973 SC 49.

-Naseem Hasan Shah (J), *The Objectives Resolution and its Impact on the Administration of Justice in Pakistan* (Islamabad: Shariah Academy IIU, 1992), 3.

retained the provisions which were not directly conflicting with the Islamic injunctions.⁶⁰ The natural implication is thus continuing to hold on the common law tradition. It is therefore can rightly be said that the law is based on Islamic as well as Common Law tradition. General practice of common law as came forth from the above discussion is that a child is a competent witness if he understands and gives rational answers to the questions put to him in preliminary test. Children's evidence, for a long time, was not considered reliable because the children did not understand the nature of oath. The children had to undergo a test demonstrating their understanding of the nature and importance of oath, cognitive concepts of 'promise', 'oath', 'lie' and religious implications of not speaking the truth. Gradually the inquiry into religious training of a child was abolished and only general test sufficed to declare a child a competent witness. A child who does not understand the nature of oath is competent to give unsworn evidence⁶¹ by going through the general competency test and on demonstrating the special duty to tell the truth. For this purpose the child witness may be informed of the importance of telling the truth.

The Common Law countries not only relaxed the competency inquiry in favor of child witnesses but also devised some tools, protocols and court-room arrangements to facilitate the testimony of children and other vulnerable witnesses like evidence via video link.⁶² Where the child witness was too young to take the oath but was sufficiently intelligent to understand her duty to speak the truth. The preliminary questions were asked to determine the level of understanding of the child and whether she should be allowed to give evidence. The questions were asked by the judge via video link. The

⁶⁰ Nafeer A Malik, *The Law of Evidence*, 2.

⁶¹ For example see English Law, Children and Young Persons Act 1933, S.38 (1) (as amended).

⁶² See English Law, Criminal Justice Act 1988, S.32.

judge asked simple questions to determine that the child understands her duty to tell the truth. The questions and answers went this way; "Q: Can you see and hear me? A: Yes, Q: How old are you? A: Six. Q: Do you go to school? A: Yes. ...Q: Do you get taught about God at school? A: Yes. Q: Do you know the difference between the truth and lie? A: Yes. Q: And you realize how terribly important it is that you tell the truth and no lies at all? A: I do not tell lies...." The judge ruled; "...I have come to the easy conclusion that it would not be appropriate for her to take the oath. However she seems to me perfectly intelligent girl and able to give her account of events, and she seems to me to be sufficiently intelligent to justify receiving her evidence unsworn."⁶³

The Law does not specify minimum age for a child to testify rather it has been left entirely in the discretion of trial judge to allow unsworn evidence of the child in the light of the circumstances of the case, the nature of the evidence the child is called to give and the fact that the child is sufficiently intelligent to justify the reception of the evidence and understood the duty to tell the truth. In case of young children more care must be exercised in admitting their evidence.⁶⁴

Due to the alarming rise in child sexual abuse cases, a large number of citations, show that some specific rules of admissibility of child evidence have evolved specially in the last two decades. For instance "fresh complaint testimony"⁶⁵ used as self corroboration. The rule of 'fresh complaint' is that the witness may testify to the fact of the complaint and give details of the complaint provided by the complainant however the complainant

⁶³R v Z [1990] 2 All ER (CA).

⁶⁴Phil Huxley, *Evidence- Cases and Material* (Blackstone Press Ltd.1996),83-85.

⁶⁵'Fresh Complaint Doctrine of Law' is a rule of evidence according to it testimony of witness is admissible to corroborate the testimony of victim to whom the victim of sexual offence made a fresh complaint (Merriam Webster Dictionary of Law). <http://dictionary.reference.com/browse/fresh+complaint> (visited on; 11/10/2013).

should not be allowed to give details of the complaint rather he should only be allowed to state that such complaint was made and to whom it was made. In case fresh complaint witnesses are multiple the judge may warn the jury that their evidence should not be treated as substantive evidence but it should only be treated as corroborative evidence.⁶⁶ Although there is no rule as to the time limitation within which a complaint of sexual assault must be made in order to be admissible as evidence, the applicable test is whether the complainant's actions were reasonable in particular circumstances however in cases involving children a great deal of promptness is not required and the due consideration should be given to the factors which might reasonably refrain a child from disclosing the abuse to a third party. The factors determining the reasonable promptness of child's report of sexual abuse include; length of delay, child's age, the relationship between the child and the defendant, the position the defendant held towards child whether is of trust or the defendant held a supervisory role in the life of the child, whether the defendant threatened or coerced the child complainant and the length of time in which the child was out of the defendant's control. The disclosure of abuse must be "triggered by an event, or a change in circumstances, that invests the disclosure with spontaneity and plausibility."⁶⁷

Examples of admissibility of child's evidence in deviation of stricture of hearsay rule are also found even with the apex courts. One such example is *R v. Khan*⁶⁸ decided by Canadian Supreme Court. It dealt with the question of admissibility of child's unsworn evidence and also the admissibility of the statement of child made to an adult about the

⁶⁶ See Case of Appeals Court of Massachusetts; Commonwealth v. Howell No.00-p-1222. MA Court of Appeal. Argued December 11, 2001 – April 03, 2003 <http://caselaw.findlaw.com/ma-court-of-appeals/1085525.html>

⁶⁷ Ibid. (These rules are based on a number of citations).

⁶⁸ *R v. Khan* [1990] S.C.R. 531 available at: <http://csc.lexum.org/en/1990/1990scr2-531.html>

sexual assault if the statement is "contemporaneous" or "spontaneous" to the incident of assault. Giving too much weight by the trial court to the fact that the child is of tender age was considered an error as it could result into the risk of letting the offences committed against young children go unprosecuted. The court discouraged to draw a line of distinction between younger and older children by stressing on the fact that the child is very young to be admitted as a witness. It was held that a less stringent test than the one applied to sworn evidence should be conducted on unsworn evidence. As in the first case the court tries to illicit the truth by "holding on the conscience of witness" whereas in case of child's unsworn evidence the test must be to demonstrate that the child knows and understands the duty to tell the truth. Traditionally the hearsay rule and its exceptions have been considered absolute, this approach have sometimes been considered "unduly inflexible" in dealing with new situations and circumstances in the law. The courts tend to adopt new flexible approach rooted under the policy of this law rather than always following its traditional exceptions and that too occasionally particularly in child abuse cases. The test applied here is two-fold; "necessity and reliability." The 'necessity' may amount to what is reasonably necessary. Deciding about necessity two factor may be decisive one is that the child's evidence is inadmissible and second that giving evidence in the court about abuse might be harmful and traumatic to the child and there is reasonable evidence based on psychological assessment to that effect. The 'reliability' might be based on child's conduct that the information he/she gave was not only spontaneous but was reported without any prompting, the child did not have any motive whatsoever to fabricate the story and that the child lacked or was not expected to have any knowledge or information about sexual act. The basic reason to relax the hearsay rule in child abuse cases is that by

retelling and reliving the traumatic incident the child will suffer more hardship. The hearsay evidence in these cases should also be corroborated by real evidence.⁶⁹

It is now a well-established rule that the nature of corroboration can vary depending upon the nature and circumstances of each case. It may be medical evidence or a circumstantial evidence connecting the accused to the offence. Where a girl child of eight years who was a victim of sex offence testified in the court and it was the only direct evidence along with the statement of her mother about the narration of facts by the victim child. The question was whether the conviction can be based on the testimony of child victim and whether the statement of her mother is sufficient to corroborate the evidence. It was held that the rule of corroboration although has been hardened as a rule of law depending on the cases does not render the corroboration essential in all circumstances rather it should be treated as a matter of prudence and must be present in the mind of judge before convicting the person. The corroboration of child victim's evidence may be rendered unnecessary due to the fact that there was no possibility of child to concoct, no likelihood of being tutored etc. and that will be question of fact in each and every case.⁷⁰

The issue that a child must be given opportunity to be heard must be separated from the issue of weight given to his views. This was held by an Irish court in a case of child abduction under Hague Abduction Convention.⁷¹ It was held that a child as young as six years old should be heard to determine whether he should be returned to the country of his habitual residence under article 12 of the Convention. It is to be decided by the

⁶⁹ Ibid.

⁷⁰ Nafeer A. Malik, *The Law of Evidence*, (citing: AIR 1971HP 17), 194.

⁷¹ Jeremy D. Morley, *Ireland-young Child in Hague Abduction Case (N v. N [hearing a child] [2008] IEHC 382.)* Available at; <http://www.international-divorce.com/irish-court-ireland.htm> (Visited on; 15.4.2013).

court whether it is appropriate to take his views into account when he objects to that return under article 13 of the Convention. It was also proposed by the court that the article 12 of the UNCRC must be applied in the cases under 'Hague Convention' as it is a principle of universal application. Hearing a child must not be confused with the weight given to his views as views expressed by an older child say of 15 years of age will have more weight than those expressed by a six years old.⁷²

The Islamic law provides detailed account of conditions and qualifications for a witness. The classical jurists' opinions based on these conditions regarding the admissibility of a child's evidence have been discussed and analyzed in chapter 2. The general opinion about child's testimony is 'non-admissibility' as a matter of principle but 'admissibility' as matter of exception. Yet some jurists have specified the areas where this 'admissibility' might be acceptable for instance "children's injuries". *Imām Mālik* has provided eleven conditions for the admissibility of child's testimony and this too by way of exception to the general principle of 'non-admissibility' for want of probity and accuracy. According to him and others it is allowed in specific matters due to necessity.⁷³

4.4. Analysis of the Article 3 (Qanoon-e-Shahadat 1984).

The Article 3 of Qanoon-Shahadat 1984 is related to competency of witness. The article lays down two requirements in this regard;

⁷² Ibid., Citing Re. D. (Abduction: Rights of Custody) [2006] U.K.H.L. 51.

⁷³ See Chapter 2 for the opinions of the Classical Islamic Jurists.

- i- That a witness understands the questions put to him and he has the ability to give rational answers to those questions,
- ii- The witness bears requisite qualifications prescribed by the *Qur'an* and *Sunnah* for the competent/credible witness.

The opening clause of the article provides that every person is a competent witness unless prevented from understanding the questions put to him and giving rational answers to those questions. A person is considered to be capable of bearing the testimony if he possesses the capability of seeing, hearing and perceiving a fact which requires either to be seen, heard or perceived by his faculties. The article contains three provisos. The first proviso disqualifies otherwise a competent witness if the person is convicted of perjury. The first and second provisos seem to be based on the Qur'anic verses;

“And those who launch a charge against chaste women and produce not four witnesses, (to support their allegations), flog them with eighty stripes and reject their evidence ever after for such men are wicked transgressors. Except those who repent thereafter and mend (their conduct); for Allah is Oft-Forgiving and Most Merciful.”⁷⁴

The second proviso states that first proviso shall not apply where the court is satisfied that the person mentioned in the first proviso has mended his ways after repenting.

According to the third proviso the court is to determine whether the witness is competent and bears the same qualifications of a competent witness as provided by the *Qur'an* and *Sunnah*. This proviso gives the court discretion to take the evidence of an available witness if such competent witness is not “forthcoming.”⁷⁵ The dictionary

⁷⁴ Al-Qur'an 24:4-5

⁷⁵ Article 3 of Qanoon-e-Shahadat 1984

meaning of 'forthcoming' is 'available', 'approaching' and 'ready to cooperate'. therefore can be inclusive of all meanings.⁷⁶

Although Art.3 of Qanoon-e-Shahadat 1984 does not provide the qualifications of a competent witness, it rather makes it a prerequisite for the admissibility of evidence that the witness should bear those qualifications mentioned in *Shari'a*. This proviso is apparently in conflict with the accepted rules of a competent witness in *Shari'a*. It seems to be based on *Shari'a* legal maxim, "necessity makes the unlawful permissible"⁷⁷ and provided to meet a situation where only witness not fulfilling those qualifications is available just as when the required number of witnesses is not available. The Federal Shariat Court has held that the proviso is based on the principle of necessity and is acceptable to safeguard the rights of people therefore is not repugnant to *Al-Qur'an* and *Sunnah* although it seems apparently in conflict with the accepted conditions and rules of the acceptability of the evidence of a witness.⁷⁸ However the Council of Islamic Ideology has expressed its opinion regarding the 3rd proviso of the Article 3 and while considering the last sentence, "...where such witness is not forthcoming, the court may take the evidence of a witness who may be available" recommended that this part of the proviso is "against the injunctions of *Al-Qur'an* and *Sunnah* therefore may be repealed."⁷⁹

Common law perception of a child witness have been of an 'incompetent' and 'non-credible' witness varying from psychological reasons (such as that the children are prone to fantasy, they lack accuracy, they have short termed memory and are unable to

⁷⁶ 3rd proviso of Art.3, Qanun-e-Shahadat Order 1984.

⁷⁷ This is termed as 'doctrine of necessity'. It has been invoked by the courts many a times even in the constitutional matters.

⁷⁸ Haider Hussain V. Government of Pakistan, PLD 1991 Federal Shariat Court 139. P. 162.

⁷⁹ Annual Report of Council of Islamic Ideology 1988-1989 (Islamabad), 78-79.

recount the incidents with accuracy etc.) or for purely legal reasons like administration of oath as they do not normally know the nature of oath, their lack of knowledge of cognitive concepts like 'oath', 'truth' and 'lie' etc. With the passage of time the concept evolved and now the only test of competency seems to be the child witness's understanding of the questions put to him/her during preliminary examination and showing sufficient intelligence by providing rational answers to those questions. If the child witness is quite young and does not understand the nature of oath it must be demonstrated that at least he/she understands and can appreciate the duty to tell the truth.

The competence test given in Article 3 is a rule of caution. A child of tender years is not excluded from testifying owing to his/her young age. No precise age is determined to be competent as a witness. In each case where child is appearing in the witness-box only test determining the competence is child's understanding of the evidence given and that he/she is capable of understanding the questions and can afford rational and intelligent answers to those questions besides his/her understanding of difference between 'truth' and 'lie'.⁸⁰ Similarly no age limit is indicated in the article, a child of 12 years of age is not considered as of tender years within the meaning of this section therefore is competent to testify as a witness.⁸¹ Even children of 9, 8, 7 or 6 years have been considered competent as long as they were able to answer intelligently the questions put to them and fulfill the criteria given in the article.⁸² There is no prerequisite as matter of law to administer a preliminary test to determine the

⁸⁰ Shaukat Mehmood, Sh. The Law of Evidence an exhaustive commentary on QANUN-E-SHAHADAT 1st ed., (Lahore, Pakistan: Legal Research Centre n. d.), 1:61.

⁸¹ Ibid., 1969 P Cr. L J 343.

⁸² Ibid., PLD 1965 Pesh. 134. And many other cases.

competency of a child witness rather it is a rule of prudence otherwise the court may satisfy itself to the fact that the witness is competent when he/she is actually testifying and during testimony giving intelligible answers and the manner he/she is giving the evidence.⁸³ It is however advisable to administer *voire dire* test before the actual commencement of examination of child witness so that if in the court's view the child is found to be deficient of intelligence then the valuable time of court may be saved.⁸⁴

It has also been held in relatively new case law that holding competency inquiry to determine the competence of a child witness is not a rule of law but a matter of prudence and mere omission to conduct preliminary test does not render the child's testimony inadmissible.⁸⁵

It is not a rule of law to corroborate the child's testimony with a material piece of evidence but by way of practice and passage of time it has hardened as a rule of law and a matter of prudence for the trial judge to be cautious in convicting a person merely on the testimony of child. The children have been considered as "dangerous witnesses"⁸⁶ by the courts who may depose about things they have neither seen nor heard of. They may also not be able to distinguish between what they have seen or heard, can be tutored and induced easily and repeat glibly what they hear and "repeat like parrots."⁸⁷ The courts have been reluctant to rely absolutely on the testimony of child witness to hold a conviction.⁸⁸ The corroboration of child's testimony is not a hard and fast rule but it must always depend on the nature and facts of each case separately.

⁸³ Ibid., 63 & 65.

⁸⁴ Ibid., 62.

⁸⁵ Muhammad Ilyas vs. Kabir Hussain, YRL 2003 SC AK, 806. & Muhammad Feroze v. The State PLD 2003 K-HC Sindh 355.

⁸⁶ Mir Muhammad Fareed v. Mst. Amreen, YLR 2003, Shariat Court Azad Kashmir 2234.

⁸⁷ Ibid and *see also* Muhammad Feroz v. The State PLD 2003, KHCS 355.

⁸⁸ Ibid.

In a case conviction was based on the evidence of a child witness when it was corroborated by other witnesses and the subsequent conduct of accused that he had absconded.⁸⁹

As mentioned earlier the law does not provide any age limit to testify rather only requires that a witness must be able to understand and respond the questions put to him/her intelligently and rationally, where a child witness of five years being victim of sodomy and only available witness was not called by the trial court to testify it was held by the Federal Shariat Court that such witness should have been summoned to testify and if the statement of child witness would have been “consistent, worthy of credence, straight forward and confidence-inspiring” the conviction could have been based on the testimony of child (despite being of tender age) while corroborated with other evidence such as medical or circumstantial evidence.⁹⁰

The trial court during the proceedings and while applying the preliminary test can better judge the conduct and demeanor of a witness therefore a witness should not be deprived of testifying in the court merely because of tender age. The competency preliminary test should be applied and when the court is satisfied that a witness is capable of understanding the questions put to him/her and responds well the same should be recorded and the testimony may be allowed. Admissibility of child witness becomes more important when he/she is the only witness and happens to be the victim of offence especially in child abuse cases.⁹¹

⁸⁹ Shaukat Mehmood Sh. *The Law of Evidence an exhaustive commentary on QANUN-E-SHAHADAT* 1st ed. (Lahore: Legal Research Centre, Pakistan) 1: 61, see also PLD 1974 Pesh. 113.

⁹⁰ Kazim Hussain alias Qazi v. The State P Cr L J 2008, FSC 971. And see also; Muhammad Raheem v. The State YLR 2010, Pesh. HC. 2400.

⁹¹ Ibid.

Understanding meaning and implication of oath make a child competent witness but where the child knows and understands the duty to speak the truth the evidence is admissible under affirmation.⁹²

Islamic Law generally does not consider a child a competent witness. The child is a person from time of birth to the age of puberty at Islamic law. The age of puberty can be the age much earlier than the age of majority universally accepted now- a- days i.e. eighteen years although there is no bar for a Muslim state to legislate and determine the age of childhood in the light of international standards besides it is in conformity with the jurists' opinion.⁹³ The child's evidence is acceptable only in the case where no 'qualified witness' according to the qualifications of witness provided by *Al-Qur'a n* and *Sunnah* is available.

The Evidence Law of Pakistan which is termed as 'The *Qanoon-e-Shahadat* 1984' has provided in its Article 3 that all persons can testify in the court who are capable of understanding the questions put to them and can give rational answers to those questions. There is no restricting provision for children to testify. According to its third proviso the article gives the discretion to the court to accept the evidence of an available witness if a "qualifying witness" in the light of injunctions of Islam is not "forthcoming". The article was challenged in the Federal Shariat Court for being repugnant to Islam on the basis of this proviso but the court held that it was not in contradiction of Islamic law and the testimony of an available witness in the absence of a qualifying witness has been allowed based on the 'doctrine of necessity' to avoid the

⁹² Shaukat Mehmood, *The Law of Evidence exhaustive Commentary on Qanoon-e-Shahadat* 1984, 1:62.

⁹³ See Chapter 2 Definition of childhood in Islamic Law. The Council of Islamic Ideology reviewed 'The Majority Act 1875' and 'Child Marriage Restraint Act 1929' and recommended that the age of majority may be fixed at 15 as according to the Sunnah and practice of the companions (3 years report of the CII 19th Nov. 1989-18th Nov. 1992, Govt. of Jammu & Kashmir, 23-24.)

loss of peoples' rights or setting the perpetrators go unpunished.⁹⁴ The study of case law reveals that according to the rule of 'judicial prudence' the conviction is not based on the testimony of child alone unless corroborated. A preliminary examination of the child witness, who does not understand the nature of oath, may be administered to ascertain the competence of such witness.

⁹⁴ See Haider Hussain V. Government of Pakistan, PLD 1991 Federal Shariat Court 139.

Chapter 5

Conclusions and Recommendations

Chapter 5. Conclusions and Recommendations

Introduction

The study was set out to explore the admissibility of child testimony in Islamic Law and common law. The Pakistani law is based on Islamic law and common law tradition. Pakistan is signatory of CRC and owes a duty towards international community and its own subjects to harmonize its legislations with the international standards. Like all other state parties annual report in this regard has to be submitted to CRC committee updating it on the steps taken to ensure the rights of children guaranteed in the instrument and its additional protocols.

The Evidence law of Pakistan is based on Islamic and common law tradition. The Evidence Act of 1872 was promulgated during the British rule in colonial India. The English law, adhering to common law tradition, introduced in British India the principles of common law. As a natural consequence the law has always been interpreted in the light of those principles. After independence Pakistan and India retained those laws including Evidence Act of 1872 until the Islamization process of former laws started during the military rule of late General Muhammad Zia-ul-Haq and resulted into the replacement of Evidence Act Of 1872 with the Qanoon-e-Shahadat Ordinance 1984. The new law

retained many provisions of previous law therefore this new law is still being interpreted keeping in view the common law practices and precedents. This research was set out to determine the position of Qanoon-e-Shahadat with regard to the admissibility or otherwise of the testimony of child, his/her competence as a witness and credibility. This task could only be achieved by having recourse to the Islamic law concept of capacity and credibility and common law competence test in this regard. Once the position of Islamic law was clear in the light of the opinions of classical jurists and application of the concept of public good or *maslaha* the study of International Human Rights Law was carried out. Different instruments and standards dealing with the rights of the child were explored. CRC being only widely ratified instrument was studied. Its core principles were studied to determine the rights of the child. Some other standards such as Rome Statute and UN model Law 'Justice in Matters involving Child Victims and Witnesses of Crime' were studied. The credibility and competence of child witness under Qanoon-e-Shahadat was studied in the light of law provisions and case law. Once the position of Pakistani law was determined with the help of its provisions and case law its evaluation under Islamic legal system and international standards became obvious.

The study of different legislations, International Standards and best practices based on various studies revealed that the weak procedural aspects of judicial process may lead to non vindication of rights. The questions of genuine eliciting of truth from a child witness may be resolved by having recourse to

contemporary best practices and making these a part and parcel of the justice process. In the absence of any witness protection program and lack of proper protocol of investigations the child witness or victim becomes more vulnerable to victimization and traumatization. The study urges the need to propose reforms in the judicial process, the adoption of which may ensure the protection of child witness from secondary victimization. The study also recommends the adopting of model protocol investigation in this regard and incorporation of some modern techniques in the court rooms.

In many cases where child witness is involved the child is a victim of offence too, for example cases of child (sexual) abuse. The prosecution's job is two-fold in these cases one is to elicit the truth from such witness and second to protect the physical, emotional and psychological well being of the child witness without impairing the right of accused to a fair trial. Keeping in view the above mentioned task many interviewing techniques and protocols have been developed. In the cases where child is victim and witness too, legal proceedings are likely to cause secondary trauma or victimization for instance when the child is confronted by the accused in the court room or by recalling the incident while testifying. Therefore adoption of effective interviewing techniques may be helpful. For the purpose of conducting an effective interview not only the interviewing techniques are important but the environment and place of interviewing is also important. The environment must be child friendly. This research proposes the adoption of modern interviewing techniques and preparation of investigative protocol suitable for Pakistani judicial process and

court practices. Similarly a witness protection program with special emphasis on child witness protection must be adopted.

5.1. Analysis of the Hypotheses of Research.

The data of the research reveals the answers to the questions of research as under.

The evidence means the “words uttered and things exhibited by witnesses before a Court of Justice.”¹ The Evidence mostly offered in the court of law is oral evidence and the rule regarding oral evidence is that it must be direct and given by a competent witness. A witness is a competent witness when nothing prevents him/ her being examined and sworn in. A witness is competent if he is capable to understand and answer the questions put to him. Moreover he bears those qualifications which are prescribed for a competent witness in the injunctions of *Qur'ān* and *Sunnah*.²

The person giving testimony/evidence is a “witness” it includes victims and experts too.

Historically children have been thought to be more unreliable, prone to fantasy and more suggestible than their adults. The courts have been reluctant to admit the child’s testimony and even if it was admitted, conviction on the basis of

¹ Khalil-ur-Rehman, *Principles and Digest of The Qanun-e-Shahadat Order 1984*, 35.

² Ibid., 56.

such testimony was avoided.³ A child witness may be required in child abuse cases, familial matters, exercising preferences in custody cases and even in armed conflicts. Recently a drastic rise in child sexual abuse cases all over the world including Pakistan has surfaced.⁴ Nature of offence suggests that in many such cases only witness available is child victim himself/herself against the perpetrator. Therefore it becomes necessary to take the statement of child victim.

The fact is that the constitution of Pakistan is an Islamic constitution. The Objective Resolution was made substantive part of it by an amendment in 1985 therefore *Al-Qur'ān* and *Sunnah* became the supreme law of the state. The constitution of Pakistan 1973 has categorically declared that the state religion of the country is Islam⁵ therefore no law contradictory to *Al-Qur'ān* and *Sunnah* may be enacted.⁶

The natural consequence of Islamic constitution was either to replace colonial laws by altogether new laws or convene amendments of the contradictory provisions of existing laws. The task was carried out under 'Islamization' process which resulted into the change of existing evidence law of British India (The Evidence Act 1872) which was replaced by new enactment; the Qanoon-e-Shahadat Order 1984.

³ Competency inquiry under common law has been discussed at length in Chapter 4.

⁴ 3508 Child Sexual Abuse cases were reported in 2014. This number is 17% more than the previous year (*Cruel Numbers 2014- A report published by Sāhil, an NGO*). SPARC (2015), 83:7.

⁵ Article 2 of the Constitution of Pakistan, 1973.

⁶ *Ibid.*, Article 2-A

-M. Mahmood, *The Constitution of Islamic Republic of Pakistan* 12thed. (Lahore : Al-Qanoon Publishers, 2Mozang Road, 2013), 207.

The foregoing fact leaves the researcher with the task to find out the competence of child witness in Islamic law first. The study of classical Islamic sources revealed that the issue has not been dealt in detail therein perhaps no need was felt then.⁷ However there are scattered opinions of jurists in this regard. The study of four classical schools of Islamic law was carried out. The opinions were gathered in chapter 2. Generally a child's testimony is not allowed in principle although there are some exceptions. Primarily the trend of all classical schools seems to restrict the testimony of children to the matters and conflicts take place among them. Children's testimony in matters where adults are involved is generally discouraged. This has been discussed in chapter 2 in length.

Unless the definition of child or childhood at law both, national and international, is determined and a study of the legal capacity of child in various matters is understood, the concept of competency of a child witness at law may not become clear especially when there is a need to understand why there is no uniform age prescribed for child witnesses to be able to testify in the court of law.

⁷ This does not mean that the Islamic Law of evidence is incapable of accommodating the contemporary incidents rather the fine principles of Islamic Law of evidence (which is distinct in nature and makes 'evidence' a religious duty as well) can be integrated in the contemporary legislations. These principles suggest something more than the Common Law concept of the 'competency' which means 'understanding' and 'intelligently' responding. It takes into consideration, evolving legal capacity with the developmental stages, concept of 'wilayah' and 'takleef'. While taking into consideration Common Law concept of 'judicial prudence' which requires the court's diligence to assess a child witness by applying a 'voir dire' test and 'corroboration' of evidence of a child to convict a person, the judiciary may also resolve to the 'facilitated testimony' by the use of modern means and devices. This will enhance the accuracy of evidence. (See 'Best Practices' in this chapter).

The commonly known law is that a person who has not yet attained the age of eighteen years is a 'child'. However the upper age limit of childhood is different for different purposes. That difference is seen in national as well as international legislations. For instance in CRC a child is "every human being under the age of 18 years..."⁸ where as the Convention on the Civil Aspects of International Child Abduction applies to the children before attaining the age of 16 years.⁹ Similarly in national legislations for the purpose of employment, marriage, consent to medical treatment childhood has different meaning.¹⁰

The capacity of a child in Islamic law and meaning of childhood is a little different than western legislations. Islamic law has introduced a system of gradually attaining the capacity. According to scholars childhood enters into adulthood passing through three different stages that is from infancy, with no cognition to seven years and from seven, which is age of discerning and of weak cognition to puberty and third stage from puberty to full maturity which is the age of full cognition.¹¹ When a person reaches the age of full cognition and discerning he is said to have complete capacity.¹² A child in infancy lacks cognition but a discerning child (of seven years or more)¹³ bears deficient performing capacity (*Ahliyyatu'l-Adāal-naqīṣa*) and attains complete capacity

⁸ Art.1 CRC.

⁹ Art.4 of the Convention on Civil Aspect of Child Abduction 1980.

¹⁰ See in Chapter 2 the 'Legal Capacity and Age of Majority'.

¹¹ 'Awda, *al-Tashrī'ī al-Jināī al-Islāmī*, 1:514-516.

¹² Shamil Rasheed Yaseen ,Al-Shaikhili 'Awarid al-Ahliyyah' 1st ed. (Matba'a al-'Ani, 1974),85.

¹³ According to a report of the Prophet (peace be upon him) a child of seven years of age should be taught how to pray. (Muhammad b. 'Ali b. Muhammad, al-Shawkānī, *Nail-al Awātār*, 1st ed. (Egypt: Maktaba' wa Matba'a Al-babi Al-halabi wa awlado),1:298.

gradually.¹⁴ Therefore discerning child is allowed to do transactions which are totally profitable like acceptance of gifts under Islamic Law.¹⁵ The age of puberty or majority according to the opinions of Muslim scholars varies between fifteen and eighteen years.¹⁶

The study of various texts of *Al-Qur'ān* and *Aḥādīth* show that it is the duty of a Muslim to testify when a right is pending on his testimony and thus assist the justice.¹⁷ A child however is not a *mukallaf*¹⁸ hence may not be considered as duty bound to testify therefore according to Common Law term he is not a compellable witness in Islamic Law.

The opinions of classical jurists of Islamic Law with regard to child testimony though vary in detail but agree on one point and that is, that it is a religious duty of a person to testify to assist the justice process in restoration of rights declining which he can incur sin.¹⁹ As children are not considered to be under such religious duty and do not possess complete capacity therefore are not liable to assist the justice process at least cannot be compelled to testify.²⁰ The Qur'ān proclaims that witnesses should be among your 'men' whom you 'agree' or

¹⁴ Al-Shaikhilī, 'Awarid al-Aḥliyyah, 88-89.

¹⁵ Ibid., 89.

¹⁶ See Chapter 2, Al-Qastalānī, *Irshad al-Sari li Sahīh al-Bukhārī*, 120-123.

¹⁷ Verses of Al-Qur'ān and different Aḥādīth are given in Chapter 2.

¹⁸ Responsible to carry out religious order.

¹⁹ Al-Qur'ān 2:282, 4:41.

²⁰ The Prophet (peace be upon him) said, "The pen (liability) is lifted from three (persons) one who is sleeping until wakes up, from an insane person until attains intellect and from a child until attains puberty" (*Būlūgh al-Marām*, Hadith: 927).

‘consent’²¹ whereas due to deficient capacity children may not be favorable witnesses.²²

The classical Islamic Jurists have agreed that the children may be witnesses in matters related to the issues of their concern or their offences. But their statement must be taken before they part²³ and generally they may not be accepted as witnesses in issues related to elders. However a child may bear the evidence during childhood and testify after attaining puberty just like other incapable witnesses who may testify after the impediment is removed.²⁴ Despite this limited admissibility of their evidence it has further been restricted with certain conditions of admissibility. *Mālikiyah* has provided eleven conditions for acceptance of child testimony as exception to the general rule of inadmissibility for want of probity, intellect and majority.²⁵ All the jurists agree that the child’s testimony may only be relied in case it has been given without delay and mixing with elders to avoid any possibilities of tutoring.²⁶ As reported from *Ibn Shahab al-Zuhri*, “It is tradition to accept evidence of children before they part.”²⁷ This corresponds with the contemporary idea of recording of statement without delay to avoid contamination of evidence for similar reasons.

²¹ Al-Qur’ān 2:282

²² Word used in the foregoing verse is *mimman* ‘*Tardawn*’ the dictionary meaning of which include whom you are ‘pleased’ with, or ‘agree’ or ‘consent’ another meaning is ‘sufficient’ according to Al-m’ojam Alwaseet, vol.1 (Iran: Intesharāt Nasir Khusraw n. d.)

²³ See Ibn Qudamah, *Almuqn’ e*, and *al-Sharḥ al-Kabeer* and also Al-Mardawi, *al-Insāf fi ma’arfa-te-Rajeh min Khilāf*, Abū ‘l-Barkāt, al-Dardīr, *al-Sharḥu Sagheer*, al-Sharbeenī, *Mughnī’l-Muhtāj*, Ibn Hazm, *al-Muḥalla*, see Chapter 2.

²⁴ *Ibid.*

²⁵ Al-Dardīr, *Al-Sharḥu Sagheer* 261-263.

²⁶ Please see Chapter 2 (and 23above).

²⁷ ‘Abd al-Razzāq, Abū Bakr b. Hammam Al-San‘ani, *Mussannaf* (Beirūt: Al-Majlis Al-‘ ilmi), 8:348.

Timely reporting requirement in some states about child abuse cases corresponds with the same idea.

It seems that classical Islamic jurists were reluctant to permit a child witness to testify mainly because a child lacks probity but have allowed a child to bear evidence during childhood and later on testify when grown up. In his opinion regarding this issue *Aḥmad b. Ḥanbāl* has said that a child of ten years or more may testify if bears probity (*mīmmūn howa fī ahl` al-`adala*).²⁸

The study of child testimony under the principle of '*maslāḥa*' (public good) and '*maqāṣid al-Shārī`a*' (objectives of Islam) reveals that the initially the theory of objectives was based on preservation of only those interests which were safeguarded by providing *hudd* punishments therefore comprised of five objectives; faith, life, intellect, lineage and property.²⁹ According to Ghazālī, "everything protecting these '*uṣūl*' is *maslāḥa* and everything that violates these '*uṣūl*' is '*mafsada*' [therefore] repelling of *mafsada*' is *maslāḥa*."³⁰ Later scholars were in favor of expanding these objectives. Those scholars were not in favor of restricting objectives to above mentioned five objectives and relate them to '*hudd*' punishments. The contemporary scholars have further included objectives which were suitable owing to the current issues faced by *ummah*. These scholars are inclined to deal contemporary legal issues not only restricting the *ijtihād* to its classically agreed sources rather they consider that

²⁸ Ibn Qūdāmah, *Al-Shārī` al-Kabīr*, 6:259. (For the interpretation of 'probity of child' please see chapter 2 at page 85 in section 2.4.2. 'Conditions of admissibility...').

²⁹ Abū Ḥamīd Muḥammad Ghazālī, *Al-Muṣṭasfa fī l-`Uṣūl*, 1st ed. (Egypt: Al-Matbā` al-Amīriyyah al-Mahmīyyah Bolāq, 1322 H), 1:287.

³⁰ Ibid. emphasis added.

treatment of contemporary legal problems now rests on public interest and objectives of Islam along with the application of classical tools of *ijtehād*.³¹

Establishing ‘Justice’ has been prime objective of the Lawgiver. At various places *Al-Qur’ān* has proclaimed that it was an assignment to the prophets that they should adhere to justice and decide among people justly. As *Al-Qur’ān* says;

“We sent aforetime Our apostles with Clear Signs and sent down with them the Book and the Balance that men may stand forth in justice...”³²

“Allah does command you to render back your trusts to those to whom they are due; and when you judge between man and man, that you judge with justice; surely how excellent is the teaching which he gives you! for Allah is He who hears and sees all things.”³³

“O you who believe, stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just, that is next to piety, and fear Allah, for Allah is well acquainted with all that you do.”³⁴

These clear commands given in the texts are evidence of the fact that ‘justice’ is a clear and foremost objective of *Shari‘a* in fact many classical and

³¹ See generally Siddiqui, *Maqasid-e-Shariat*, (Islamabad: Islamic Research Institute, 2009) al-‘Alim, Yousaf Hamid, *Islami Shariat : Maqasid aur Masalih* (trans. Muhammad Tufail Hashmi) (Islamabad: IRI, IIU,2011) and Muhammad Tahir Mansoori, “Maqasid Al Shari‘ah: A new paradigm for Ijtihad in contemporary legal issues”, *Islamabad Law Review* 2:1 (2004),39-54.

³² Al-Qur’ān 57:25

³³ Ibid., 4:58.

³⁴ Ibid., 5:8.

contemporary scholars have added ‘justice’ in objectives of *Shari‘a*.³⁵ Justice is defined as “ placing things on their rightful place” it also means “equal treatment” The foregoing verses clearly declare that justice is meant for all human beings even one’s enemies must be treated with justice. Mawdūdī has counted ‘the right to justice’ among the basic human rights given by Islam.³⁶

It is clear that everything which aims at protecting the essential interests or objectives is ‘*maslaha*’.³⁷ Therefore every effort aiming at the protection and promotion of justice is ‘*maslaha*’. Vindication of rights depends on effective mechanism of dispensing of justice. The core component of judicial process, which is a means of dispensation of justice, is the best available evidence. The best available evidence when in the form of oral evidence must be direct, which rests on the production of witnesses in the court. In many cases only available witness is child witness and in some cases only witness is child victim especially in the cases of child’s sexual abuse. Keeping in view opinions of jurists and the conditions for admissibility of statement of child witness may be allowed by way of ‘*maslaha*’ any impediments may be removed by way of judicial prudence exercised by the presiding judge and by way of adopting contemporary modern means and techniques to facilitate the eliciting of truth.³⁸

³⁵ Siddiqui, *Maqāsid-e-Shariah* (Islamabad: IRI, IIU, 2009), 25.

³⁶ Mawdūdī, Syed Abū I ‘Alā, *Human Rights in Islam* 2nd ed. (Islamabad: D‘awah Academy IIU, 1999), 19.

³⁷ Ghazālī, *Al-Mustasfā*, 1:287.

³⁸ See ‘Best Practices’ below.

The study was set out by making the Islamic Law (*Shari'a*) a standard and the first question has been replied by considering the opinions of jurists and looking at the issue in the light of objective theory and 'maslaha' or public good.

Human rights are universal and meant for every human. State is under a duty to ensure these rights for its subjects. Islam has laid down universal fundamental rights for all humans regardless to religion, class, creed or gender.³⁹ The only binding instrument on the States Parties with reference to child rights is UN Convention on the Rights of the Child 1989 (CRC). This Convention has dealt almost all the rights of children in its 54 articles and two protocols. The four core principles of the CRC are expressed in its articles are the right to life, survival and development, non discrimination, devotion to the best interest of the child and respect for the views expressed by the child.⁴⁰

The Convention binds the states parties to ensure the implementation of rights provided in the Convention by taking appropriate measures such as legislative and administrative steps.⁴¹

The Convention sets out the age of childhood below eighteen years but recognizes the age of majority if provided earlier than this in the domestic law applicable to the child.⁴²

Historically children were thought to be passive bearers of rights but the convention has equalized them to adults by considering them to be the active

³⁹ Mawdūdi, *Human Rights in Islam* , 9-10.

⁴⁰ See Articles 2,3,6 and 12 of the CRC.

⁴¹ Article 4 of the CRC.

⁴² Article 1 of the CRC. This gives the recognition to cultural and religious diversity.

holders of rights. The state is duty bearer in this regard. The autonomy shown towards children in CRC is well handled by the concept of 'best interest'. The rights of child have been balanced by this provision.⁴³ It has obliged the states parties to take steps to ensure such care and protection to the child which are necessary for his/her well being without over stepping the rights or duties of the parents or guardians or extended family whichever the case is.⁴⁴ This is further enhanced in application by acknowledging a child's right to 'direction' and 'guidance' in consistence with child's evolving capacities in consideration with cultural and customary requirements of each child.⁴⁵

The international law has in its instruments recognized the right of an individual to hold an opinion which cannot be either controlled or regulated by law.⁴⁶ The convention has given the child right of expression,⁴⁷ which is manifestation of expression by binding the states parties to ensure the participation and involvement of children in matters affecting them. The right of expression is given with emphasis on the serious consideration and giving 'due weight' to their views according to their age and level of maturity.⁴⁸ The CRC Committee in its general comment No.7 has urged the states parties to promote the concept of child as a possessor of freedom of expression and to introduce such right from within the family and community with regard to the matters of their concern such as health, education, legal proceedings and provision of

⁴³ Article 3 of the CRC. (Please see page 152, footnote 95, for Islamic Law position).

⁴⁴ Article 3 and 5 of the CRC.

⁴⁵ Article 5 of the CRC

⁴⁶ See Article 19(1) of the International Covenant on Civil and Political Rights, Article 19 of the Universal Declaration of Human Rights.

⁴⁷ Article 12 of the CRC.

⁴⁸ Bueren, *The International Law on the Rights of the Child*, 136-137.

different services etc. and to provide necessary training and skills to the elders in achieving the children's right of expression and participation when it is in their best interest.⁴⁹

The right of best interest⁵⁰ and the right to be heard⁵¹ are inherent in all rights or provisions of the CRC. The right of expression or to be heard is mentioned in other provisions of the CRC in different context like in case of separation of parents,⁵² in case of adoption,⁵³ when the child is deprived of his liberty⁵⁴ and in the court proceedings.⁵⁵ The right to be heard is available to the child in all matters including administrative and judicial proceedings.⁵⁶ It can only be effectively implemented when national legislation and mechanism is in place to facilitate the child in this regard therefore the Convention has laid down the duties of states parties to bring their legislation and administration of juvenile justice system in conformity with the Convention.⁵⁷

The provisions of CRC are succinct on the issue of child testimony but when joined with the provisions of other international instruments in this regard the objective of the international human rights law thus becomes clear.

Article 12 and 40 b (iv) of the Convention are direct on the testimony of child. A child has the right to express his views and opinions and to contribute in the

⁴⁹ Maria Belser and others. *Source book on International Children's Rights*, 132-133.

⁵⁰ Article 3 of the CRC.

⁵¹ Article 12 of the CRC.

⁵² Article 9 (2) of the CRC.

⁵³ Article 21 (a) of the CRC.

⁵⁴ Article 37 (d) of the CRC.

⁵⁵ Article 40 b (iv).

⁵⁶ Article 12 (2) of the CRC.

⁵⁷ See Articles 37, 39 and 40 of the Convention.

decisions affecting his life especially those taken during judicial process whether a delinquent, victim or witness. A child's views should be taken seriously and weight must be given to those opinions and views in the light of child's abilities, maturity and evolving capacities. International law does not propose any age limit for a child witness in order to be capable to testify. It is the States Parties' national law which is a deciding factor in this regard. In order to provide equal protection to child witness and victim in all countries 'Guidelines on Justice in Matters of involving child Victim and Witness of Crime' were drafted and adopted by a resolution 2005/20. Guideline18 is relevant to the competence of child witness. It negates the relationship of competency with the (maturity of) age.

A UN Model Law taking into account the Convention on the Rights of Child, the Economic and Social Council Resolution 2005/20 of July 2005, it includes Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime as an annex. So the 'Model Law of 2009' is a combination of CRC and above mentioned Guidelines. The Law has been drafted keeping in view the children going through judicial process regardless to whether they are in conflict with the law or are victims or witnesses. The law aims at providing the states parties' guidance to draft the law in this regard which must aim at facilitating the child witnesses and to prevent the child victims from secondary victimization. The child must be dealt with dignity. It emphasized on the provision of trained staff or support persons sensitive to the rights of children. Privacy, confidentiality and safety of such children must be ensured without

affecting the right of accused to a fair trial and to cross examine the child witness. The 'Model Law' also provides that competency inquiry of a child witness must be either by the court based on the questions submitted by public prosecutor, defence lawyer or an expert appointed by the court. The competency test may not be repeated without due necessity. The law has been drafted to facilitate the states to convene such legislation which is according to the international standards.⁵⁸

The provisions of CRC and other standards suggest that in judicial proceedings the 'best interest' principle and right of participation (right to be heard) should be ensured. It is indicated through these provisions that these rights can only be provided when a criminal justice system is in place.⁵⁹

Pakistan, like many other countries, lacks child friendly procedures rather its juvenile law is designed to deal with juvenile offenders only.⁶⁰ In fact the law dealing with child delinquency in Pakistan needs a great deal of overhauling in the light of international standards. This requires a separate research.

The International Criminal Court (ICC) was established under Rome Statute (RS).⁶¹ The ICC's jurisdiction does not extend to the person below eighteen years of age therefore the children can only participate in the capacity of victims or witnesses of crime. The RS prohibits the recruitment of children below 15 and declares it as a war crime for the jurisdiction of ICC and provides special

⁵⁸ See review of The UN Model Law, 'Justice in Matters involving Child Victims and Witnesses of Crime' 2009 in Chapter 3.

⁵⁹ Article 40 (3) of CRC.

⁶⁰ See Juvenile Justice System Ordinance (JJSO)2000 of Pakistan

⁶¹ Article 1 of R.S for ICC.

provisions for the protection of children during investigation.⁶² In fact prohibition of recruitment of a child below 15 has been provided in different international standards and has become part of customary international law.⁶³ As far as witness protection is concerned ICC does not have any witness protection program of its own rather in case such need arises the court relies on the national witness program. Witness protection may include creating new identity of a witness.⁶⁴ The international bodies and tribunals trying war crimes seek guidance from CRC, its optional protocol and other standards such as African Convention on the Rights of the Child while taking into consideration the best interest policy of CRC.⁶⁵ The measures for witness protection were taken by permitting evidence via video link.⁶⁶

The CRC is widely recognized instrument which has addressed all sorts of rights of the children. The need of reflecting its provisions into domestic legislation cannot be overemphasized. Pakistan being signatory of the CRC is under a duty to reflect its provisions into national legislation. In Pakistan, with regard to International Law, dualism⁶⁷ is the accepted norm and international agreement signed by the country can be enforced through legislation only. This

⁶² Article 54 (b) and Article 68 of R.S. See also Emma Bonino and Carol Bellamy, *International Criminal Justice* (September 2002), 15.

⁶³ *International Criminal Justice and Children -No peace without justice*, (UNICEF Innocenti Research Centre, September 2002), 44.

⁶⁴ Articles 11, 43 (6) 68 of R.S.

⁶⁵ See Natali Mann and Bert Theuermann, *Truth and Reconciliation Commission for Sierra Leone* 2006.

⁶⁶ See Chapter 3, Kyra Sanin and Anna Stirnemann, *Child Witness at Sierra Leone*, 2006.

⁶⁷ 'Dualism' is to regard the international law and municipal law as two distinct and separate systems. Some states adhere to 'monist' tradition which is obviously opposite to the 'dualism'.

liability has been incurred fully especially by withdrawing the reservation which was first provided at the time of ratification.⁶⁸

It is obvious that the principles and rights provided in the CRC and other instruments and international standards can be looked at for guidance to improve the domestic law. The principles of 'best interest' and 'right to be heard' are the core principles applied in the administration of justice for children. Other standards mentioned earlier, though may not have been ratified as yet, can be a source of guidance especially in developing domestic witness protection program, adopting means of facilitating testimony of child so that a child may testify effectively and without fear. Adoption of modern technical means, court room modifications and provisions of support persons according to international standards and model law will enhance the quality of evidence.

Another question or hypothesis set out to be searched was with relevance to national law of Pakistan. The Evidence Law of Pakistan is based on Islamic and common law tradition for the reasons mentioned in chapter 4. This research aimed at finding out the concept of competency and credibility of witness in common law tradition thus inquiring into the competency of child witness and how it has been dealt in the national law. Whether there are any and, if so, what conditions must be met in order to permit a child witness to testify?

⁶⁸ The reservation, "provisions of the Convention shall be interpreted in the light of the Islamic Law and values" was withdrawn on July 23, 1997. See Chapter 3. The Council of Islamic Ideology reviewed CRC at the request of the Government of Pakistan's Division for Special Education and Welfare and it was said that nothing in CRC is repugnant to the injunctions of Islam. (Annual Report of CII 1990-1991, 190-191.)

The constitution of Pakistan is based on *grund-norm* that the Sovereignty over the universe belongs to Almighty and the legal authority exercised by people is a sacred trust. This norm is immutable and has been accepted and enunciated in the Objective Resolution passed by the Constituent Assembly on March 7, 1949. The Objective Resolution was not a part of the Constitution. It was only in 1985 that the Presidential Order 14 made it a part and parcel of the constitution of 1973 and it was added as section 2-A in the Constitution of Pakistan 1973.⁶⁹

Shari'a is the supreme law of Pakistan. The Constitution of Pakistan declared that no law may be made which is repugnant to *Al-Qur'an* and *Sunnah*. This has cast duty on the state to either repeal or amend those existing laws which were in conflict with the Islamic Law. The process has been termed as islamization process. The Evidence Law of 1872 which was a British enactment in colonial India and continued to be the governing law of the Pakistani courts after independence was repealed by new enactment 'Qanoon-e-Shahadat' Order 1984. The law in its thirteen chapters and 166 articles maintained old provisions with addition of some new provisions. The competency clause in the Qanoon-e-Shahadat Order 1984 has provided only one simple test to decide the competency of a witness and that is eligibility of a witness to understand and respond in a rational way to the questions put to him/her.⁷⁰ The relevant article in this regard declares every person competent to testify if by reason of tender

⁶⁹ M. Mehmood, *The Constitution of Islamic Republic of Pakistan, 1973*, 12thed. (Lahore: Al-Qanoon Publishers 2-Mozang Road, 2013),17.

⁷⁰ Qanoon-e-Shahadat Order 1984, Part 1, Ch.2 Article 3.

or extreme old age or any other reason he/she is not prevented to understand the question put to him/her and then answer the same in a rational manner. However in another provision of the same law it has been reiterated that the competence and number of witnesses required must be decided according to the injunctions of Islam.⁷¹ Whereas this rule has been soften again in third proviso of above mentioned article (3) that while determining the competency of a witness the qualifications of a witness provided by *Al-Qur'an* and *Sunnah* must be fulfilled but if a witness bearing those qualifications is not available then any available witness ready to testify may be permitted by the court to testify.⁷² The words used for such unavailable witness are "not forthcoming".⁷³ The dictionary meanings of 'forthcoming' are; 'ready to cooperate', 'available when required (or promised)', 'approaching', 'about to appear (or take place)', 'informative', 'responsive' and 'produced when wanted'.⁷⁴ These provisions point out to the distinct feature of Islamic Procedure and that is *Tazkiyyah* or Purgation, a procedure to test the veracity or probity of witnesses and maintaining record of the same. The fact is that piety and righteousness cannot be found of the same standards therefore administration of oath is considered sufficient. When the competency of a witness is challenged a *voire dire* test or a preliminary examination should be conducted by the presiding officer to determine whether the witness in the witness box is competent to testify.⁷⁵ The inquiry into the

⁷¹ Article 17 (1) of Qanoon-e-Shahadat order 1984.

⁷² Article 3 (3rd Proviso) Qanoon-e-Shahadat 1984.

⁷³ Ibid.

⁷⁴ Concise Oxford Dictionary, 6th edition July 1975,
-Oxford English Urdu Dictionary, 4th edition 2005,
-Free Online Dictionary.

⁷⁵ Khalil-ur-Rehman Khan, *Principles and Digest of the Qanun-e-Shahadat* 1984, 1:62.

conduct of the witness however will be made if he is challenged on the grounds of his giving false evidence or perjury. The inquiry into the conduct of such witness is material in deciding the credibility of witness for example about his conduct and way of life after conviction and the fact that he has repented thereafter.⁷⁶

The only requirement of the competency test prescribed by the Qanoon-e-Shahadat is that a witness has the capacity to understand the questions put to him/her and provide rational answers to those questions.⁷⁷

The law does not fix minimum age to testify. The question of competency of a child does not depend on the fact that the child has reached to a certain age. The English Law rule of child's evidence is that it shall be received unless in the court's opinion child is incapable of giving intelligible testimony.⁷⁸ Similarly under law of Evidence in Pakistan admissibility of testimony of child does not depend on his/her age rather it depends on the intelligence of child witness to be able to understand and reply to the questions put to him/her in a rational manner. The words 'tender years' in the article 3 of Qanoon-e-Shahadat 1984 do not suggest that the evidence may be rejected due to tender age rather it denotes that evidence may be rejected when a child witness is unable to understand questions put to him/her due to tender age. Therefore the only test remains, as mentioned above, the capacity of child to understand the questions and give rational answers. It is 'rule of prudence' that the judge after

⁷⁶ Ibid.

⁷⁷ Article 3 of Qanoon-e-Shahadat 1984.

⁷⁸ S. 33A (2A) of the Criminal Justice Act (CJA) 1988.

ascertaining competency of a child to be a witness through *voire dire* test may record the same with his opinion in this regard. However the fact that a preliminary test was conducted and the court found the child a competent witness has not been recorded, it will not render the evidence of child inadmissible if otherwise it is admissible. Requirement of preliminary test as rule of judicial prudence is highly desirable and recommended as it saves the time of court so that it may not proceed with recording the evidence of an incompetent witness.⁷⁹

The question whether a child witness has to be administered with oath? The law is that all witnesses, who are being examined by the court, shall be administered oath or affirmation except for a child under twelve who may not understand the obligation under oath but clearly understands the importance and obligation to speak the truth. The non administration of oath or affirmation will not render the evidence inadmissible without foregoing the sense of duty of witness to speak the truth.⁸⁰

The detailed case study of Common Law tradition⁸¹ reveals that despite careful scrutiny of child witness and highly recommended preliminary test and child's sense of duty to speak the truth, it has become a hardened rule of law that a conviction cannot be based on the evidence of child unless corroborated with a material piece of evidence.

⁷⁹ See generally comment on Article 3 by Khalil-ur-Rehman J, *The Qanun-e-Shahadat* , 75-76 and see Nafeer A Malik, *The Law of Evidence*, 112, 113 & 131.

⁸⁰ Section 5 of The Oath Act (X) 1873.

⁸¹ See cases given in Chapter 4.

Since its enactment The Evidence Act 1872 has been interpreted in the light of common law principles of evidence. The law replaced it in Pakistan, Qanoon-e-Shahadat 1984, retained many provisions of its predecessor law which were not repugnant to Islamic law including the competency clause. The natural consequence thus is that the current law continued to be interpreted in the light of common law principles and precedents. This can be seen in the bulk of cases decided by the Pakistani courts. The corresponding provision of Article 3 of Qanoon-e-Shahadat in Indian Evidence Act 1872 is Section 118 except three provisos in article 3 the same wording has been used.⁸² The sections from 118 to 121 and 133 of the Evidence Act 1872 deal with the competency of witnesses. The two rules of judicial prudence were always considered while dealing with the child witness; one is that a preliminary examination was conducted by putting simple questions of ordinary nature. This brief proceeding was recorded for the satisfaction of appellate court regarding the capacity of child and it has also been desirable that the judge or magistrate record the fact that the child understands the duty to speak the truth failing which could affect the credibility of witness seriously. This could lead in some cases to the rejection of the evidence.⁸³ The second rule of prudence in this regard has been not to convict on the basis of child testimony unless the evidence was corroborated.⁸⁴ A child's evidence was not rejected if it has been forthcoming before any likelihood of

⁸² See Section 118 of Indian Evidence Act 1872.

⁸³ H.S. Ursekar, *Law of Evidence* (of J. M. Monir) 5th ed., (Allahabad: The University book Agency, 1994), 542 and

-Rameshwar v. State, 1952 SC 54.

⁸⁴ Ibid., Ursekar, *Law of Evidence* , 543.

being tutored or child's demeanor suggests his straightforwardness, intelligence and there was no infirmity in his statement then corroboration may not be required,⁸⁵ but where a child accompanying his deceased brother who was killed by blows given on his abdomen did not give statement several days after the incidence out of fear and the medical report corroborated the testimony. The evidence was admissible.⁸⁶ Similar standing of courts in Pakistan has been observed with regard to the testimony of child. It has been the practice of the courts to exercise the discretion based on judicial prudence while deciding the admissibility of the evidence of child witness.⁸⁷ But it must be taken into consideration that inherent infirmity in the evidence cannot be recovered with corroboration or any other reliable evidence.⁸⁸

Some Common Law countries have provided detailed procedure of eliciting evidence from child witness and that include reporting requirement, recording the statement of child witness or elder whom the child narrated the incident without unreasonable delay (as an exception to hearsay rule), investigating and interviewing protocols devised to record first hand statements without contaminating the evidence due to the possibility of suggestibility, coaching and tutoring, use of video-taped interviews and court-room- modifications. The

⁸⁵Ibid.,

-Sadhu Singh Alias Surya Partap Singh v. State of U.P, 1978 CrLR (SC) 485.

⁸⁶ Ursekar, *Law of Evidence*, 543.

-Roshan Lal v. State, 1987 ALJ 110.

⁸⁷See Pakistani cases in chapter 4.

⁸⁸ Hazoor Baksh v. State PLD 1985 SC 233.

study of these good practices reveals that it has helped the judicial process in convicting perpetrators of child sexual abuse.⁸⁹

As far as the Islamic character of Qanoon-e-Shahadat is concerned the courts while interpreting the law has not welcomed the idea of going beyond the Islamic provisions of the law itself. It was held;

“The Principles of Islamic Law of Evidence, so far as they have not been codified or adopted by Qanoon-e-Shahadat 1984 are not *per se* applicable and cannot be pressed into service.”⁹⁰

Whereas the courts kept on interpreting the provisions of law in the light of common law principles even after the enactment of Qanoon-e-Shahadat 1984. The provisions of Evidence Act of 1872 not repugnant to Islamic injunctions were retained. The bulk of case law since then was available as precedents. This has provided a great deal of flexibility to the law.

A future research is proposed to revisit Qanoon-e-Shahadat in the light of *Shari'a* standards keeping in view trends of contemporary scholars towards the expansion of application of the Objective theory and changing needs of the society, especially when children have become more vulnerable owing to the use of modern devices access to social media, increase in child abduction, sexual abuse and pornography. These offences were unknown to the early Muslim societies and thus there was no need of *ijtehād* in this regard.

⁸⁹ Based on the study of researches mentioned in ‘The Best Practices’ see below (5.2).

⁹⁰ Sardar Bakhsh v. Mst. Maqsood Bibi PLD 1994 Lah. 453.

Islamic law principles of *Shahadāt* are based on the idea that depositing evidence is a sacred duty of an individual. The children however are not considered to be the subject matter of *Khitāb Sharī'i* (legal ruling) therefore cannot be compelled to testify. However when a credible witness in the eyes of *Shari'a* is not forthcoming and the only available witness is a child witness, he may be permitted to testify but again resolving to the common law rule of prudence and Islamic Law stricture of the criteria of a witness less weight may be given to such evidence. Generally the convictions should not be based on the evidence of children. While rejecting altogether children's evidence can lead to the non-vindication of the rights and thus liable to incur injustice which is against the spirit and objectives of *Shari'a*.⁹¹

5.2. Best Practices

The Common Law perception of the child witness was of an unreliable witness both for psychological and legal reasons. Psychological reasons include inaccuracy, having short term memory and being prone to fantasy. Whereas legal reasons include their incapability to understand the nature of oath and understanding of cognitive concepts of 'truth' and 'lie'. Gradually a child witness was accommodated in the judicial process. The only criteria remains that a (child) witness is capable of understanding the questions put to him/her and demonstrating sufficient intelligence by giving rational answers to those

⁹¹ The reader is requested to refer to the opinions of classical Islamic Jurists given in Chapter 2 and Common Law competency inquiry in Chapter 4.

questions. If a child's testimony goes unheard, there are many offences committed against children themselves, the perpetrators will go unpunished and the misery and trauma of child can continue.

When a study is commenced in child's perspective it cannot be devoid of international instruments and standards. International and regional human rights instruments are considered to be the standards of ascertaining the rights. International standards must be looked at for guidance in evolving a better procedure of recording evidence of a child witness. The child witness may also be a victim therefore the protection measures must be in place and the guidance may be sought from international human rights law; standards and practices. Participation of child witness in judicial process is participation in different dimensions like witness, victim, perpetrator and even by-stander that may be able to provide valuable information and cooperate with the justice system to meet the ends of justice.

In order to facilitate a child assisting the judicial process in any capacity mentioned before and to make him testify without fear or threat a number of measures are provided in the guidelines of the Economic and Social Council adopted via resolution 2005/20 of 20th July 2005.⁹² These guidelines and provisions of CRC provided guidance in drafting the UN Model Law, 'Justice in Matters involving Child Victims and Witnesses of Crime.'⁹³

⁹² Annexed as 'Annexure I'

⁹³ See Chapter 3 for review and summary of the UN Model Law.

The researches and studies conducted to improve interviewing techniques and examination procedure in the court may be considered in designing the relevant protocols along with these international instruments. Moreover provisions of Rome Statute and ICC's witness protection measure can be looked at to improve or initiate law and procedure.⁹⁴

Apart from international sources and researches suggesting improvement measures and devising best practices certain measures are already in place in different legal systems. The child's testimony is sought to be more accurate and devoid of weaknesses by a number of steps.

In some States of the United States of America, during 1980s, all states in the cases of child sexual abuse dropped the requirement of corroboration of evidence, allowed testimony by way of hearsay evidence as an exception to general principle, allowed sometimes leading questions to be asked during witness examination, adopted Shield Laws permitting child evidence behind a one way screen to obstruct child's view of the defendant.⁹⁵

In some countries as well as on the international level, ICC and tribunals, rising acceptability of testimony via video link is seen. The witness protection programs are basically designed for cases of corruption, terrorism and organized crimes but also referred to in cases of violation of human rights.⁹⁶

⁹⁴ Pakistan is not signatory of RS thus is not bound by the provisions of ICC.

⁹⁵ Ceci, Stephen J and Eduardus de Bruyn, "Child Witness in Court: A growing Dilemma in Children Today", *U.S. Dept. of Health and Human Services*, 1993, 22:1 (n.p).

⁹⁶ Karen Kramer, Witness Protection as a Key Tool in Addressing Serious and Organized Crimes, (Seminar Paper), 10. Available at;

www.unafei.or.jp/english/pdf/PDF...Fourth_GGSeminar_P3.19.pdf (Last Visited on 16/4/2014).

The witness protection programs may be designed to meet the following objectives;

- i. Reducing fear of witness by avoiding confrontation with the perpetrator or defendant.
- ii. In case of organized crimes taking measures to hide the identity of a witness.
- iii. Limiting the public exposure of witness to avoid any type of stress.

To meet these objectives a number of steps may be taken for instance;

- a pre-trial statement may replace the testimony in the court,
- removing either witness or defendant from the court room,
- use of video links or shielding the witness during testimony,
- to change the venue of the trial,
- removal of public from court room,
- to provide support person, and
- to allow a parent or guardian to accompany the child witness.

All or any of the above mentioned measures may be taken into consideration for greater safety and facilitation of a child witness to elicit accurate testimony.

This must be reiterated that these steps may not hamper and obstruct the constitutional right of the defendant to a fair trial and right of examining the witness.⁹⁷

The JJSO 2000 does not provide for a support person. Its clause 4, however aims at safeguarding the child and that too only by directing a person to leave the court in the interest of the child for the time which is, in the opinion of the

⁹⁷ Ibid., 8.

court, necessary and is in the interest of child.⁹⁸ It dispenses with the presence of child in the court in its subsequent proceedings⁹⁹ but for reasons other than protection and security.

The model best practices adopted to elicit accurate testimony are the measures taken to facilitate and protect a child witness. Psychological aspect of testifying in the court has been an area of interest for researchers. In a number of studies good and bad interviewing techniques have been discussed. Based on empirical studies different theories of recovery of a child's memory have been propounded. The present study is not aimed at the details of the studies on retrieval of memory.

The suggestive and coercive techniques of interviewing have been condemned for having distorting effect on child's recollection of actual events.¹⁰⁰

Before 1980s multiple interviews were conducted by lawyers, police officers, doctors, mental health professionals but later during 80s and 90s steps were taken to reduce the number of interviews and it was agreed that trained interviewers should video tape interviews and other professionals may have a chance to watch it behind a one way glass shield.¹⁰¹

The studies have shown that repeatedly asking the same question can result into changing the child his/her statement as children consider that the elders are not

⁹⁸ Clause 4, JJSO 2000 of Pakistan.

⁹⁹ Ibid., Clause 5 and 6.

¹⁰⁰ Judith K. Adams, "Interviewing Methods and Hearsay Testimony in Suspected Child Sexual Abuse Cases: Question of Accuracy" *IPT Journal* Volume 9 (1997): 2. Available at; http://www.ipt-forensics.com/journal/volume9/9_1_4.htm (visited on 3/8/2010)

¹⁰¹ Myers John E.B, "Improved Forensic Interviewing (The legacy of the McMartin Pre-School Case)" in Kathryn Kuehnel and Mary Connell (ed.), *The Evaluation of Child Sexual Abuse Allegations (A comprehensive Guide to Assessment and Testimony)*, (John Wiley & Sons, Inc.2009), xxiv.

happy with their answers or that the answer is wrong and may change it.¹⁰² It has been suggested by several studies that in case of young children the error increases with repeated interviews.¹⁰³ Suggestive and leading questions are discouraged. The suggestion planted by the interviewer at very first stage of interviewing will demonstrate itself in the subsequent interviews thus contaminating the testimony.¹⁰⁴ Interviewer being authority figure to child like police officer or prosecutor may influence either consciously or unconsciously influence the child's narrative¹⁰⁵ this can have negative impact on the testimony of child. The accuracy demands that the account of child must be free of influence and stress. It has been observed that the interviewing process is a start of psychologically "healing process" especially when child witness/victim has gone through a trauma experience.¹⁰⁶ Therefore an interviewer must be an expert psychologist or mental health practitioner and sensitive towards the psychological needs of child.

In child abuse cases hearsay testimony of first recipient of the child's account or information is admitted¹⁰⁷ however there are certain tests to avoid

¹⁰² Adams ,K. "Interviewing Methods and Hearsay Testimony in Suspected Child Sexual Abuse Cases: Questions of Accuracy" , 2.

¹⁰³ Malloy Lindsay C. & Quas Judi A. "Children's Suggestibility (Area of Consensus and Controversy)" in Kathryn Kuehnle and Marry Connell (ed.) *The Evaluation of Child Sexual Abuse Allegations* , 280.

¹⁰⁴ Adams, K. "Interviewing Methods and Hearsay Testimony" , 2-3.

¹⁰⁵ *Ibid.* , 2.

¹⁰⁶ Adams, K.. "Interviewing methods and Hearsay Testimony", 5.

¹⁰⁷ Ceci et al. "Child Witness in Court: A growing Dilemma in Children Today", *U.S. Dept. of Health and Human Services*, 1993, 22:1, (n. p).

admissibility of inaccurate hearsay testimony for example the testifying person/expert himself must be a trustworthy witness.¹⁰⁸

The researches regarding interviewing techniques have indicated court related stress of young witnesses therefore some studies suggest court preparation programs as the stress is often result of lack of understanding of the courts procedures or a wrong perceptions due to television or film portrayal of the courts. A child's court related stress may be for a number of reasons including; multiple interviews, giving testimony multiple times, harsh cross examination, practices prevalent in the judicial process which are not sensitive towards the developmental needs of a child, lack of communications between whole judicial system and family of child (or lack of education of the judicial system and processes) and feeling threatened from defendant. The measures should be taken to minimize the court related stress of a child witness.¹⁰⁹ If a child is prepared adequately for court appearance this is likely to increase his/her ability to give credible evidence. To relieve child witness of judicial system related stress interdisciplinary collaboration and sensitivity towards child's developmental needs can be helpful moreover from 'preparation of child for court appearance' should not be mistaken by tutoring, coaching or influencing the child witness.¹¹⁰ Court preparations should be educational and aiming at

¹⁰⁸ Adams, k. "Interviewing methods and Hearsay Testimony in Suspected Child Sexual Abuse cases: Questions of Accuracy", 9.

¹⁰⁹ Walters Susanne M. *Preparing the Child Witness for court* (based on Finnegan, M.J. Creating and administering a Kids Court Program 2000), 2-4 Available on; <http://fwk.2itb.com/prep.htm> (retrieved on; May 19, 2011).

¹¹⁰ Julie Lipovsky and Paul Sten, "Preparing the children for Court: An interdisciplinary View" *Child Maltreatment* (1997) 2:150-163, 151. DOI: 10.1177/107755957002002008 Available at: <http://cmx.sagepub.com/content/2/2/150> (The Article has been downloaded from Catholic University Leuven, Belgium on June 21,2011).

child's understanding of court procedure and legal terms. Family support is important to relieve the stress of a child therefore it must be facilitated even in the absence of familial support an alternate may be provided in accordance with the opinion of therapist. Level of anxiety and stress may be assessed by professional therapist and measures should be taken to lessen such anxiety especially when the child is afraid of confronting the defendant. The court room proceedings may be modified in such a way that the child could avoid face to face confrontation with the defendant.¹¹¹ All or some of the above mentioned measures may only be taken when really needed keeping in view developmental needs of child witness¹¹² because children have ability to cope some day to day stresses like examinations, sport events for which preparation means enhancing the performance similarly preparation for the court appearance aims at improving the quality and credibility of evidence. Strategies may be adopted by family, advocate, mental health practitioner to cope the anxiety.¹¹³

A child in double role of victim and main witness may be prone to secondary victimization. Appropriate protections should be provided from secondary victimization of child witness like avoiding repeated testimony, testimony via video-link (one way or two way according to the circumstances) to avoid confrontation with defendant, excluding the public and having closed sessions.¹¹⁴

¹¹¹Ibid. ,155.

¹¹² Ibid.

¹¹³Ibid., 158-159.

¹¹⁴See generally Bernd Schunemann, "Protection of children and other vulnerable victims against secondary victimization: making it easier to testify in Court" *ERA Forum* (2009) 10: 387-396 (and specifically 390-391). DOI 10.1007/s12027-009-0130-7. (Visited on May 5, 2011).

To maximize the accuracy of the testimony of child a number of interviewing protocols have been designed which not only provide guidance towards investigative interviewing techniques but also indicate that other factors like demeanor of the interviewee, environment of the venue, presence of certain persons etc may have either positive or negative effect on the accuracy of testimony. The investigative interviewing protocols have been designed keeping in view children who are testifying in cases of child (sexual) abuse but can be modified according to the need and requirement of both witness and nature of case.¹¹⁵

In the context of eye witness account three main factors have been observed during studies to affect the accuracy of child testimony; age, type of questions asked during interview and the context of interview itself.¹¹⁶

An adult or a mature child may not be able to remember and recount the events took place at the age of three to four years whereas at the time of interview young children's account is not accurate and liable to errors but with the growing age children's refinement of memory and accuracy improves.¹¹⁷ Perhaps this is the reason why classical Islamic Jurists have differentiated between the age of 'bearing evidence' and the age of 'giving

¹¹⁵ See for example Maria Keller-Hamelia, "The Child Interviewing. Practice Guidelines", Małgazata Toeplitz-Winiewska, "Development Stages and Methods of Interviewing Children". Teresa Jaskiewicz-Obydzinska & Ewa Wach, "The Cognitive Interview of Children in Child as a Witness" in *resource material* (Nobody's Children Foundation, International Society for Prevention of Child Abuse and Neglect -ISPCAN. n.d.). And also see "Forensic Interview of The Child (Part v)" in Kathryn Kuehnle and Mary Connell (ed.) *The Evaluation of Child Sexual Abuse Allegations (A comprehensive Guide to Assessment and Testimony)* , 2009.

¹¹⁶ Malloy Lindsay C. and Quas Jodi A. "Children's Suggestibility (Areas of Consensus and Controversy)" in Kathryn Kuehnle and Marry Connell (ed.) *The Evaluation of Child Sexual Abuse Allegations* , 268.

¹¹⁷ Ibid, 269.

evidence.' They have allowed bearing evidence (*tahammul al-Shahadah*) and depositing evidence (*Ada al-Shahadah*) at the age of maturity.¹¹⁸

In response to the questions allowing free recalls a child may provide more accurate account of incident. But direct questions can also elicit accurate account but when put in leading or suggestible manner can compromise the accuracy of child's account. In the context of the interview if the child is suggested by the interviewer that an event took place or is pressurized to respond in a particular manner the child is misled to assent to the interviewer's suggestion.¹¹⁹

The interviewing techniques/guidelines may be summarized in a few words.

The studies providing guidelines on interviewing techniques focus on three aspects; Venue of interview, interviewer's demeanor and content of interview with consideration of special needs of cognitive development of a child. Interview of child witness may be conducted outside the regular court room or the office of prosecutors, police officers etc. in a child friendly environment excluding irrelevant persons. This may enhance accuracy of child's statement being free of stress which could otherwise be incurred when the interview is conducted in more formal surroundings. The interviews may be video-taped to avoid secondary trauma to the child and may also forego the multiple interviews.

¹¹⁸ See Chapter 2 for opinions of classical Islamic jurists on *Shahadah*.

¹¹⁹ Open ended questions allow free recall for example, "what happened?" or "tell me all you know." See Lindsay and others "Children's Suggestibility (Areas of Consensus and Controversy)" in Kathryn Kuehnle and Marry Connell (ed.), 279.

The first interview should be exhaustive (but not necessarily conducted in one sitting) and in case it is video-taped the recording should be available to the defence advocate.¹²⁰

The demeanor and overall conduct of interviewer is important to cause the child open up and speak. The interviewer should adopt friendly and supportive gestures. The interviewer should be able to develop rapport with the child, “personalize the interview”, should be patient and sensitive towards developmental needs of the child.¹²¹

As far as the content of interview is regarded it must be conducted after establishing rapport with the child by greeting him/her etc and explaining the purpose of interview to the child. The interviewer first assess the cognitive developmental level of the child by putting various questions like asking colors, counting, checking child's understanding of prepositions etc. Then frame his questions for interview accordingly. Concept of truth and lie may be explained and rules of interview may be set for example telling the child that he/she should not guess the answer in case does not know one. The interviewer should use simple intelligible language and vocabulary, ask short questions, speak slowly, do not get irritated as the child might be frightened and may not speak up easily. Instead of pronouns like "he" or "she" first names may be used. To encourage the child speak up and elicit maximum accurate account the child

¹²⁰ Bernd Schunemann, "Protection of children and other vulnerable victims against secondary victimization: making it easier to testify in Court" *ERA Forum* (2009) 10: 387-396, 395.

¹²¹ Teresa Jaskiewicz-Obydzinska and Ewa Wach, *The Cognitive Interview of Children*, (Krakow: Institute of Forensic Expert opinions, n. d.), 20.

should be asked open ended question.¹²² Child's narrative may be encouraged by prompting like, "then what happened" or "tell me more about it" but the answers should not be judged by saying "" that's right" or "this is wrong". The child should not be asked leading or suggestive questions. The interviewer should refrain from making promises to child, using threatening words or tone, showing annoyance, or offering or promising reward for reply. The interviewer should also refrain from promising secrecy. The interviewer should adapt with the way of speech of the child and his/her vocabulary for this purpose he may ask the meaning and clarification.¹²³ The interview may be conducted in more than one session if the child does not speak up easily. During the interview the child should be given pauses if it is necessary to give breaks. Overall, the interview must be conducted in child friendly environment and in a child sensitive manner.

Closing of the interview is important as the child must be explained what is going to happen next, the child may be appreciated for his/her cooperation and efforts but refrain from praising him/her for the content or replies. During the

¹²² It has been observed that when children are given the opportunity to recall freely or their narrative is elicited through open ended, general questions even very young children may give evidence as accurate as given by an adult *see for example*;
-Graeme D. Hutcheson, James S. Baxter, Karen Telfer, and David Warden, "Child Witness Statement Quality- Question Type and Errors of Omission" *Law and Human Behavior*, Volume.19, Number.6, (1995): 642.

-Ruby Fivush and April Schwarzmueller, "Say it Once Again: Effects of Repeated Questions on Children's Event Recall" *Journal of Traumatic Stress*, Volume.8, Number.4, (1995): 556.

¹²³ Ibid., and *see also generally* Maria Keller-Hamela, "The Child Interviewing Practice Guidelines", Malgazata Toeplitz-Winiewska, "Development Stages and Methods of Interviewing Children". Teresa Jaskiewicz-Obydzinska & Ewa Wach, "The Cognitive Interview of Children in Child as a Witness" in *resource material* (Nobody's Children Foundation, International Society for Prevention of Child Abuse and Neglect -ISPCAN. n. d.).

interview or at the closing if child has any question or need that must be addressed properly and satisfied.¹²⁴

Investigative Interviewing protocols may be designed by keeping in view the foregoing guidelines given as a result of researches and studies mentioned here.¹²⁵ It has been experienced repeatedly that in comparison with theoretical training sessions of the forensic interviewers which do not transform into practice effectively a structured protocol of investigative interview proved to be more result oriented. NICHD protocol¹²⁶ has proved to be more helpful in improving the quality of investigative interviews and thus elicit more accurate account from child witness. But a structured protocol should not be considered as panacea or a final word rather it can only be helpful in providing techniques of interviewing to extract maximum information from a child witness which is likely to be accurate however a forensic interviewer may adapt with different circumstances and situations and modify his conduct of interview accordingly. Moreover improvement may be brought by sharing interviewing experience and review of the interviews conducted by them with other expert interviewers for the purpose of learning.¹²⁷ All possibilities of eliciting wrong information or impairing the quality and accuracy of the testimony of child should be ruled out by taking care of the following:

¹²⁴ Ibid., Maria Keller-Hamela, "The Child interview. Practice Guidelines, Child as a Witness" in *Resource material of ISPCAN*, 9,10& 11.

¹²⁵ Some investigative interviewing protocols may be looked at for guidance such as 'National Institute of Child Health and Human Development Protocol (NICHD). These protocols have been designed in consideration of particular needs of Child Sexual Abuse cases but may be modified according to the requirement, need and nature of case.

¹²⁶ Annexed as 'annexure II'

¹²⁷ Brown, Deirdre and Lamb, Michael E. "Forensic Interviews with Children" in Kathryn Kuehnle and Marry Connell (ed.), 317.

- i- Before starting the interview, preparation and necessary planning must be done with regard to rapport building (with the child), use of language suitable to the developmental needs (of the child), and types of prompts used during interview to elicit maximum information about the target event and accurate narrative of the child witness.
- ii- Setting the rules of interview and making the child to understand and apply those rules for example, “if you do not know the answer say I don’t know but do not guess it.”
- iii- Affording an opportunity to the child to recall the events in detail even if these are not relevant to the substance of interview so that by further prompts substance can be elicited.
- iv- Conducting forensic interviews is not an easy task the interviewer can maintain the standard and quality of interview high by regular review, supervising his work and improving in the light of other interviews conducted.¹²⁸

5.3. Limitations of Research and need for Future Research.

This research was set out to explore the competence and credibility of a child witness in the realm of judicial process. In the light of more and more involvement of children in the justice process specially in the criminal justice system both in national and international has given rise to the questions such as; whether a child witness can be relied in the provision of justice? Or whether a

¹²⁸ Ibid., (modified).

child witness is competent at all to be considered a credible witness to testify in the court of law and assist the judicial process to provide justice? The study was carried out in three distinct yet interrelated disciplines. The first was *Shari'a* or Islamic Law. Being the holder of Islamic Constitution all state laws of Pakistan are required to be in conformity with the injunctions of *Al-Qur'an* and *Sunnah*. The Islamic provisions in the Evidence law may be revisited in the light of expansion of the theory of Objectives of *Shari'a* and day to day changing needs of the judicial process.

Secondly the role and competence of child witness was explored in the International Law. Pakistan is a signatory of a number of international instruments more significant in this regard is CRC. The state has incurred the liability to incorporate the principles and rules provided in CRC in the domestic judicial system by way of legislation to that effect.

Thirdly the national law was looked at and the case law to see how the child witness is treated at the criminal justice system of Pakistan. The study was limited to the competency and admissibility of a child witness.

The role of child witness in the judicial process cannot be severed from the juvenile justice system. Pakistan has promulgated its first juvenile law in 2000 named as Juvenile Justice System Ordinance 2000 (JJSO 2000). This study could not accommodate an analysis of the above mentioned law. However a future research is proposed to analyze the law in the light of CRC and other international standards (e.g. Beijing Rules and Riyadh Guidelines).

Child witness can be the most vulnerable, scared and confused witness sometimes especially where such witness is a victim too. A child witness may be a victim of domestic violence, sexual abuse, victim of organized crimes and armed conflicts. To elicit quality evidence from a child witness it is important that all fears, insecurities, revisiting the stress and trauma condition or feeling threatened must be removed from the child. For this purpose a (child) witness protection program should be in place. The study however does not extend to witness protection therefore a future research may be proposed to devise witness-protection-measures according to international standards.

As childhood, according to both national and international law, varies from birth to eighteen years of age so a child may attain his cognitive abilities gradually. The psychologists have divided the cognitive stages in four categories: early childhood, pre-school age, school age and adolescence. Starting from 2-3, 4-6, 7-12 and 13-18 for interviewing purpose the last stage children are normally treated as adults.¹²⁹ A child witness who happens to be a victim may have suffered trauma condition and may be unable to recall the incidents accurately experts may help him/her in retrieving memory. There are different theories of recovery of memory. This research cannot be extended to those studies and research but considers the valuable contribution these have made towards understanding and assessing a child witness. Keeping in view psychological well being of the child witness and victim who has suffered

¹²⁹ Malgorzata Toeplitz-Winiewska, " Development Stages and Methods of interviewing Children" In *Child as a Witness* (Resource Material) (Psychology Department Warsaw University, n. d.), 13-14. The International Society for Prevention of Child Abuse and Neglect (ISPCAN).

physical and mental pain, a cognitive interviewing technique may be developed with the help of experts with particular reference to child witnesses produced in the courts. This will help the judicial process, child and family of the child. Further research may be conducted to develop interviewing standards for the child witnesses and first hand investigating agencies. The prosecutors may be provided with these standards or interview protocols and that must be done in consultancy with experts/psychologists. It must be reiterated that all measures must be to assist the judicial process and not deprive the defendant from his right to a fair trial.

Material limitations included dearth of research material in the form of books. There is scarce and scattered information as no systematic study has been carried out before. Therefore sometimes the study relied on online sources but it has been an utmost effort to refer to only authentic sources and many articles/material casting doubt of authenticity were sheared off.

5.4. Conclusion

While concluding this research it may be said that the childhood spreads right from birth to the age of eighteen universally. During this period a human goes through different stages of development. Islamic Law takes into consideration three stages of development in childhood. A child has deficient capacity of execution and is not considered to be *mukallaf* however at discerning age child attains limited capacity of execution of rights. The question whether a child can be a witness to testify in front of a *Qādī* (judge) and assist in the justice process?

There is no clear text prohibiting either or allowing the child to testify in the court. The classical Islamic jurists by way of induction have propounded that the child is not a favorable witness. The law of evidence in Pakistan is based on common law tradition having some Islamic provisions which state that a qualifying witness and number of witnesses required in each case should be decided according to injunctions of *Al-Qur'ān* and *Sunnah* but when a qualifying witness is not forthcoming an available witness may testify. As to competency of a witness the only criteria is that witness understands and responds to the questions put to him/her in a rational manner. The admissibility of evidence is not based on the age of a person but on the intellect and understanding. An issue not dealt in the clear text of *Shari'a* may be studied in the light of public good and objectives of Islamic Law.

Vindication of rights and provision of justice is an objective and prime concern of Islamic legal system. In the absence of qualifying forthcoming witness the right may rest on the admissibility of a child witness who is discerning and understanding may be allowed to testify with the exercise of a great deal of caution, care and scrutiny.

The law of evidence of Pakistan that is Qanoon-e-Shahadat 1984 does not speak of any details as to the modes of eliciting the truth from child witness through different aids like court room modifications or use of modern devices. This may be done by way of amendment in the existing evidence as well as procedural law.

It is duty of the state, being an Islamic state and holder of the Islamic constitution which has made it obligatory for the state to facilitate its subjects to fashion their lives in accordance with Islamic norms, to widely disseminate knowledge and create awareness regarding concept of human rights in Islam and provide these rights to all its subject more specifically to the children.

There is no (comprehensive) law on witness protection or any program of such nature in place in the country for adult witnesses.¹³⁰ It is a matter of concern that incidents of threat and physical harm, even taking lives, take place sometimes in the premises of courts. There is dire need to protect witnesses who come out and speak to help the courts in the process of providing justice. The witness protection program or (more accurate) a witness assistance program may be initiated providing protections or assistance for child witnesses over and above the adult witness especially when their intimidation or threat is likely to take place from the defendant.¹³¹ The international standards such as Rome Statute and ICC's guidelines may be looked at for guidance in this regard.¹³²

Under common Law a conviction may not be based on the testimony of child unless corroborated by another material piece of evidence. This is not a rule of law but a rule of judicial prudence. However some common law states have abolished the requirement of corroboration in child sexual abuse cases.

¹³⁰ However Sindh Witness Protection Act of 2013, Anti Terrorism Act 1997 (sec.21) and the protection of Pakistan Act 2014(ss. 9,10 and 13) are exceptions. Recently Pakistan Army (amendment) Bill, 2015, has been passed to protect the prosecutors and witnesses.

¹³¹ Good Practices for the protection of witnesses in criminal proceedings involving organized crime, UNODC Vienna, Feb.2008.

¹³² See chapter 3.

The UN convention on the Rights of the Child (CRC) 1989 has provided all sorts of rights to the children of International Community. Among four core principles and fundamental rights of children 'right to the best interest' and the 'right of participation' or 'the right to be heard' are inherent in all provisions and are available to children in all matters concerning their lives. The States Parties are bound to reflect these rights in their domestic laws, judicial and administrative systems. Pakistan being signatory of CRC shares the same duty. The rights of the child can only be effectively implemented when police, prosecution, lawyers, judges, parties, parents (family or guardian) of child witness, intermediaries and support persons (overall) the judicial machinery and the persons involved in the administration of juvenile justice system must be trained, sufficiently informed and sensitized about the rights of the child and more specifically rights provided in CRC. It is, therefore, important to propagate widely CRC and other international standards.

It is important that not only society at large but children themselves must also be aware of their rights. A chapter of human rights may be included in their syllabi from early education harmonized with the Islamic concept of rights of children. A further research may be undertaken as how to educate children of their rights according to their own religious and cultural values.

Therefore it is required that the rights proclaimed in the CRC along with the rights of children provided in *Shari'a* need to be translated into practice by effective legislation. Moreover a great deal of sensitization towards children's rights of all stake holders dealing with children and children themselves is

required. The children may also be educated on their rights and a mechanism of access to the rights may be devised for them.

In Pakistan children do not enjoy their rights according to the emerging international trends in favor of recognition of those rights with emphasis on criminal justice system. It is therefore recommended to create wide spread sensitization of those officers who are dealing with the children under the Juvenile Justice Order 2000, and more so the law itself must be harmonized with international standards and Islamic legal Principles.

CRC creates full range of rights for children (like political, social, economic, cultural, administrative and judicial). It has declared that it is obligation of the States Parties to put measures in place for the effective enjoyment of those rights. Pakistan is signatory of CRC and thus bound to take steps forward in this regard. A comprehensive child law in conformity with the Islamic injunctions and teachings must be in place.

Testifying in the court can be a traumatic experience for some children in criminal justice system especially when witness is a victim of an offence. To avoid repeated examinations in the court and to elicit accurate account of the event child testimony may be aided or facilitated, besides other measure, with the investigative interviews. An interviewer who sometimes is a police officer, prosecutor or preferably a mental health practitioner may use specifically designed investigative forensic interview protocols for maximum accuracy of the child's narratives. The protocol may be modified according to the

circumstances and nature of each case and cognitive developmental needs of the child witness. Moreover other measures such as video-taped interviews, testimony via electronic link or use of court-room modifications and avoiding confrontation with the perpetrator of crime or defendant for the protection of child witness, may be taken into consideration. An interpreter may be provided in cases where child is unable to understand the language of the proceeding.

The legislation may be done to allow courts to arrange two-way closed-circuit-television in cases where the chances of child witness to suffer trauma are more likely. In this way the defense will be having the opportunity to cross-examine and the child may be able to identify the accused without being felt threatened.

For the purpose of protection the child witness may be awarded a pseudonym and kept away from general exposure. In case a child victim is a witness the protection measures must be taken in accordance with the international standards. Some states have introduced shielding procedure for child witness it has been criticized for erosion of accused person's right to cross examine and thus right to fair trial.¹³³ Therefore the legislation proposed earlier may strike the balance between protection of the child witness and the right of accused to confront the accuser.

Pakistani judicial system and investigating agencies have not yet adopted any model protocol devoid of coercive and suggestible interviewing. This research

¹³³ *Proposed uniform child witness testimony Act: An impermissible abridgment of criminal defendants' rights*, 2. Available at; <http://www.bclawr.org/45> (last visited 16/6/2011)

proposes the adoption of standard protocol which may be modified slightly according to the age, intelligence and cultural needs of a responding child.

All steps taken to facilitate a child's testimony may not impair the right of fair trial of the defendant.

5.5. Recommendations.

The study recommends that:

- With regard to the admissibility of child testimony a clear policy may be adopted and an elaborate legislation based on Islamic legal principles, Common Law tradition, International Standards and model best practices may be done.
- A detailed legislation and a procedural lay out with regard to the child witnesses and recording of their testimony according to the International standards may be provided.
- Legislation may be provided in the light of UN Model Law ¹³⁴for the appointment of intermediaries and support persons. Their functions may be determined under the same legislation while ensuring the elimination of any type of suggestibility and tutoring of the witness on the part of these intermediaries and support persons.

¹³⁴See Chapter 3.

- Qualifications and skills of intermediary or support persons may be developed by further research.
- Although it may not always be the case (and it is generally considered) that a child witness suffers mental stress and trauma more than an adult witness, if in the court's assessment (which may be reached at with the help of expert opinion) it is so, the testimony may be preferred via one way closed-circuit television.¹³⁵
- To avoid the re-living of child the bad experience and trauma situation and further possibility of not giving coherent testimony in the later stages of trial. A pre-recorded testimony may be produced especially in case of young children without hampering the right of accused to cross examine.
- All the stake holders including children themselves must be sufficiently informed and sensitized about the rights of the child both international and Islamic.
- The law of Pakistan is silent on any details of eliciting the truth from child witness through different aids like court room modifications and use of modern devices. This may be done by way of amendment in the existing evidence as well as procedural law.
- It is duty of the Islamic State (Pakistan) to disseminate knowledge and create awareness of human rights in Islam and provide these rights to all its subjects more specifically to the children.

¹³⁵ Flip Schutte, *Child Witnesses in Criminal Justice System in South Africa: An overview of proposals for reforms*, 10.

- To achieve the above mentioned, research may be carried out to enumerate children's rights in Islam and including these in the curricula.
- The Qanoon-e-Shahadat Order 1984 must be revisited and made more in conformity with the injunctions of *al-Qur'an* and *Sunnah*.¹³⁶
- An effective witness protection program must be in place.
- A comprehensive child law ensuring children's rights according to international standards harmonized with the Islamic concept of rights is need of the day.
- Children are usually scared and may not be able to testify in the formal setting of a court room. It has been suggested in different researches and studies that a child friendly environment may be created to elicit a child's testimony.¹³⁷
- While interviewing and cross-examining a child witness it is better to ask short questions in simple language. "(G)ood child witness questions are five-word sentences"¹³⁸ (a model protocol based on interview techniques is recommended).
- A child's vocabulary is limited, his/her understanding of direction, time, place, day, date might be different than adults (especially in case of children of tender years) this specific understanding might be differentiated from lying and may not be considered as negatively

¹³⁶ The Council of Islamic Ideology reviewed the provisions of Qanoon-e-Shahadat Order 1984 and recommended amendments in its annual report for the year 1988-1989. These provisions include Articles; 1,2,3,9,10,11,12,13,14,16,17,124,151 and 163.

¹³⁷ Eric Van De Sandt. *A Child's Story for Global Peace and Justice*, 30.

¹³⁸ Joel Erik Thompson, "Cross-examination of child witnesses" *IPT journal* Volume. 5 (1993): 6. available at; http://www.ipt-forensic.com/journal/volume5/j5_1_7.htm (last visited: September 2011).

affecting the credibility of the child witness and accuracy of his statement.

- To avoid the possibility of tutoring of the child witness it is recommended that the first hand statement must be recorded properly (or video-taped preferably) by the investigating agency. Interview protocols and electronic devices may be used to facilitate the testimony for having more accuracy.
- The child's right of participation or his/her voice to be heard according to article 12 of CRC must be made available in all administrative and judicial proceedings whether civil or criminal including detention, custody, referral to reformatory, familial matters like custody and child preference.¹³⁹
- There is wide disparity between the ages of criminal liability and upper age limit of childhood¹⁴⁰ not only in different legal systems but sometimes in the same legal system. This can give rise to serious implications. There is need to develop a consensus in this regard.

¹³⁹ The right of 'expression' may be subject to the parental control, societal and religious norms and cultural diversity wherever applicable according to the given circumstances (Hosain v. Malik, 671 A.2d 988, Md.Ct.Spec.App.1996).

¹⁴⁰ In Pakistan for the purpose of labor law, marriage law, employment law and criminal law different upper age limit is given for 'childhood' or in other words start of 'adulthood', and in some cases different upper age limits have been prescribed for male and female. Please see for example; the Qisas and Diyat Ordinance, sec.299 (a) of Pakistan Penal Code and The Child Marriage Restraint Act, 1929, sec. 2 (a).

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Annexure-I
Guidelines on Justice in Matters involving
Child Victims and Witnesses of Crime adopted by

Economic and Social Council resolution 2005/20 of 22 July 2005

I. Objectives

1. The present Guidelines on Justice for Child Victims and Witnesses of Crime set forth good practice based on the consensus of contemporary knowledge and relevant international and regional norms, standards and principles.
2. The Guidelines should be implemented in accordance with relevant national legislation and judicial procedures as well as take into consideration legal, social, economic, cultural and geographical conditions. However, States should constantly endeavour to overcome practical difficulties in the application of the Guidelines.
3. The Guidelines provide a practical framework to achieve the following objectives:
 - (a) To assist in the review of national and domestic laws, procedures and practices so that these ensure full respect for the rights of child victims and

witnesses of crime and contribute to the implementation of the Convention on the Rights of the Child, by parties to that Convention;

- (b) To assist Governments, international organizations, public agencies, non-governmental and community-based organizations and other interested parties in designing and implementing legislation, policy, programmes and practices that address key issues related to child victims and witnesses of crime;
- (c) To guide professionals and, where appropriate, volunteers working with child victims and witnesses of crime in their day-to-day practice in the adult and juvenile justice process at the national, regional and international levels, consistent with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;
- (d) To assist and support those caring for children in dealing sensitively with child victims and witnesses of crime.

4. In implementing the Guidelines, each jurisdiction should ensure that adequate training, selection and procedures are put in place to protect and meet the special needs of child victims and witnesses of crime, where the nature of the victimization affects categories of children differently, such as sexual assault of children, especially girls.

5. The Guidelines cover a field in which knowledge and practice are growing and improving. They are neither intended to be exhaustive nor to preclude further development, provided it is in harmony with their underlying objectives and principles.

6. The Guidelines could also be applied to processes in informal and customary systems of justice such as restorative justice and in non-criminal fields of law including, but not limited to, custody, divorce, adoption, child protection, mental health, citizenship, immigration and refugee law.

II. Special considerations

7. The Guidelines were developed:

(a) Cognizant that millions of children throughout the world suffer harm as a result of crime and Abuse of power and that the rights of those children have not been adequately recognized and that they may suffer additional hardship when assisting in the justice process;

(b) Recognizing that children are vulnerable and require special protection appropriate to their age, level of maturity and individual special needs;

(c) Recognizing that girls are particularly vulnerable and may face discrimination at all stages of the justice system;

(d) Reaffirming that every effort must be made to prevent victimization of children, including, among other things, through implementation of the Guidelines for the Prevention of Crime;

(e) Cognizant that children who are victims and witnesses may suffer additional hardship if mistakenly viewed as offenders when they are in fact victims and witnesses;

(f) Recalling that the Convention on the Rights of the Child sets forth requirements and principles to secure effective recognition of the rights of children and that the Declaration of Basic Principles of Justice for Victims of Crime and abuse of Power sets forth principles to provide victims with the right to information, participation, protection, reparation and assistance;

(g) Recalling international and regional initiatives that implement the principles of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including the *Handbook on Justice for Victims* and the *Guide for Policy Makers on the Declaration of Basic Principles*, both issued by the United Nations Office for Drug Control and Crime Prevention in 1999;

(h) Recognizing the efforts of the International Bureau for Children's Rights in laying the groundwork for the development of guidelines on justice for child victims and witnesses of crime;

(i) Considering that improved responses to child victims and witnesses of crime can make children and their families more willing to disclose instances of victimization and more supportive of the justice process;

(j) Recalling that justice for child victims and witnesses of crime must be assured while safeguarding the rights of accused and convicted offenders;

(k) Bearing in mind the variety of legal systems and traditions, and noting that crime is increasingly transnational in nature and that there is a need to ensure that child victims and witnesses of crime receive equivalent protection in all countries.

III. Principles

8. As stated in international instruments and in particular the Convention on the Rights of the Child as reflected in the work of the Committee on the Rights of the Child, and in order to ensure justice for child victims and witnesses of crime, professionals and others responsible for the well-being of those children must respect the following cross-cutting principles:

- (a) *Dignity.* Every child is a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected;
- (b) *Non-discrimination.* Every child has the right to be treated fairly and equally, regardless of his or her or the parent or legal guardian's race, ethnicity, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status;
- (c) *Best interests of the child.* While the rights of accused and convicted offenders should be safeguarded, every child has the right to have his or her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development:
- (i) *Protection.* Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect;

(ii) *Harmonious development.* Every child has the right to a chance for harmonious development and to a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been traumatized, every step should be taken to enable the child to enjoy healthy development;

(d) *Right to participation.* Every child has, subject to national procedural law, the right to express his or her views, opinions and beliefs freely, in his or her own words, and to contribute especially to the decisions affecting his or her life, including those taken in any judicial processes, and to have those views taken into consideration according to his or her abilities, age, intellectual maturity and evolving capacity.

IV. Definitions

9. Throughout these Guidelines, the following definitions apply:

(a) “Child victims and witnesses” denotes children and adolescents, under the age of 18, who are victims of crime or witnesses to crime regardless of their role in the offence or in the prosecution of the alleged offender or groups of offenders;

(b) “Professionals” refers to persons who, within the context of their work, are in contact with child victims and witnesses of crime or are responsible for addressing the needs of children in the justice system and for whom these Guidelines are applicable. This includes, but is not limited to, the following: child

and victim advocates and support persons; child protection service practitioners; child welfare agency staff; prosecutors and, where appropriate, defence lawyers; diplomatic and consular staff; domestic violence programme staff; judges; court staff; law enforcement officials; medical and mental health professionals; and social workers;

(c) "Justice process" encompasses detection of the crime, making of the complaint, investigation, prosecution and trial and post-trial procedures, regardless of whether the case is handled in a national, international or regional criminal justice system for adults or juveniles, or in a customary or informal system of justice;

(d) "Child-sensitive" denotes an approach that balances the child's right to protection and that takes into account the child's individual needs and views.

V. The right to be treated with dignity and compassion

10. Child victims and witnesses should be treated in a caring and sensitive manner throughout the justice process, taking into account their personal situation and immediate needs, age, gender, disability and level of maturity and fully respecting their physical, mental and moral integrity.

11. Every child should be treated as an individual with his or her individual needs, wishes and feelings.

12. Interference in the child's private life should be limited to the minimum needed at the same time as high standards of evidence collection are maintained in order to ensure fair and equitable outcomes of the justice process.

13. In order to avoid further hardship to the child, interviews, examinations and other forms of investigation should be conducted by trained professionals who proceed in a sensitive, respectful and thorough manner.

14. All interactions described in these Guidelines should be conducted in a child-sensitive manner in a suitable environment that accommodates the special needs of the child, according to his or her abilities, age, intellectual maturity and evolving capacity. They should also take place in a language that the child uses and understands.

VI. The right to be protected from discrimination

15. Child victims and witnesses should have access to a justice process that protects them from discrimination based on the child's, parent's or legal guardian's race, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status.

16. The justice process and support services available to child victims and witnesses and their families should be sensitive to the child's age, wishes, understanding, gender, sexual orientation, ethnic, cultural, religious, linguistic and social background, caste, socio-economic condition and immigration or refugee status, as well as to the special needs of the child, including health,

abilities and capacities. Professionals should be trained and educated about such differences.

17. In certain cases, special services and protection will need to be instituted to take account of gender and the different nature of specific offences against children, such as sexual assault involving children.

18. Age should not be a barrier to a child's right to participate fully in the justice process. Every child should be treated as a capable witness, subject to examination, and his or her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone as long as his or her age and maturity allow the giving of intelligible and credible testimony, with or without communication aids and other assistance.

VII. The right to be informed

19. Child victims and witnesses, their parents or guardians and legal representatives, from their first contact with the justice process and throughout that process, should be promptly and adequately informed, to the extent feasible and appropriate, of, *inter alia*:

(a) The availability of health, psychological, social and other relevant services as well as the means of accessing such services along with legal or other advice or representation, compensation and emergency financial support, where applicable;

(b) The procedures for the adult and juvenile criminal justice process, including the role of child victims and witnesses, the importance, timing and manner of testimony, and ways in which “questioning” will be conducted during the investigation and trial;

(c) The existing support mechanisms for the child when making a complaint and participating in the investigation and court proceedings;

(d) The specific places and times of hearings and other relevant events;

(e) The availability of protective measures;

(f) The existing mechanisms for review of decisions affecting child victims and witnesses;

(g) The relevant rights for child victims and witnesses pursuant to the Convention on the Rights of the Child and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

20. In addition, child victims, their parents or guardians and legal representatives should be promptly and adequately informed, to the extent feasible and appropriate, of:

(a) The progress and disposition of the specific case, including the apprehension, arrest and custodial status of the accused and any pending changes to that status, the prosecutorial decision and relevant post-trial developments and the outcome of the case;

(b) The existing opportunities to obtain reparation from the offender or from the State through the justice process, through alternative civil proceedings or through other processes.

VIII. The right to be heard and to express views and concerns

21. Professionals should make every effort to enable child victims and witnesses to express their views and concerns related to their involvement in the justice process, including by:

(a) Ensuring that child victims and where appropriate witnesses are consulted on the matters set forth in paragraph 19 above;

(b) Ensuring that child victims and witnesses are enabled to express freely and in their own manner their views and concerns regarding their involvement in the justice process, their concerns regarding safety in relation to the accused, the manner in which they prefer to provide testimony and their feelings about the conclusions of the process;

(c) Giving due regard to the child's views and concerns and, if they are unable to accommodate them, explain the reasons to the child.

IX. The right to effective assistance

22. Child victims and witnesses and, where appropriate, family members should have access to assistance provided by professionals who have received relevant training as set out in paragraphs 40-42 below. This may include assistance and support services such as financial, legal, counselling, health, social and educational services, physical and psychological recovery services and other services necessary for the child's reintegration. All such assistance should address the child's needs and enable him or her to participate effectively at all stages of the justice process.

23. In assisting child victims and witnesses, professionals should make every effort to coordinate support so that the child is not subjected to excessive interventions.

24. Child victims and witnesses should receive assistance from support persons, such as child victim/witness specialists, commencing at the initial report and continuing until such services are no longer required.

25. Professionals should develop and implement measures to make it easier for children to testify or give evidence to improve communication and understanding at the pre-trial and trial stages. These measures may include:

(a) Child victim and witness specialists to address the child's special needs;

- (b) Support persons, including specialists and appropriate family members to accompany the child during testimony;
- (c) Where appropriate, to appoint guardians to protect the child's legal interests.

X. The right to privacy

26. Child victims and witnesses should have their privacy protected as a matter of primary importance.

27. Information relating to a child's involvement in the justice process should be protected. This can be achieved through maintaining confidentiality and restricting disclosure of information that may lead to identification of a child who is a victim or witness in the justice process.

28. Measures should be taken to protect children from undue exposure to the public by, for example, excluding the public and the media from the courtroom during the child's testimony, where permitted by national law.

XI. The right to be protected from hardship during the justice process

29. Professionals should take measures to prevent hardship during the detection, investigation and prosecution process in order to ensure that the best interests and dignity of child victims and witnesses are respected.

30. Professionals should approach child victims and witnesses with sensitivity, so that they:

- (a) Provide support for child victims and witnesses, including accompanying the child throughout his or her involvement in the justice process, when it is in his or her best interests;
- (b) Provide certainty about the process, including providing child victims and witnesses with clear expectations as to what to expect in the process, with as much certainty as possible. The child's participation in hearings and trials should be planned ahead of time and every effort should be made to ensure continuity in the relationships between children and the professionals in contact with them throughout the process;
- (c) Ensure that trials take place as soon as practical, unless delays are in the child's best interest. Investigation of crimes involving child victims and witnesses should also be expedited and there should be procedures, laws or court rules that provide for cases involving child victims and witnesses to be expedited;
- (d) Use child-sensitive procedures, including interview rooms designed for children, interdisciplinary services for child victims integrated in the same location, modified court environments that take child witnesses into consideration, recesses during a child's testimony, hearings scheduled at times of day appropriate to the age and maturity of the child, an appropriate notification system to ensure the child goes to court only when necessary and other appropriate measures to facilitate the child's testimony.

31. Professionals should also implement measures:

- (a) To limit the number of interviews: special procedures for collection of evidence from child victims and witnesses should be implemented in order to reduce the number of interviews, statements, hearings and, specifically, unnecessary contact with the justice process, such as through use of video recording;
- (b) To ensure that child victims and witnesses are protected, if compatible with the legal system and with due respect for the rights of the defence, from being cross-examined by the alleged perpetrator: as necessary, child victims and witnesses should be interviewed, and examined in court, out of sight of the alleged perpetrator, and separate courthouse waiting rooms and private interview areas should be provided;
- (c) To ensure that child victims and witnesses are questioned in a child-sensitive manner and allow for the exercise of supervision by judges, facilitate testimony and reduce potential intimidation, for example by using testimonial aids or appointing psychological experts.

XII. The right to safety

32. Where the safety of a child victim or witness may be at risk, appropriate measures should be taken to require the reporting of those safety risks to appropriate authorities and to protect the child from such risk before, during and after the justice process.

33. Professionals who come into contact with children should be required to notify appropriate authorities if they suspect that a child victim or witness has been harmed, is being harmed or is likely to be harmed.

34. Professionals should be trained in recognizing and preventing intimidation, threats and harm to child victims and witnesses. Where child victims and witnesses may be the subject of intimidation, threats or harm, appropriate conditions should be put in place to ensure the safety of the child. Such safeguards could include:

- (a) Avoiding direct contact between child victims and witnesses and the alleged perpetrators at any point in the justice process;
- (b) Using court-ordered restraining orders supported by a registry system;
- (c) Ordering pre-trial detention of the accused and setting special “no contact” bail conditions;
- (d) Placing the accused under house arrest;
- (e) Wherever possible and appropriate, giving child victims and witnesses protection by the police or other relevant agencies and safeguarding their whereabouts from disclosure.

XIII. The right to reparation

35. Child victims should, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery. Procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive.
36. Provided the proceedings are child-sensitive and respect these Guidelines, combined criminal and reparations proceedings should be encouraged, together with informal and community justice procedures such as restorative justice.
37. Reparation may include restitution from the offender ordered in the criminal court, aid from victim compensation programmes administered by the State and damages ordered to be paid in civil proceedings. Where possible, costs of social and educational reintegration, medical treatment, mental health care and legal services should be addressed. Procedures should be instituted to ensure enforcement of reparation orders and payment of reparation before fines.

XIV. The right to special preventive measures

38. In addition to preventive measures that should be in place for all children, special strategies are required for child victims and witnesses who are particularly vulnerable to recurring victimization or offending.
39. Professionals should develop and implement comprehensive and specially tailored strategies and interventions in cases where there are risks that child victims may be victimized further. These strategies and interventions should take

into account the nature of the victimization, including victimization related to abuse in the home, sexual exploitation, abuse in institutional settings and trafficking. The strategies may include those based on government, neighbourhood and citizen initiatives.

XV. Implementation

40. Adequate training, education and information should be made available to professionals, working with child victims and witnesses with a view to improving and sustaining specialized methods, approaches and attitudes in order to protect and deal effectively and sensitively with child victims and witnesses.

41. Professionals should be trained to effectively protect and meet the needs of child victims and witnesses, including in specialized units and services.

42. This training should include:

- (a) Relevant human rights norms, standards and principles, including the rights of the child;
- (b) Principles and ethical duties of their office;
- (c) Signs and symptoms that indicate crimes against children;
- (d) Crisis assessment skills and techniques, especially for making referrals, with an emphasis placed on the need for confidentiality;

- (e) Impact, consequences, including negative physical and psychological effects, and trauma of crimes against children;
- (f) Special measures and techniques to assist child victims and witnesses in the justice process;
- (g) Cross-cultural and age-related linguistic, religious, social and gender issues;
- (h) Appropriate adult-child communication skills;
- (i) Interviewing and assessment techniques that minimize any trauma to the child while maximizing the quality of information received from the child;
- (j) Skills to deal with child victims and witnesses in a sensitive, understanding, constructive and reassuring manner;
- (k) Methods to protect and present evidence and to question child witnesses;
- (l) Roles of, and methods used by, professionals working with child victims and witnesses.

43. Professionals should make every effort to adopt an interdisciplinary and cooperative approach in aiding children by familiarizing themselves with the wide array of available services, such as victim support, advocacy, economic assistance, counselling, education, health, legal and social services. This approach may include protocols for the different stages of the justice process to encourage cooperation among entities that provide services to child victims and witnesses, as well as other forms of multidisciplinary work that includes police, prosecutor,

medical, social services and psychological personnel working in the same location.

44. International cooperation should be enhanced between States and all sectors of society, both at the national and international levels, including mutual assistance for the purpose of facilitating collection and exchange of information and the detection, investigation and prosecution of transnational crimes involving child victims and witnesses.

45. Professionals should consider utilizing the present Guidelines as a basis for developing laws and written policies, standards and protocols aimed at assisting child victims and witnesses involved in the justice process.

46. Professionals should be enabled to periodically review and evaluate their role, together with other agencies in the justice process, in ensuring the protection of the rights of the child and the effective implementation of the present Guidelines.

Annexure-II

THE NICHD INVESTIGATIVE INTERVIEW PROTOCOL (2007)

Introduction

1 “Hello, my name is _____ and I am a police officer. [Introduce anyone else in the room; ideally, nobody else will be present.] Today is _____ and it is now _____ o’clock. I am interviewing _____ at _____.”

“As you can see, we have a video-camera and microphones here. They will record our conversation so I can remember everything you tell me. Sometimes I forget things and the recorder allows me to listen to you without having to write everything down.”

“Part of my job is to talk to children [teenagers] about things that have happened to them. I meet with lots of children [teenagers] so that they can tell me the truth about things that have happened to them. So, before we begin, I want to make sure that you understand how important it is to tell the truth.”[For younger children, explain: “**What is true and what is not true**”].

“If I say that my shoes are red (or green) is that true or not true?”

[Wait for an answer, then say:]

1. **“That would not be true, because my shoes are really [black/blue/etc.]. And if I say that I am sitting down now, would that be true or not true [right or not right]?”**

[Wait for an answer.]

2. **“It would be [true/right], because you can see I am really sitting down.”**

“I see that you understand what telling the truth means. It is very important that you only tell me the truth today. You should only tell me about things that really happened to you.”

[Pause.]

3. **“If I ask a question that you don’t understand, just say, ‘I don’t understand.’ Okay?”**

[Pause]

“If I don’t understand what you say, I’ll ask you to explain.”

[Pause.]

4. “If I ask a question, and you don’t know the answer, just tell me, ‘I don’t know.’”

“So, if I ask you, ‘What is my dog’s name?’ [Or “my son’s name”] what would you say?”

[Wait for an answer.]

[If the child says, “I don’t know,” say:]

5. “Right. You don’t know, do you?”

[If the child offers a GUESS, say:]

“No, you don’t know because you don’t know me. When you don’t know the answer, don’t guess -- say that you don’t know.”

[Pause.]

6. “And if I say things that are wrong, you should tell me. Okay?”

[Wait for an answer.]

7. "So if I said that you are a 2-year-old girl [when interviewing a 5-year-old boy, etc.], what would you say?"

[If the child denies and does not correct you, say:]

"What would you say if I made a mistake and called you a 2-year-old girl[when interviewing a 5-year-old boy, etc.]?"

[Wait for an answer.]

8. "That's right. Now you know you should tell me if I make a mistake or say something that is not right."

[Pause.]

9. "So if I said you were standing up, what would you say?"

[Wait for an answer.]

"OK"

II. Rapport Building

"Now I want to get to know you better."

1. "Tell me about things you like to do."

[Wait for child to respond.]

[If the child gives a fairly detailed response, skip to question 3.]

[If the child does not answer, gives a short answer, or gets stuck, you can ask:]

2. "I really want to know you better. I need you to tell me about the things you like to do."

[Wait for an answer.]

3. "**Tell me more about** [activity the child has mentioned in his/her account. AVOID FOCUSING ON TV, VIDEOS, AND FANTASY]."

[Wait for an answer.]

III. Training in Episodic Memory

Special Event

[NOTE: THIS SECTION CHANGES DEPENDING ON THE INCIDENT.]

[BEFORE THE INTERVIEW, IDENTIFY A RECENT EVENT THE CHILD EXPERIENCED -- FIRST DAY OF SCHOOL, BIRTHDAY PARTY, HOLIDAY CELEBRATION, ETC. -- THEN ASK THESE QUESTIONS ABOUT THAT EVENT. IF POSSIBLE, CHOOSE AN EVENT THAT TOOK PLACE AT ABOUT THE SAME TIME AS THE ALLEGED OR SUSPECTED ABŪ SE. IF THE ALLEGED ABŪ SE TOOK PLACE DURING A SPECIFIC DAY OR EVENT, ASK ABOUT A DIFFERENT EVENT]

"I want to know more about you and the things you do."

- 1. “**A few [days/weeks] ago was [holiday/ birthday party/ the first day of school/ other event]. Tell me everything that happened on [your birthday, Easter, etc.].**”

[Wait for an answer.]

- 1a. “**Think hard about [activity or event] and tell me what happened on that day from the time you got up that morning until [some portion of the event mentioned by the child in response to the previous question].**”

[Wait for an answer.]

[Note: Use this question as often as needed throughout this section.]

- 1b. “**And then what happened?**”

[Wait for an answer.]

[Note: Use this question as often as needed throughout this section.]

- 1c. “**Tell me everything that happened after [some portion of the event mentioned by the child] until you went to bed that night.**”

[Wait for an answer.]

[Note: Use this question as often as needed throughout this section.]

- 1d. “**Tell me more about [activity mentioned by the child].**”

[Wait for an answer.]

[Note: Use this question as often as needed throughout this section.]

- 1e. **“Earlier you mentioned [activity mentioned by the child]. Tell me everything about that.”**

[Wait for an answer.]

[Note: Use this question as often as needed throughout this section.]

[If the child gives a poor description of the event, continue with questions 2-2e.]

[Note: If the child gives a detailed description of the event, say:

- **“It is very important that you tell me everything you remember about things that have happened to you. You can tell me both good things and bad things.”**

Yesterday

- 2. **“I really want to know about things that happen to you. Tell me everything that happened yesterday, from the time you woke up until you went to bed.”**

[Wait for an answer.]

- 2a. **“I don’t want you to leave anything out. Tell me everything that happened from the time you woke up until [some activity or portion of the event mentioned by the child in response to the previous question].”**

[Wait for an answer.]

- 2b. "Then what happened?"

[Wait for an answer.]

[Note: Use this question as often as needed throughout this section.]

- 2c. "**Tell me everything that happened after [some activity or portion of the event mentioned by the child] until you went to bed.**"

[Wait for an answer.]

- 2d. "**Tell me more about [activity mentioned by the child].**"

[Wait for an answer. Note: Use this question as often as needed throughout this section.]

- 2e. "**Earlier you mentioned [activity mentioned by the child]. Tell me everything about that.**"

[Wait for an answer.]

[Note: Use this question as often as needed throughout this section.]

Today

IF THE CHILD DOES NOT PROVIDE AN ADEQUATELY DETAILED NARRATIVE ABOUT YESTERDAY, REPEAT QUESTIONS 2 TO 2E ABOUT TODAY, USING "THE TIME YOU CAME HERE" AS THE CLOSING EVENT.

“It is very important that you tell me everything about things that have really happened to you.”

Go to:

The Substantive Part of the Interview

IV. Transition to Substantive Issues

“Now that I know you a little better, I want to talk about why [you are here] today.”

[If the child starts to answer, wait.]

[If the child gives a summary of the allegation (Example: ‘David touched my wee-pee’, or ‘Daddy hit me’), go to question 10.]

[If the child gives a detailed description, go to question 10a.]

[If the child doesn’t make an allegation, continue with question 1.]

1. “I understand that something may have happened to you. Tell me everything that happened from the beginning to the end.”

[Wait for an answer.]

[If the child makes an allegation, go to question 10.]

[If the child gives a detailed description go to question 10a.]

[If the child does not make an allegation, continue with question 2.]

2. “**As I told you, my job is to talk to kids about things that might have happened to them. It is very important that you tell me why [you are here/ you came here/ I am here]. Tell me why you think [your mum, your dad, your grandmother] brought you here today [or ‘why you think I came to talk to you today’].**”

[Wait for an answer.]

[If the child makes an allegation, go to question 10.]

[If the child gives a detailed description, go to question 10a.]

[If the child does not make an allegation and you don’t know that there was previous contact with the authorities, go to question 4 or 5.]

[If the child does not make an allegation and you know that there was previous contact with the authorities, go to question 3.]

3. “**I’ve heard that you talked to [a doctor/ a teacher/ a social worker/ any other professional] at [time/location]. Tell me what you talked about.”**

[Wait for an answer.]

[If the child makes an allegation, go to question 10.]

[If the child gives a detailed description, go to question 10a.]

[If the child does not make an allegation and there are no visible marks, proceed to question 5.]

[When marks are visible, the investigator has been shown pictures of or told of marks, or the interview takes place in the hospital or right after the medical examination say:]

4. "I see [I heard] that you have [marks/ injuries/ bruises] on your _____. Tell me everything about that."

[Wait for an answer.]

[If the child makes an allegation, go to question 10.]

[If the child gives a detailed description, go to question 10a.]

[If the child does not make an allegation, proceed with question 5.]

5. "Has anybody been bothering you?"

[Wait for an answer.]

[If the child confirms or makes an allegation, go to question 10.]

[If the child gives a detailed description, go to question 10a.]

[If the child does not confirm, and does not make an allegation, proceed with question 6.]

6. "Has anything happened to you at [location/time of alleged incident]?"

[Note: Don't mention the name of the suspect or any details of the allegation.]

[Wait for an answer.]

[If the child gives a detailed description, go to question 10a.]

[If the child confirms or makes an allegation, go to question 10.]

[If the child does not confirm or does not make an allegation, continue with question 7.]

7. "Did someone do something to you that you don't think was right."

[Wait for an answer.]

[If the child confirms, or makes an allegation, go to question 10.]

[If the child gives a detailed description, go to question 10a.]

[If the child does not confirm or does not make an allegation, proceed to question 8.]

PAUSE. ARE YOU READY TO GO ON? WOULD IT BE BETTER TO TAKE A BREAK BEFORE GOING FURTHER?

IN CASE YOU DECIDE TO GO AHEAD, YOU SHOULD HAVE FORMULATED SPECIFIC VERSIONS OF QUESTIONS 8 AND 9, USING

THE FACTS AVAILABLE TO YOU, BEFORE THE INTERVIEW. BE SURE THAT THEY SUGGEST AS FEW DETAILS AS POSSIBLE TO THE CHILD. IF YOU HAVEN'T FORMULATED THESE QUESTIONS, TAKE A BREAK NOW TO FORMULATE THEM CAREFULLY BEFORE YOU PROCEED.

8. **"Did somebody [briefly summarize allegations or suspicions without specifying names of alleged perpetrator or providing too many details]."** (For example, "Did somebody hit you?" or "Did somebody touch your wee-pee [private parts of your body]?"")

[Wait for an answer.]

[If the child confirms or makes an allegation, go to question 10.]

[If the child gives a detailed description, go to question 10a.]

[If the child does not confirm or does not make an allegation, proceed to question 9.]

9. **"Your teacher [the doctor/psychologist/neighbour] told me /showed me [that you touched other children's wee-pee]/ "a picture that you drew"], and I want to find out if something may have happened to you. Did anybody [briefly summarize allegations or suspicions without specifying the name of the alleged perpetrator or providing too many details]."** (For example: "Did somebody in

your family hit you?" or "Did somebody touch your wee-pee or other private parts of your body?")]

[Wait for an answer]

[If the child confirms or makes an allegation, go to question 10.]

[If the child gives a detailed description, go to question 10a.]

[If the child does not confirm or does not make an allegation, go to section XI.]

V. Investigating the Incidents

Open Ended Questions

- 10. [If the child is under the age of 6, REPEAT THE ALLEGATION IN THE CHILD'S OWN WORDS without providing details or names that the child hasn't mentioned.]

[then say:]

"Tell me everything about that."

[Wait for an answer.]

[If the child is over the age of 6 simply say:]

“Tell me everything about that.”

[Wait for an answer.]

- **10a. “Then what happened?” or “Tell me more about that.”**

[Wait for an answer.]

[Use this question as often as needed until you have a complete description of the alleged incident.]

[NOTE: IF THE CHILD’S DESCRIPTION IS GENERIC, GO TO QUESTION 12 (SEPARATION OF INCIDENTS). IF THE CHILD DESCRIBES A SPECIFIC INCIDENT, CONTINUE WITH QUESTION 10b]

- **10b. “Think back to that [day/ night] and tell me everything that happened from [some preceding event mentioned by the child] until [alleged abusive incident as described by the child].”**

[Wait for an answer.]

[Note: Use this question as often as needed to ensure that all parts of the incident are elaborated.]

- **10c. “Tell me more about [person/object/ activity mentioned by the child].”**

[Wait for an answer.]

[Note: Use this question as often as needed throughout this section.]

- 10d. “**You mentioned** [person/ object/ activity mentioned by the child], **tell me everything about that.**”

[Wait for an answer.]

[Note: Use this question as often as needed throughout this section.]

[If you are confused about certain details (for example, about the sequence of events), it may help to say:]

“You’ve told me a lot, and that’s really helpful, but I’m a little confused. To be sure I understand, please start at the beginning and tell me [how it all started/ exactly what happened/ how it all ended/ etc].”

Focused questions relating to information mentioned by the child.

[If some central details of the allegation are still missing or unclear after exhausting the open-ended questions, use direct questions. It is important to pair open ‘invitations’ with direct questions whenever appropriate.]

[Note: First focus the child’s attention on the detail mentioned, and then ask the direct question.]

Following is the General Format of Direct Questions:

- 11. “**You mentioned** [person/object/activity], [Completion of the direct question.]

Examples

1. “**You mentioned you were at the shops. Where exactly were you?”** [Pause for a response] “**Tell me about that shop.”**
2. “Earlier you mentioned that your mother ‘hit you with this long thing’. Tell me about that thing.”
3. “**You mentioned a neighbour. Do you know his/her name?”** [Pause for a response] **Tell me about that neighbour.”** [Do not ask for a description.]
4. “**You said that one of your classmates saw that. What was his/her name?”** [Pause for a response] “**Tell me what he was doing there.”**

Separation of Incidents

- 12. “Did that happen one time or more than one time?”

[If the incident happened one time, go to the Break].

[If the incident happened more than one time, continue to question 13.
REMEMBER TO EXPLORE INDIVIDUAL REPORTED INCIDENTS IN DETAIL AS SHOWN HERE.]

Exploring Specific Incidents When There Were Several Open -Ended Questioning

- 13. “**Tell me everything about the last time** [the first time/the time in [some location]/the time [some specified activity/another time you remember well]]**something happened.”**

[Wait for an answer.]

- 13a. **“And then what happened?” Or “Tell me more about that.”**

[Wait for an answer.]

[Note: Use this question as often as needed throughout this section.]

- 13b. **“Think back to that [day/night] and tell me everything that happened, from [preceding events mentioned by the child] until [alleged abusive incident as described by the child].”**

[Wait for an answer.]

[Note: Use variants of this question as often as needed until all parts of the incident are elaborated.]

- 13c. **“Tell me more about [person/object/activity mentioned by the child].”**

[Wait for an answer.]

[Note: Use this question as often as needed throughout this section.]

- 13d. **“You mentioned [person/object/activity mentioned by the child]. Tell me everything about that.”**

[Wait for an answer.]

[Note: Use this question as often as needed throughout this section.]

Focused questions relating to information mentioned by the child.

[If some central details of the allegation are still missing or unclear after exhausting the open-ended questions, use direct questions. It is important to pair open ‘invitations’ with direct questions, whenever appropriate.]

[Note: First focus the child’s attention on the detail mentioned, and then ask the direct question.]

Following is the general format of direct questions:

14. “You mentioned [person/object/activity],

[How/when/where/who/which/what] [Completion of the direct question.]”

Examples

1. “You mentioned you were watching TV. Where exactly were you?”

[Wait for a response]

“Tell me everything about that.”

2. “Earlier you mentioned that your father ‘whacked you’. Tell me exactly what he did.”

3. “You mentioned a friend was there. What is her/his name?”

[Wait for a response]

“Tell me what s/he was doing.”

4. "Earlier you said that your uncle 'fingered you' ['French kissed']/ 'had sex with you'/ etc]. Tell me exactly what he did."

REPEAT THE ENTIRE SECTION FOR AS MANY OF THE INCIDENTS MENTIONED BY THE CHILD AS YOU WANT DESCRIBED. UNLESS THE CHILD HAS SPECIFIED ONLY TWO INCIDENTS, ASK ABOUT "THE LAST," THEN "THE FIRST," THEN "ANOTHER TIME YOU REMEMBER WELL."

VI. Break

[Tell the child:]

"Now I want to make sure I understood everything and see if there's anything else I need to ask. I will just [think about what you told me/go over my notes/go and check with?]"

[During the break time, review the information you received, fill out the Forensic Checklist, see if there is any missing information, and plan the rest of the interview. BE SURE TO FORMULATE FOCUSED QUESTIONS IN WRITING.]

After the Break

[To elicit additional important information that has not been mentioned by the child, ask additional direct and open-ended questions, as described above. Go back to open-ended questions ("Tell me more about that") after asking each direct question. After finishing these questions, proceed to section VII.]

VII. Eliciting information that has not been mentioned by the child

[You should ask these focused questions only if you have already tried other approaches and you still feel that some forensically important information is missing. It is very important to pair open invitations (“Tell me all about that”) whenever possible.]

[Note: In case of multiple incidents, you should direct the child to the relevant incidents in the child’s own words, asking focused questions only after giving the child an opportunity to elaborate on central details.]

[BEFORE YOU MOVE TO THE NEXT INCIDENT, MAKE SURE YOU HAVE OBTAINED ALL THE MISSING DETAILS ABOUT EACH SPECIFIC INCIDENT.]

The general format of questions focused on information that has NOT been mentioned by the child

“When you told me about [specific incident identified by time or location] you mentioned[person/object/activity]. Did/was [focused questions]?”

[Wait for an answer.]

[Whenever appropriate, follow with an invitation; say:]

“Tell me all about that.”

Examples

1. “When you told me about the time in the basement, you mentioned that he took off his trousers. Did something happen to your clothes?”

[Wait for an answer.]

[After the child responds, say:]

“Tell me all about that.”

[Wait for an answer.]

2. “When you told me about the last time, you mentioned that he touched you. Did he touch you over your clothes?”

[Wait for an answer.]

[After the child responds, say:]

“Tell me all about that.”

[Wait for an answer.]

3. “Did he touch you under your clothes?”

[Wait for an answer.]

[After the child responds, say:]

“Tell me all about that.”

4. “You told me about something that happened on the playground. Did somebody see what happened?”

[Wait for an answer.]

[When appropriate, say:]

“Tell me all about that.”

5. “Do you know whether something like that happened to other children?”

[Wait for an answer.]

[When appropriate, say:]

“Tell me all about that.”

6. “You told me about something that happened in the barn. Do you know when that happened?”

VIII. If Child Fails To Mention Information You Expected

Use only the prompts that are relevant.

If you know of conversations in which the information was mentioned say:

1. “I heard that you talked to [] at [time/place]. Tell me what you talked about.”

[If child doesn't provide more information, ask question 2; If child does give some more information, say:]

“Tell me everything about that.”

[Follow up with other open-ended prompts, such as “Tell me about that.” If necessary.]

If you know details about prior disclosures and the information has not been disclosed to you, say:

2. **"I heard [s/he told me] you said [summarize allegation, specifically but without mentioning incriminating details if possible]. Tell me everything about that."**

[Follow up with other open-ended prompts, such as "Tell me about that." If necessary.]

3. If something was observed, say:

- a. **"I heard that someone saw []. Tell me everything about that."**

[Follow up with other open-ended prompts, such as "Tell me about that." If necessary.]

If child denies, go to 3b.

- b. **"Has anything happened to you at [place/time]? Tell me everything about that."**

[Follow up with other open-ended prompts, such as "Tell me about that." If necessary.]

If child has/had injuries or marks say:

4. **"I see [I heard] that you have [marks/bruises] on your []."**

“Tell me everything about that.”

[Follow up with other open-ended prompts, such as “**Tell me about that.**” If necessary.]

5. “**Did somebody** [summarize without naming the perpetrator (unless child already named her/him) or providing most incriminating details]?”

If child denies, go to next section.

If child acknowledges something say:

“Tell me everything about that.”

[Follow up with other open-ended prompts, such as “**Tell me about that**” if necessary.]

IX. Information about the Disclosure

“You’ve told me why you came to talk to me today. You’ve given me lots of information and that really helps me to understand what happened.”

[If child has mentioned telling someone about the incident(s), go to question 6. If child hasn’t mentioned telling anyone, probe about possible immediate disclosure by saying:]

1. “**Tell me what happened after** [the last incident].”

[Wait for an answer.]

2. “And then what happened?”

[Note: Use this question as often as needed throughout this section.]

[If the child mentions a disclosure, go to question 6. If not, ask the following questions.]

3. "Does anybody else know what happened?"

[Wait for an answer. If the child identifies someone, go to Question 6.]

[If the child confirms but doesn't mention the name, ask:]

"Who?"

[Wait for an answer. If the child identifies someone, go to Question 6.]

4. "Now I want to understand how other people found out about [the last incident]."

[Wait for an answer. If the child identifies someone, go to Question 6.]

[If there is missing information, ask the following questions.]

5. "Who was the first person besides you and [the perpetrator] to find out about [alleged Abū se as described by the child]?"

[Wait for an answer.]

6. "Tell me everything you can about how [the first person mentioned by the child] found out."

[Wait for an answer.]

[Then say:]

“Tell me more about that.”

[Wait for an answer.]

[If the child describes a conversation, say:]

“Tell me everything you talked about.”

[Wait for an answer.]

7. **“Does anyone else know about [alleged Abū se as described by the child]?”**

[Wait for an answer.]

[Then say:]

“Tell me more about that.”

[If the child described a conversation, say:]

“Tell me everything you talked about.”

[Wait for an answer.]

[if the child does not mention that he/she told somebody ask:]

REPEAT ENTIRE SECTION AS NECESSARY FOR EACH OF THE INCIDENTS
DESCRIBED BY THE CHILD.

X. Closing

[Say:]

“You have told me lots of things today, and I want to thank you for helping me.”

1. “Is there anything else you think I should know?”

[Wait for an answer.]

2. “Is there anything you want to tell me?”

[Wait for an answer.]

3. “Are there any questions you want to ask me?”

[Wait for an answer.]

4. “If you want to talk to me again, you can call me at this phone number.”[Hand the child a card with your name and phone number.]

XII. Neutral Topic

“What are you going to do today after you leave here?”

[Talk to the child for a couple of minutes about a neutral topic.]

“It’s [specify time] and this interview is now complete.”

